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INDIAN CASES

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Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports, for the months of May and June 1916, with the corresponding Volumes and Pages of Indian Cases.

Table 1

ALLAHABAD HIGH COURT.

(A).—38 I. L. R., ALLAHABAD SERIES, FOR MAY-JUNE, 1916.

Page of Vol. 38 I. L. R., All. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 38 I. L. R., All. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
214	Murlidhar v. Diwan Chand ...	32	945	276	Emperor v. Bhawani Dat ...	32	664
217	Ram Harakh v. Ram Lal ...	33	124	280	Pallia v. Mathura Prasad ...	32	622
223	Ganga Singh v. Ram Sarup ...	33	119	284	Emperor v. Murli Dhar ...	33	643
226	Ganpat Rai v. Multan ...	33	97	286	Bangi Lal v. Jassa ...	35	208
230	Ali Husain v. Hakim-ullah ...	33	187	289	Taj Singh v. Jagan Lal ...	35	234
232	Bajrangi Lal v. Ghura Rai ...	32	913	292	Nihal Singh v. Sewa Ram ...	35	275
237	Nihal Singh v. Collector of Buland- shahr ...	33	165	297	Nihal Singh v. Khushhal Singh ...	33	80
240	Piari Lal v. Hanif-un-nissa Bibi... ..	34	303	302	Kalka Prasad v. Manmohan Lal ...	33	86
243	Shambhu Singh v. Daljit Singh ...	33	19	311	Emperor v. Bhima ...	33	639
254	Gur Dayal Singh v. Karam Singh ...	35	289	315	Bajjnath Rai v. Dharam Deo Tiwari ...	35	707
260	Mahadeo Prasad v. Jagar Deo Gir ...	33	23	322	Digbijai Singh v. Hira Devi ...	34	276
271	Debi Bakhsh Singh v. Shadi Lal ...	33	681				

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(B).—14 ALLAHABAD LAW JOURNAL, FROM APRIL 21ST TO JUNE, 1916.

Page of Vol. 14 A. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 14 A. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
401	Abdul Karim v. Islam-un-nissa Bibi	34	231	597	Gauri Datt Basdeo v. Nanik Ram		
409	Hardwari Lal v. Muhammad Sala- mat-ullah Khan ...	34	272	601	Chanthmal ...	35	203
412	Husain Khan v. Emperor ...	36	145	604	Govind Ram v. G. I. P. Railway...	35	208
415	Lareti v. Hazari Lal ...	33	523	605	Emperor v. Jhamman ...	34	969
417	Abdul Karim v. Emperor ...	36	148	610	Prag Narain v. Prag Narain ...	35	198
419	Digbijai Singh v. Hira Devi ...	34	276		Nidha Lal v. Collector of Buland- shahr ...	35	209
422	Somwarpuri v. Matabadal ...	34	280	615	Sahdeo Ojha v. Lachmina Kuar ...	34	207
425	Durga Baksh Singh v. Fateh Baha- dur Singh ...	33	30	621	Ram Prakash Das v. Anand Das...	33	583
430	Chunni Lal v. Emperor ...	35	173	638	Mehta, P. J. v. Chan Mah Phee ...	35	190
434	Nehal Singh v. Sewa Ram ...	35	275	643	Jawahir Thakur v. Emperor ...	34	315
438	Beni Prasad v. Lajja Ram ...	35	63	645	Imami v. Kallu ...	34	298
441	Khurshed Ali v. Abdul Majid ...	35	210	650	Radhika Prasad Bapuli v. Sec- retary of State ...	35	711
445	Lal Behari v. Emperor ...	35	485	654	Porna Koer v. Chunni Lal ...	35	718
447	Mahabir Prasad v. Mahadeo Pra- sad ...	33	495	656	Shambhu Nath v. Emperor ...	35	832
449	Jagrani v. Bisheshar Dube ...	35	701	657	Ganga Dahal Rai v. Gaura ...	35	46
464	Bageshra v. Sheo Nath ...	32	930	662	Udit Narain Misir v. Asharfi Lal...	35	732
466	Sheo Parsan Singh v. Ramnandan Prashad Narayan Singh ...	33	914	666	Ganga Prasad v. Har Narain ...	35	739
477	Debi Bakhsh Singh v. Shadi Lal...	33	681	669	Fazal Ahmad v. Wesal-ud-din ...	35	742
481	Hari Kunwar v. Lakhmi Ram Jani	35	833	671	Bhagwanti, <i>In the matter of</i> ...	<i>To be printed.</i>	
494	Alla-ud-din v. G. I. P. Railway Company ...	34	104	673	Param Hans v. Randhir Singh ...	35	748
498	Kaur Sen v. Darbari Lal ...	34	171	677	Goswami Sri Raman Lalji v. Hari Das ...	34	364
502	Udhishter Singh v. Kausilla ...	34	79	684	James E. Powell v. L. B. Powell...	36	567
513	Suraj Bhan v. Boot and Equipment Factory ...	36	397	687	Emperor v. Adhin ...	36	143
518	Lal Singh v. Emperor ...	36	481	688	Gulab Singh v. Emperor ...	35	191
521	Harbilas v. Shankar Lal ...	36	402	700	Emperor v. Bechan Pande ...	<i>To be printed.</i>	
527	Jatendra Nath Bose v. Peyer Deyee Debi ...	34	69	705	Udho Singh v. Mul Chand ...	36	317
534	Jamuna Bai v. Vasanta Rao ...	34	213	709	Dhanraj Singh v. Lakhrani Kuar	35	601
538	Ram Charan Lal v. Rahim Bux ...	34	108	713	Shankarlal v. Latafat Ali ...	35	600
549	Chhotey Lal v. Lakhmi Chand Magan Lal ...	34	113	717	Bhoj Raj v. Ram Narain ...	35	915
554	Rustam Ali Khan v. Mushtaq Husain ...	35	718	719	Emperor v. Gaya Bhar ...	35	979
589	Ram Barechha Ram v. Tarak Te- wari ...	33	805	722	Santi Lal v. Indian Exchange Bank	36	498
				724	Muhammad Abdul Jalil v. Ram Dayal ...	34	357
				728	Niadar Singh v. Ganga Dei ...	35	86
				731	Emperor v. Aijaz Husain ...	35	973
				734	Bhawan v. Madan Mohan Lal ...	35	41
				738	Dharamdeo Singh v. Emperor ...	35	978

Table 2

BOMBAY HIGH COURT.

(A).—40 I. L. R., BOMBAY SERIES, FOR MAY-JUNE, 1916.

Page of Vol. 40 I. L. R., Bom. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page of Vol. 40 I. L. R., Bom. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
		V. P.			V. P.
270	Nagindas Bagwandas v. Bachoo Hurkissondass ...	32 403	321	Murlidhar Narayan Gujarathi v. Vishnudas Balmukunddas ...	33 749
289	Jamshed Khodaram Irani v. Burjorji Dhunjibhai ...	32 246	329	Laxman Nilkant Pusalkar v. Vinayak Keshav Pusalkar ...	33 956
301	Karl Ettlinger v. Chagandas & Co.	33 205	333	Hansa Godhaji Marwadi v. Bhawajogaji Marwadi ...	33 232
313	Bhaskar Gopal v. Padman Hira Chowdhari ...	33 267	337	Sitabai v. Laxmibai ...	32 985

(B).—18 BOMBAY LAW REPORTER, FOR MAY-JUNE 15TH, 1916.

Page of Vol. 18 Bom. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page of Vol. 18 Bom. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
		V. P.			V. P.
347	Bhupendra Krishna Ghose v. Amarendra Nath Dey ...	34 892	387	Bank of Bengal v. Ramanathan Chetty ...	32 419
355	Seth Jaswant Rai v. Secretary of State ...	33 924	397	Sheoparsan Singh v. Ramnandan Prashad Narayan Singh ...	33 914
360	Subramanian Chettiar v. Rajah Rajeswara Dorai ...	32 258	408	Suna Ana Arunachellam Chetty v. Ramaswamy Chetty ...	35 1
372	Venkatanarayana Pillay v. Subbammal ...	32 373	412	Raja Debi Bakhsh Singh v. Shadi Lal ...	33 681
378	Mooshahar Sahu v. Hakim Lal ...	32 343	418	Srimati Nrityamoni Dassi v. Lakhan Chunder Sen ...	33 452
352	Pandit Parbhu Dyal v. Kalyan Das ...	33 505			

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Table 3

BURMA (LOWER) CHIEF COURT.

(A)—9 BURMA LAW TIMES, FROM MARCH TO JUNE, 1916.

Page of Vol. 9 Bur. L. T. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 9 Bur. L. T. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
69	Swan Tee v. Ma Ngwe ...	32	630	121	K. E. Mahomed v. Ma O ...	36	476
74	Maung Pya Gi v. Maung Po Ka ...	33	118	122	P. L. M. Firm v. Daisy M. Stacy ...	33	169
76	Maung Po Hla v. King-Emperor ...	35	823	124	G. C. Chakrabatty v. King-Em- peror ...	33	319
77	Maung Thein v. Ma Thet Hnin ...	32	507	125	Pranjivandas Jagjivandas Mehta v. Chan Ma Phee ...	35	190
80	Puzandaung Bazaar Co., Ltd. v. T. Gwan Chan ...	32	692	128	Sit Taw v. Maung Gee ...	34	334
81	Ma Shein v. Kim Sein ...	32	848	130	Ardikappa Chetty v. K. A. R. Kadappa ...	36	418
83	Ko Bat v. Maung Kya Baw ...	32	569	133	Deiya v. King-Emperor ...	36	468
84	Ma Nyein Me v. Ma May ...	32	568	135	Ram Sarup v. King-Emperor ...	36	471
86	Maung Ne Dun v. Ma Le ...	32	573	136	Nga Poona v. King-Emperor ...	34	325
87	Maung Shwe Kho v. Ma Mya ...	33	129	141	Mahomed Ismail Ariff v. Hajee Hamed Moolla Dawood ...	35	30
88	Ma U v. Maung Lu Gale ...	32	610	148	Moolla Cassim v. Moolla Abdul Rahim ...	35	950
89	Chan Tat Thai v. Ma Lat ...	33	124	150	Nauk To v. Ma Hnin ...	36	5
90	Ma Shwe Yu v. Maung Sok Nyun ...	32	564	152	Ma Shwe Yat Aung v. Maung Da Li ...	33	868
92	Shwe Bon v. Mi U Tha Nyo ...	32	696	154	Maung Seik v. Ma Thit Pu ...	33	927
93	Maung On Gaing v. Ma On Sin ...	33	135	157	Ma Nyun v. Maung Ba Tha ...	33	945
95	Chan Tha v. Mi Ma Pyu ...	33	127	158	Silam Kalia v. Silam Sitama ...	33	941
97	Maung Shwe Bon v. Maung Pu ...	35	731	160	Manekji Palonji v. Nederlandsche Handel ...	34	176
98	Ma Yon v. Maung Kya Gaing ...	35	710	162	Maung Tha U v. Maung Mya Khin ...	35	972
99	S. K. R. Cama & Co. v. K. K. Shah ...	33	96	163	M. V. Pillai v. C. K. Seikh Eb- rahim ...	36	10
101	Moolla Mahomed v. P. K. Ebrahim ...	35	725	164	Maung Po U v. Maung Po Thin ...	33	985
106	S. King v. D. J. Buchanan ...	35	741	166	M. A. R. R. M. B. M. Chetty v. Badier Rahman Chowdry ...	36	19
108	Baba Khan v. Maung Ba Naing ...	35	830				
110	K. P. Mahomed Ebrahim v. K. E. Mahomed ...	35	337				
111	Collector of Rangoon v. Maung Aung Ba ...	33	920				
114	In re Ma Htwe v. Maung Lun ...	33	163				
117	Maung Po Tun v. Ma E Kha ...	33	735				
119	A. G. Madari v. R. Misser ...	36	431				

(B).—8 LOWER BURMA RULINGS, FROM JANUARY TO JUNE, 1916.

Page of Vol. 8 L. B. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 8 L. B. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
222	Thein Shin v. Ah Shein ...	24	367	329	King-Emperor v. Nga Kala ...	35	523
225	Ma Shein v. Kim Sein ...	32	848	332	Edward Francis Dover v. Evelyn Sarah Dover ...	29	684
227	<i>In re</i> Maung Naw v. Ma Shwe Hmut ...	30	772	334	Ma Htwe v. Maung Lun ...	33	163
233	Maung Maung v. S. G. Firm ...	35	448	338	Po Win v. Ma Tin ...	36	385
235	Maung Pu v. Lucy Moss ...	26	39	342	U Wilatha v. U Thiri ...	30	112
256	Ma Array v. E Po ...	27	604	343	A. K. A. S. Jamal v. Moolla Dawood Sons and Company ...	31	949
258	A. K. A. M. Firm v. Ahmed Soolayman Mapara ...	33	559	347	Maung Thein v. Ma Thet Hnin ...	32	507
260	Annamalay Chetty v. Shwe May ...	33	580	350	N. C. Chatterji v. R. M. K. Karpan Chetty ...	36	402
262	Asha Bi Bi v. Nuruddin ...	30	680	351	Poozundaung Bazaar Company, Limited v. T. Gwan Chwan ...	32	692
264	Aung Hla v. Ton Gyi ...	35	432	353	<i>In re</i> King-Emperor v. Nga Saing J. & F. Graham & Co. v. H. C. Elsey ...	32	680
266	San Bwin v. A. N. K. Nagamutu ...	30	710	356	Po Hla v. King-Emperor ...	32	683
270	Po Shin v. Mahomed Thamby ...	30	753	357	King-Emperor v. Po Gyi ...	35	823
274	S. P. Ghosh v. King-Emperor ...	30	724	361	Malayandi Chetti v. Narayanan Chetty ...	36	465
288	Basant Singh v. Burma Railways Co., Ltd. ...	30	278	363	Maung Gyi Maung v. Moosajee Ahmed & Co. ...	36	225
290	King-Emperor v. Nga E Maung ...	30	654	367	Asha Bibi v. Suleman Ismail Atcha ...	36	252
293	British India Steam Navigation Company, Limited v. Jiawoola ...	30	939	372	Tun Myaing v. Kauk San ...	36	249
294	<i>In the matter of</i> a 1st Grade Pleader, Rangoon ...	30	995	377	King-Emperor v. Po Aung ...	30	999
300	Valliappa Chetty v. Rungasawmy Naicker ...	35	429	378	Collector of Rangoon v. Aung Ba ...	35	495
301	Foeson or Fakir Chan v. Adi Chandro Borwa ...	35	431	382	Ma Cho v. Maung Sein ...	33	920
302	Shwe Paw v. Pan Zi ...	31	332	385	Ma Gun v. Tha Hnyin ...	36	381
306	Nga Mya v. King-Emperor ...	32	641	387		36	320
328	Boyhenj Chandra v. Rangoon Municipality ...	35	518				

Table 4

BURMA (UPPER) JUDICIAL COMMISSIONER'S COURT.

2 UPPER BURMA RULINGS, FROM APRIL TO JUNE, 1916.

Page of U. B. R., II, 1916	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of U. B. R. II, 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
108	Barachi v. King-Emperor ...	35	961	114	King-Emperor v. Nga Aung Ba ...	35	962
110	Nga Cho v. Mi Se Mi ...	36	7	116	Ma Nge Ma v. Ma Shwe Hnit ...	36	3
113	Nga Kyaw Zan Hla v. King-Emperor ...	35	962	119	Ma Me v. Maung Aung Min ...	36	10

Table 5

CALCUTTA HIGH COURT.

(A).—43 I. L. R., CALCUTTA SERIES, FOR MAY-JUNE, 1916.

Page of Vol. 43 I. L. R., Cal. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 43 I. L. R., Cal. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
332	Ram Narain Singh v. Chota Nagpur Banking Association ...	36	321	447	Kassim Ebrahim Saleji v. Johurmull Khemka ...	34	799
417	Ravaneshwar Singh v. Chandi Prasad Singh ...	36	499	459	Parmeshwar Dube v. Gobind Dube	33	190
421	Causley v. Emperor ...	32	661	467	Atimannessa Bibi v. Abdul Sobhan ...	32	21
426	Emperor v. Sreenath Mahapatra...	35	983	493	Jamal v. Moolla Dawood Sons & Co. ...	31	949
432	Bhupendra Krishna Ghose v. Amarendra Nath Dey ...	34	892	504	Atrabannessa Bibi v. Safatullah Mia ...	31	189
441	India General S. N. & R. Co., Ltd. v. Lal Mohan Saha ...	31	35	511	Sherjan Khan v. Alimuddi ...	34	598

(B).—23 CALCUTTA LAW JOURNAL, FOR MAY-JUNE 1ST, 1916.

Page of Vol. 23 C. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 23 C. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
453	Cassim Ahmed Molla v. Eusuf Haji Ajam Pepardi ...	34	221	559	Lala Deosaran Lal v. Bateswar Mondol ...	32	1003
463	Lukhipriya Dassi v. Rai Kissori Dassi ...	34	435	561	Dina Nath Dass v. Rama Nath Dass ...	34	702
473	Prabhulal v. Kumar Krishna Dutt	33	78	563	Krishna Nath Chakrabarti v. Mahomed Wafiz ...	31	789
477	King-Emperor v. Aushi Bibi ...	33	828	567	Nawab Khajah Hobibullah v. Khajah Abtiakallah ...	34	693
490	Anila Bala Dassi v. Rajendra Nath Dalal ...	34	227	570	Krishna Kumar Nandi v. Jai- krishna Nandi ...	29	690
482	Khobhari Sah v. Jhaman Sah ...	34	220	573	Shiba Durga Debi v. Gopi Mohan Saha ...	33	180
485	Bhushan Chandra Ghose v. Sri- kanta Banerjee ...	33	957	578	Madan Chandra Pal v. Kirtiram Biswas ...	34	163
489	Kali Prasanna Sil v. Panchanan Nandi Chowdhury ...	33	670	580	Nafar Chandra Pal Chowdhury v. Rahaman Sheikh ...	34	45
493	Abdul Quader Khalifa v. Fritz Kapp ...	35	951	583	Kashi Nath Pal v. Raja Jagat Kishore Acharyya Chowdhuri ...	35	293
501	Krishna Chandra Ghosh v. Rasik Lal Khan ...	33	568	587	Girja Kanta Chakrabarti v. Mohini Chandra Acharji ...	35	294
506	Ananda Kumar Bhattacharya v. Secretary of State ...	32	774	592	Adwaita Charan Chaudhuri v. Sarojranjan Chaudhuri ...	34	584
514	Lakurka Coal Company, Limited v. Jamnadass Bhagwandass ...	33	838	595	Lakhimi Ram Gagoi v. King-Em- peror ...	34	986
547	Radha Sham Basak v. Secretary of State ...	34	130	596	Khohua Moran v. King-Emperor...	34	654
553	Monmohon Roy v. Hemanta Kumar Mookerjee ...	34	777	598	Nabin Chandra Aich v. Noakhali Municipality ...	34	985
555	Atal Hazra v. Uma Charan Chong- dar ...	33	822	600	Tirthabasi Singha Roy v. Bepin Krishna Roy ...	34	30
557	Jamadar Singh v. Raja Jagat Kishore Acharya Chowdhury ...	34	697				

Table 6

MADRAS HIGH COURT.

(A).—39 I. L. R., MADRAS SERIES, FOR MAY-JUNE, 1916.

Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
409	Jamma Bai v. Vasanta Rao ...	34	213	419	Venkata Subba Reddi v. Bazian- mal ...	29	113
414	Re Hanumantha Rao ...	28	97				

(A).—39 I. L. R., MADRAS SERIES, 1916—concl'd.

Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
429	Karunakara Menon v. Krishna Menon ...	27	952	537	Subbayya v. Ramayya ...	28	733
433	Govindan Nair v. Achutha Menon ...	28	394	539	Re Adur Desikachari ...	28	527
447	Jallaldeen Marakayar v. Vijaya-swami ...	28	624	541	Subramania Pillai v. Kumaravelu Ambalam ...	33	66
449	Re Annavi Muthiriyar ...	28	518	543	Mammali v. Kutti Annam ...	30	144
456	Narayanan Chettiar v. Lakshmanan Chettiar ...	29	1	544	Muhammad Hussain Sahib v. Abdul Karim Sahib ...	29	237
462	Avula Charamudi v. Mariboyina Raghavulu ...	28	871	548	Mool Chand v. Alwar Chetty ...	29	303
472	Appadu v. Appamma ...	28	662	554	Sri K. L. Jagannada Raju Garu v. Sri Rajah Prasada Rao Garu ...	29	241
473	Audiappa Pillai v. Nallendran Pillai ...	29	4	561	Re Kuppaswami Aiyar ...	29	109
476	Periah v. Lakshmiddevamma ...	29	203	565	Chidambaramma v. Hussainamma ...	30	101
476	Periah v. Lakshmiddevamma ...	24	96	570	Rajah of Karvetnagar v. Venkata Reddi ...	29	231
479	Tiruvenkatachariar v. Thangayiammal ...	29	294	576	Krishnamachari v. Messrs. Shaw, Wallace and Company ...	29	331
485	Velliappa Chettiar v. Subrahman-yam Chetty ...	29	119	579	Ayyakutti Markondan v. Periyasami Kavundan ...	30	497
488	Lakshmi Achi v. Subbarama Ayyar ...	29	142	583	Perumal Nadan v. Sivaramji Nada-chi ...	30	544
494	Balkrishna Rao v. Secretary of State ...	30	355	584	Raman Nair v. Gopala Menon ...	30	383
501	Syed Ahmed Sahib Shutari v. Magnesite Syndicate, Limited... ..	29	60	587	Narayana Annavi v. Ramalinga Annavi ...	36	428
503	Re Sobhanadri ...	29	668	593	Munguluri Sivaramayya v. Singu-amahanti Bhujanga Rao ...	30	703
505	Vellayanambalam v. Solai Servai ...	30	152	597	Nethiri Menon v. Gopalan Nair ...	30	713
509	Sri Rajah Malraju Lakshmi Ven-kayyamma Rao Bahadur v. Sri Rajah Venkata Narasimha Appa Rao Bahadur ...	34	921	602	Narayanan Singh v. Aiyasami Reddi ...	31	188
527	Public Prosecutor v. Kadiri Koya Hajee ...	30	145	604	Re Rangayya ...	31	350
				608	Mohideen Ibrahim Nachi v. Ma-homed Ibrahim Sahib ...	33	894

(B).—30 MADRAS LAW JOURNAL, FOR MAY, 1916.

Page of Vol. 30 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 30 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
621	Dallin Genda Kunwar v. Harnan-dan Prashad Singh ...	33	790	635	Adwaitya Prasad v. Baldeo Das ...	33	852

(C).—(1916) 1 MADRAS. WEEKLY NOTES, FOR APRIL 30TH 1916.

Page of (1916) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of (1916) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
877	Adwaitya Prasad v. Baldeo Dass...	33	852	396	Sree Ravi Seshayya Garu v. Rajah of Pittapur	34	780
384	Sheik Abdul Kadir Sahib v. Em- peror	33	648	399	Suna Ana Arunachellam Chetty v. Ramaswami Chetty	35	1
391	Rajah of Vizayanagaram v. Poosa- pati Appala Narasimha Raju ...	34	480	402	Ponniathakathoot Parameswaran Munpu v. Narayanan Namboodri	34	384
394	Rudrappa Achary v. Corporation of Madras	34	735				

Table 7

NAGPUR JUDICIAL COMMISSIONER'S COURT.

12 NAGPUR LAW REPORTS, FOR MAY-JUNE, 1916.

Page of Vol. 12	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 12 N. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
66	Lachman v. Kalya	34	458	86	Nakulsao v. Ramadhinsao	34	698
69	Shardaprasad v. Sikandar	34	461	90	Vishwanath v. Shankerlal	34	704
75	Narsingdas v. Ratanlal	34	471	94	Yado v. Emperor	34	965
83	Nanhu v. Narbadaprasad	34	695				

Table 8

OUDH JUDICIAL COMMISSIONER'S COURT.

3 OUDH LAW JOURNAL, FOR MAY-JUNE, 1916.

Page of Vol. 3 O. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 3 O. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
251	Rikhi v. Badri Singh ...	35	760	289	Bakhtawar Singh v. Ram Singh...	36	44
252	Bhawani Din v. Musammatt Jhamman ...	35	753	298	Muhammad Amir Khan v. Musammatt Sikandar Begam ...	36	49
256	Bhaiya Gur Prasad Singh v. Bhaiya Sant Bakhsh Singh ...	35	759	309	Durga Singh v. Gaya Singh ...	36	55
258	Raja Ragburaj Bahadur Singh v. Rai Rajeshwar Bali ...	35	761	313	Khan Bahadur Mir Buniyad Hussain v. Mata Din Singh ...	36	57
265	King-Emperor v. Mendai ...	35	824	322	Debi Bakhsh Singh v. Parshotam Das ...	36	64
267	Raja Muhammad Abul Hasan Khan v. Ram Autar ...	36	91	326	Hulai v. King-Emperor ...	36	133
268n	Ram Autar v. Raja Muhammad Abul Hasan Khan ...	36	83	327	Suraj Bali v. Tilok Chand ...	36	68
271	Ram Karan v. Actal Singh ...	35	799	339	Satrohan Lal v. Nageshar Prasad Khan Bahadur Mir Buniyad Hussain v. Musammatt Hazir-un-nisa ...	35	770
274	Sheo Nath v. Sampat ...	35	843	354	Ramnan Lal v. Ram Gopal ...	35	764
276	Arjun Prasad v. Laiq Singh ...	35	845	367	Muhammad Hamid Ullah Khan v. Seth Sita Ram ...	35	713
279	Jang Bahadur v. Raja Muhammad Abul Hasan Khan ...	35	743	377			

Table 9

PATNA HIGH COURT.

1 PATNA LAW JOURNAL, FOR MAY-JUNE, 1916.

Page of Vol. 1 P. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 1 P. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
33	Jadhu Mahto v. Kosi Prasanna Bhattacharjee ...	34	733	47	Central Karkend Coal Co., Ltd. v. Kartic Rewani ...	34	616
37	K. L. Mackenzie v. Maharajah Sir Rameshwar Singh Bahadur ...	34	754	48	Bindeshwari Prasad v. Lekhraj Sahu ...	33	711
39	Mandil Das v. Megh Navain Dubey ...	34	742	64	Jadunandan Prasad v. King-Emperor ...	34	650
43	Chintaman Singh v. Chuni Sahu ...	34	747				

1 PATNA LAW JOURNAL, 1916—conold.

Page of Vol. 1 P. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 1 P. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
65	Sri Rang Behari Lal v. Racheya Lal	35	429	99	Gajanand Thakur v. King-Emperor	35	508
67	Pirthi Chand Lal Choudhry v. Sheikh Mohamed Tahir	35	427	106	Sarjug Prasad Singh v. King-Emperor	35	512
69	Kishun Deyal Singh v. Kishun Deo Jha	35	430	109	Lal Gajendra Nath Sahi Deo v. Lal Mathurlal Nath Sahi Deo	35	383
71	Banwari Lal v. Jagarnath Prasad	35	431	129	Rambahadur Singh v. Ajodhya Singh	34	370
73	Sheikh Amiruddin v. Sheikh Saidur Rahman	35	433	133	Bali Singh v. Bindeswari Tewari	35	532
76	Gur Sahai Mahto v. Keshwar Sahu	35	437	138	Maharaja Kesho Prasad Sinha Bahadur v. Lalji Ray	35	535
81	Musammam Narainbati Kumri v. Ramdhari Singh	34	277	140	Darpan Koer v. Kedar Nath	35	539
86	Bhagat Mal Sahu v. Abdul Karim	34	23	143	Ram Tahal Singh v. Sukeswar Royain	35	547
90	Ram Narain Ram v. Pati Ram Tewary	34	105	146	Fakira Lal Sahu v. Munshi Ram-charan Lal	35	554
92	Abu Muhammad Mian v. Mukut Pertap Narain	34	88	149	Naik Pandey v. Bidya Pandey	34	149
95	Ses Lal Singh v. Haldhar Narain	35	441	154	Muhammad Sadik v. Khedan Lal	36	197
97	Srikishen Lal v. King-Emperor	35	506	157	Bidya Nath v. Khikhinda Koer	35	544

Table 10

PUNJAB CHIEF COURT.

(A).—17 PUNJAB LAW REPORTER, FROM APRIL TO JULY, 1916.

No. of Vol. 17 P. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 17 P. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
73	Labhu Ram v. Amir Chand	35	633	82	Tulsi Ram v. Ghulam Muhai-uddin	Not re- portable. Ditto. Ditto.	
74	Firm of Lal Chand-Gela Ram v. Nathu Ram	36	48	83	Chinnai v. Adal Shah		
75	Kidar Nath v. Hari Singh	36	55	84	Saidan Shah v. Musammam Durani		
76	Nawab Khan v. Musammam Mehr Bano	36	57	85	Haroon Singh v. Bhagwan Singh	35	867
77	Mathu Mal v. Kidar Nath	36	62	86	Indar Singh v. Karm Singh	35	870
78	Rahmani v. Crown	24	971n	87	Fattah Khan v. Baz Khan	35	875
79	Harjas v. Harditta	35	709	88	Ram Nath v. Crown	36	150
80	Zarif v. Musammam Bakht Nisa	Not re- portable.		89	Waris v. Crown	36	152
81	Musammam Iqbal Jan v. Fida Mohammad			90	Mula Shah v. Harbhagwan	36	73
		Ditto.		91	Gaman v. Muhammad	36	76

(B).—51 PUNJAB RECORD, FOR MAY-JUNE, 1916.

No. of Vol. 51 P. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 51 P. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
	<i>Civil.</i>				<i>Civil—contd.</i>		
44	Santu v. Musammat Jok ...	36	625	61	Shib Dial v. Mathra]Das ...	35	561
45	Dewa Singh v. Lehna Singh ...	31	740	62	Kachaya Lal v. Alliance Bank of Simla, Limited ...	35	564
46	Ziada v. Musammat Jowai ...	34	538	63	Musammat Sardar Begam v. Mu- hammad Sharif ...	35	555
47	Kalu Khan v. Umda ...	34	546	64	Vir Singh v. Tirath Ram ...	35	583
48	Dalipa v. Rani Suraj Kaur ...	34	581	65	Gokal Chand v. Milkhi ...	35	543
49	C. Bevan Petman v. Ganesh Das...	34	542				
50	Ladha Singh v. Bhag Singh ...	34	549				
51	Musammat Bibi Sodhan v. Harsa Singh ...	34	585		<i>Criminal.</i>		
52	Feroz Din v. Musammat Basri ...	32	446	11	Crown v. Salimi ...	34	974
53	Allah Ditta v. Nazar Din ...	33	474	12	Kaimi v. Crown ...	34	987
54	Sohan Lal v. Puran Singh ...	35	537	13	Musammat Mehran v. Crown ...	34	1003
55	Musammat Bakhtawari v. Shibban Lal ...	35	532	14	Tota Ram v. Crown ...	34	982
56	Devi Ditta v. Musammat Indar Devi ...	35	542	15	Crown v. Nawab ...	34	1000
57	Ganga Singh v. Musammat Begam ...	35	549	16	Crown v. Jaisukh ...	33	653
58	Indar Narain v. Nanak Chand ...	32	454		<i>Revenue.</i>		
59	Jhanda v. Data Ram ...	35	597				
60	Kanshi Ram v. Sarda Nand ...	33	763	1	Labha v. Tulsi ...	34	528

(C).—11 PUNJAB WEEKLY REPORTER, FOR MAY-JUNE, 1916.

No. of Vol. 11 P. W. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 11 P. W. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
	<i>Civil.</i>				<i>Civil—concl.</i>		
48	Bashesar Nath v. Ramkishan ...	32	860	64	In re Sardar Sher Singh v. Mazr- ulla ...	35	293
49	Amir Chand v. Jawahir Mal ...	32	853	65	Kasim Beg v. Jhanda ...	33	338
50	Abdul Aziz Khan v. Kala Shah ...	32	961	66	Jetha Ram v. Mehnga Ram ...	33	438
51	Allah Ditta v. Nazar Din ...	33	474	67	Muhammad Hayat v. Raghbar Dial ...	33	487
52	Jat Mal v. Beli Ram ...	33	948	68	Firm Shamasuddin-Chiragh Din v. Firm Muhammad Hussain- Mu- hammad Sadiq ...	33	494
53	Musammat Tajo v. Allah Din ...	35	229	69	Mathra Das v. Gopal Das ...	33	526
54	Nur Ali v. Bahawal ...	31	386	70	Diwan Singh v. Musammat Paro... Ram Saran v. Gappu Ram ...	33	529
55	Guran Rakha v. Bindraban ...	35	233	71	Feroz Din v. Musammat Basri ...	32	446
56	Locha Ram v. Jindwadda Khan ...	35	235	72	Hukam Singh v. Makhan Lal ...	32	793
57	Locha Ram v. Jindwadda Khan ...	36	565	73	Indar Narain v. Nanak Chand ...	32	454
58	Musammat Basanti v. Natha ...	33	147	74	Madhoo Mal v. Muhammad Zaka- ria ...	32	820
59	Tharu Mal v. Chandu Ram ...	33	138	75			
60	Ganga Ram v. Sardara ...	35	278				
61	Secretary of State v. Nanak ...	35	283				
62	Nawab v. Topan Ram ...	35	494				
63	Kala v. Hasham ...	35	291				

(C).—11 PUNJAB WEEKLY REPORTER, 1916—concl'd.

No. of Vol. 11 P. W. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 11 P. W. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
	<i>Civil—concl'd.</i>				<i>Criminal.</i>		
76	Sher Zaman v. Karm Bakhsh ...	32	806	13	Dharma Shah v. Crown ...	34	311
77	Natha Mal v. Jiwan Ram ...	33	733	14	Sher Singh v. Crown ...	34	998
78	Nathu Mal v. Pala Mal ...	35	110	15	Sher Singh v. Crown ...	34	641
79	Musammatt Ralli v. Ralla ...	33	783	16	Jahangir v. Crown ...	33	627
80	Ram Kishen v. Musammatt Umrao Bibi ...	33	730	17	Abdul Rahman v. Crown ...	33	630
81	Kishen Chand v. Ramsukh Das ...	33	815	18	Harnam Singh v. Crown ...	33	631
82	Barkat Ali v. Musammatt Sultan Bibi ...	33	787	19	Nika v. Crown ...	33	636
83	Shera v. Gauhar Khan ...	33	738	20	Nasir-ud-din v. Abdul Aziz ...	33	641
84	Kidar Nath v. Ganesha Mal ...	33	741	21	Jaisukh v. Crown ...	33	653
85	Musammatt Murad Khatun v. Muhammad Bakhsh ...	33	742	22	Tajoo v. Crown ...	34	999
				23	Fateh Sher Khan v. Crown ...	33	305
				24	Ishar Singh v. Crown ...	33	823
				25	Gurdit Singh v. Crown ...	34	652
				26	Lehna Singh v. Crown ...	34	1002
				27	Ram Jas v. Crown ...	35	175
				28	Musammatt Mehran v. Crown ...	34	1003

Table 11

SIND JUDICIAL COMMISSIONER'S COURT.

10 SIND LAW REPORTER, FROM FEBRUARY TO MAY, 1916.

Page of Vol. 10 S. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 10 S. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
1	Firm of Dhanpatmal Dewanchand v. Firm of Kishinlal Indraj ...	35	536	34	Dularam Piniomal v. Badaldas ...	35	478
4	Trikamji Jiwandas & Co. v. Trustees of the Port Trust of Karachi ...	36	96	38	Gehimal Dayalmal v. Karmumal Sirumal ...	35	551
7	Crown v. Sulleman ...	36	474	45	Jagan Nath v. Crown ...	35	671
9	Mitho v. Crown ...	35	668	47	Messrs. Fleming Shaw & Co., <i>In the matter of a petition by</i> ...	35	539
12	Tikandas Mulchand v. Gokaldas Vishindas ...	35	593	49	Jiwatmal Bhurumal v. Musammatt Gianibai ...	35	681
14	Tarachand Ghanshamdas v. Messrs. Louis Dreyfus & Co. ...	35	449	53	Pragji Kala v. Assa Jalal ...	35	530
28	Pamanmal Hemanmal, <i>In the matter of an application by</i> ...	35	541	56	Ali Mahomed v. Crown ...	35	484
20	Shamumal Teumal v. Rijhumal Bojoomal ...	36	92	58	Bilawal v. Gianmal ...	35	652
				64	Allahwarayo v. Crown ...	35	672
				65	Dodumal v. Crown ...	35	481
				68	Begraj Basharam v. Crown ...	35	525
				69	Udhasing Tahalsing v. Crown ...	35	620

Table 12

CRIMINAL LAW JOURNAL OF INDIA.

17 CRIMINAL LAW JOURNAL OF INDIA FOR MAY-JUNE, 1916.

Page of Vol. 17 Cr. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 17 Cr. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
177	Jaggu v. Pala ...	33	817	197	Pardip Singh v. Emperor ...	34	809
179	Turimella Kurmanna, <i>In re</i> ...	33	819	199	Emperor v. Dharma Shah ...	34	811
180	Jaipal v. Emperor ...	33	820	200	Bishessur Chuckerbutty v. Em- peror ...	34	812
182	Atul Hazra v. Uma Charan Chang- dar ...	33	822	201	Emperor v. Po Yin ...	34	813
183	Isher Singh v. Emperor ...	33	823	202	Nishi Kanta Lahiri v. Emperor ...	34	814
184	Nallapparaju Venkataramaraju v. Medisetti Achayya ...	33	824	203	Jawahir Thakur v. Emperor ...	34	815
184	Gulab Chand v. Emperor ...	33	824	205	Nur Din v. Emperor ...	34	817
185	Emperor v. Sheik Abdul ...	33	825	207	Ma Sein v. Emperor ...	34	819
188	Emperor v. Aushi Bibi ...	33	828	208	Ambica Tewari v. Emperor ...	34	820
190	Puran v. Emperor ...	33	830	209	Nga Po Chein v. Emperor ...	34	821
190	Bhaganathi Servai v. Valayec ...	33	830	22	Mam Chand v. Emperor ...	34	824
191	Jogesh Chandra Gupta, <i>In the</i> <i>matter of</i> ...	33	831	213	Nga Poona v. Emperor ...	34	825
193	Moggambara Pattan, <i>In re</i> ...	34	305	217	Maradanayakam Pillai v. Moham- mad Rowthen ...	34	829
193	Alexander v. Connor, R. W. ...	34	305	220	Ghulam Rasul v. Emperor ...	34	832
194	Emperor v. Nawab ...	34	306	222	Sit Taw v. Maung Ye ...	34	834
195	Maddela Ramanijamma, <i>In re</i> ...	34	307	223	Harkaran Singh v. Harnam Singh	34	835
				224	Rahiman Bibi v. Mobarak Mondal	34	836

1 TABLE

OF Cases reported in Volume XXXIV of Indian Cases, 1916.

An asterisk () denotes cases not reported yet elsewhere.*

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Abdu' Ali Choudhury v. Emperor ...	s. c. 20 C. W. N. 197; 23 C. L. J. 108; 43 C. 671; 17 Cr. L. J. 241	961
Abdul Karim v. Islamunnissa Bibi ...	s. c. 14 A. L. J. 401; 38 A. 339 ...	231
Abdul Samad v. Municipal Committee Delhi ...	s. c. 26 P. R. 1916 ...	866
Abdullahai Lalji v. Executive Committee, Aden ...	s. c. 18 Bom. L. R. 296; 40 B. 446	141
Abhoy Pado Bose v. Managing Committee, Etc. ...	s. c. 19 O. C. 15 ...	263
Abu Muhammad Mian v. Mukut Pertap Narain ...	s. c. 1 P. L. J. 92 ...	88
Achama Naidu v. Krishnaswami Naidu ...	*Madras High Court ...	518
Administrator-General of Bengal v. A. D. Christiana ...	s. c. 43 C. 201 ...	157
Adwaitya Charan v. Sorajranjan ...	*Calcutta High Court ...	584
Afiladdi v. Satish Chandra Banerji ...	*Calcutta High Court ...	497
Aiyasami Chetty v. Chinnia Nainar ...	s. c. 3 L. W. 338 ...	431
Alagappa Iyengar v. Maugathai Ammangar ...	s. c. 30 M. L. J. 504 ...	766
Alexander v. Connors ...	s. c. 20 C. W. N. 698; 17 Cr. L. J. 193 ...	305
Ali Husain Khan v. Bandi Bibi ...	s. c. 3 O. L. J. 226 ...	775
Ali Mahamud v. Aftabuddin Bhuya ...	s. c. 20 C. W. N. 355 ...	251
Alla-ud-din Hadi v. G. I. P. Ry. Co. ...	*Allahabad High Court ...	104
Ambica Tewari v. Emperor ...	s. c. 17 Cr. L. J. 20 ...	320
Amir Chand v. Durga Das ..	s. c. 70 P. L. R. 1916; 92 P. W. R. 1916 ...	957
Amirul Rahman v. Dhan Kumar Das ...	s. c. 3 O. L. J. 201 ...	689
Ammiraju v. Seshamma ...	s. c. 3 L. W. 49 ; (1916) 1 M. W. N. 368 ...	578
Amrita Lal Kundu v. Anukul Chandra Das ...	s. c. 20 C. W. N. 378; 43 C. 586 ...	253
Anand Sarup v. Chawwa ...	s. c. 14 A. L. J. 115 ...	952
Anantharama Iyer v. Vettath Kuttimalu Kovilammal ...	s. c. 19 M. L. T. 357; 3 L. W. 504; 30 M. L. J. 611 ...	829
Andi Thevan v. Zemindar of Sivagiri ...	*Court of the Board of Revenue, Madras ...	460

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Anila Bala Dasi v. Rajendra Nath Dalal ...	s. c. 23 C. L. J. 480; 43 C. 300 ...	227
Anna Laxman Bhintade v. Emperor ...	s. c. 18 Bom. L. R. 289; 17 Cr. L. J. 253 ...	973
Ari Chetty v. Theertthamalai Chetty ...	s. c. 3 L. W. 521 ...	791
Asad Ali v. Mohamed Husain ...	*Calcutta High Court ...	83
Ashutosh Mookherjee v. Akhoy Kumari Debi ...	*Calcutta High Court ...	581
Bajinath Marwari v. W. S. Street ...	s. c. 20 C. W. N. 518; 17 Cr. L. J. 251 ...	971
Baikuntha Nath Rai v. Basanta Kumari Dasi ...	s. c. 23 C. L. J. 151 ...	946
Bakhtawar Singh v. Dharam Singh ...	s. c. 3 O. L. J. 40 ...	9
Bakir Saheb Amir Saheb v. Emperor ...	s. c. 18 Bom. L. R. 284; 17 Cr. L. J. 249 ...	969
Baldeo Pershad v. Narain Halwai ...	*Allahabad High Court ...	123
Baldeo Sabai v. Kanhaya Lal ...	s. c. 65 P. L. R. 1916 ...	955
Balu Mudali v. Durvasalu Pillai ...	s. c. 4 L. W. 74; (1916) 2 M. W. N. 276 ...	570
Bandi Bakhsh v. Indar Pal ...	s. c. 3 O. L. J. 191 ...	304
Bankey Behary Lal v. Bhagwan Das Marwari ...	*Patna High Court ...	897
Bapuji Jagannath v. Govindlal Kasandas Shah ...	s. c. 18 Bom. L. R. 335; 40 B. 439 ...	167
Bela Singh v. Emperor ...	s. c. 54 P. L. R. 1916; 17 Cr. L. J. 284 ...	1004
Beni Rai v. Ram Prasad Rai ...	*Court of the Board of Revenue, United Provinces ...	84
Betireddi Somireddi v. Betireddi Tatayya ...	*Madras High Court ...	748
Bevan Petman v. Ganesh Das ...	s. c. 49 P. R. 1916; 144 P. W. R. 1916 ...	542
Bhagat Mal Sahu v. Abdul Karim ...	s. c. 1 P. L. J. 86 ...	23
Bhairon Prasad v. Samarpuri ...	*Allahabad High Court ...	441
Bharat Chander Galui v. Pramotha Nath Roy ...	*Calcutta High Court ...	337
Bhikariram Bhagat v. Maharaj Bahadur Singh ...	s. c. 43 C. 195 ...	152
Bhola Jha v. Kali Parsad ...	s. c. 1 P. L. J. 180 ...	288
Bhupendra Krishna Ghose v. Amarendra Nath Dey ...	s. c. 19 M. L. T. 97; 20 C. W. N. 169; 30 M. L. J. 110; 23 C. L. J. 169; 14 A. L. J. 167; 3 L. W. 252; (1916) 1 M. W. N. 73; 18 Bom. L. R. 347; 43 C. 432 P. C. ...	892
Bibi Sodhan v. Harsa Singh ...	s. c. 51 P. R. 1916; 138 P. W. R. 1916 ...	585
Bikkina Ramayya v. Adabala Seshayya ...	s. c. 30 M. L. J. 338 ...	475
Bindeshri Pershad Chand v. Girdhar Das ...	*Allahabad High Court ...	91
Biseswar Singh v. Parbhoo Nath Pathuk ...	*Patna High Court ...	506
Bisheshar Singh v. Bikaramjit Singh ...	s. c. 3 O. L. J. 189; 19 O. C. 30 ...	349
Bisheshar Singh v. Tirbhawan Bahadur Singh ...	s. c. 3 O. L. J. 222 ...	768
Bishessur Chuckerbutty v. Emperor ...	s. c. 20 C. W. N. 758; 17 Cr. L. J. 200; 24 C. L. J. 272 ...	312

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Bismilla Beg v. Azam Ali Beg ...	s. c. 3 O. L. J. 127 ...	865
Bitto v. Ram Nidh ...	s. c. 3 O. L. J. 208 ...	693
Bombay & Africa Steam Navigation Co., Ltd. v. Ajum Goolam Hoosein ...	s. c. 18 Bom. L. R. 230 ...	525
Brahmadat Tewari v. Chaudan Bibi ...	s. c. 20 C. W. N. 192 ...	686
Brij Kumar Lal v. Munshi Sahai ...	*Calcutta High Court ...	899
British South Africa Company v. Lennou, Lim. *P. C. ...	... 273	273
Brojendra Kumar Das v. Gobinda Moban Das ...	s. c. 20 C. W. N. 752 ...	186
Budhan Lal v. Jagan Nath ...	s. c. 3 O. L. J. 214 ...	757
Cassim Ahmad Molla v. Eusuf Haji Ajam Pepardi ...	s. c. 23 C. L. J. 453 ...	221
Chatterjee Brahmin v. Durgadutt Agarwalla ...	s. c. 23 C. L. J. 436; 20 C. W. N. 943 ...	394
Central Karkend Coal Co., Ltd., v. Kartic Rewani ...	s. c. 1 P. L. J. 47 ...	616
Chhotey Lal v. Firm Lakhmi Chand ...	s. c. 14 A. L. J. 549; 38 A. 425 ...	113
Chidambaram Chetty v. Karuthan Chetty ...	s. c. (1916) 2 M. W. N. 18; 4 L. W. 10; 20 M. L. T. 134 ...	543
Chinnu Pillai v. Venkatasamy Chettiar ...	s. c. 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217 ...	507
Chintama Singh v. Chuni Sabu ...	s. c. 1 P. L. J. 43 ...	747
Chokkalingam Chetty v. Annamalai Chetty ...	*Madras High Court ...	417
Chuto v. Khuda Bax ...	s. c. 9. S. L. R. 199 ...	470
Dalipa v. Suraj Kaur ...	s. c. 48 P. R. 1916; 142 P. W. R. 1916 ...	581
Daluchand Fulchand Gandhi v. Gulabbhai Kanthadji ...	s. c. 18 Bom. L. R. 323 ...	198
Dat Prasad Singh v. Gopal Ram ...	s. c. 14 A. L. J. 57 ...	234
Dattatraya Sakharam Devli v. Govind Sambhaji Kulkarni ...	s. c. 18 Bom. L. R. 258; 40 B. 429 ...	423
Daya Bhai v. Maharaj Bahadur Singh ...	s. c. 1 P. L. J. 238 ...	482
Dayalpuri v. Narayan Dutt ...	s. c. 14 A. L. J. 878 ...	26
Devaraja Naicken v. Ammani Ammal ...	s. c. 3 L. W. 319 ...	539
Digbijai Singh v. Hira Devi ...	s. c. 14 A. L. J. 419; 38 A. 322 ...	276
Dina Nath Das v. Ram Nath Das ...	s. c. 23 C. L. J. 561 ...	702
Dina Nath Das v. Sarat Chandra Chackerbutty ...	*Calcutta High Court ...	851
Dinabandhu Nandi v. Chamiraddi Miji ...	*Calcutta High Court ...	548
Dinvahi Lakshmipati v. Pingali Narasimham ...	s. c. (1916) 1 M. W. N. 473; 3 L. W. 590 ...	898
Dost Muhammad Khan v. Dost Muhammad Khan ...	s. c. 30 P. R. 1916 ...	920
Duraiswami Reddiar v. Rajagopala Reddiar ...	s. c. 4 L. W. 329 ...	712
Durga Bai v. Sobha Singh ...	*Patna High Court ...	827
Dwarika Nath Roy v. Mathura Nath Roy ...	s. c. 24 C. L. J. 40 ...	833
Dwarka Singh v. Layakat Ali Khan ...	*Patna High Court ...	44
Dwijapada Karmakar v. Miss Baileau ...	s. c. 20 C. W. N. 608 ...	632

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Eastern Mortgage Agency Co., Ltd. v. Premananda Saha ...	s. c. 23 C. L. J. 217 ...	789
Ebrahim Ahmed v. Samuel Balthazar ...	* Lower Burma Chief Court. ...	297
Emperor v. Dharma Shah ...	s. c. 8 P. R. 19 6 Cr.; 13 P. W. R. 1916 Cr.; 17 Cr. L. J. 199 ...	311
Emperor v. Nawab ...	s. c. 15 P. R. 1916 Cr.; 17 Cr. L. J. 194; 46 P. W. R. 1916 Cr. ...	306
Emperor v. Po Yin ...	s. c. 17 Cr. L. J. 201 ...	313
Emperor v. Salimi ...	s. c. 11 P. R. 1916 Cr.; 17 Cr. L. J. 254 ...	974
Eusuffzeman Sarkar v. Sanchia Lal Nahata ...	s. c. 43 C. 207; 20 C. W. N. 272; 23 C. L. J. 390 ...	606
Fatteh Chand v. Bilas Rai ...	s. c. 61 P. L. R. 1916; 89 P. W. R. 1916; 96 P. R. 1916; 140 P. W. R. 1916 ...	587
Gajodhar v. Udit Narain Singh ...	s. c. 3 O. L. J. 193 ...	682
Ganga Ram v. Ram Saran ...	*Allahabad High Court ...	502
Ganga Ram Rai v. Maula Baksh ...	*Patna High Court ...	185
Gangadara Mudali v. Sambasiva Mudali ...	s. c. 19 M. L. T. 397; (1916) 2 M. W. N. 58 ...	769
Gangahari Chakrabarti v. Nabin Chandra Banikya ...	s. c. 20 C. W. N. 232; 23 C. L. J. 145 ...	959
Ganes Dutt Singh v. Lachmi Narain Singh ...	s. c. 23 C. L. J. 209 ...	783
Ganesha v. Nageshar Bakbsh Singh ...	s. c. 19 O. C. 1 ...	257
Gani Latif v. Manilal Mulji ...	s. c. 18 Bom. L. R. 217 ...	520
Gariya Rangaswamy Patrudu v. Majji Appalaswamy ...	s. c. (19 6) 1 M. W. N. 286 ...	456
Gauri Shankar v. Abu Jafar Khan ...	s. c. 3 O. L. J. 204 ...	690
Gautam Jayachand Gujar v. Malhari Bapu Bhong ...	s. c. 12 Bom. L. R. 247; 40 B. 397 ...	406
Ghulam Rasul v. Emperor ...	s. c. 7 Cr. L. J. 220; 31 P. W. R. 1916 Cr. ...	332
Girdhar Gopal v. Gaya Prasad ...	s. c. 3 O. L. J. 235 ...	672
Girdharimal v. Emperor ...	s. c. 9 S. L. R. 202; 17 Cr. L. J. 240 ...	656
Gobind Rani Dasi v. Brinda Rani Dasi ...	s. c. 23 C. L. J. 440 ...	405
Gokal Chand v. Hukam Chand-Nathu Mal ...	s. c. 109 P. W. R. 1916 ...	714
Gopal Proshad Bhagat v. Rajendra Lal Panja ...	s. c. 20 C. W. N. 615 ...	625
Gopala Krishna Aiyar v. Srinivasa Row Sahib ...	*Court of the Board of Revenue, Madras ...	935
Gopisetti Narayanaswamy Naidu Garu v. V. Kunaparaju China Venkataraju ...	*Madras High Court ...	774
Goppammal v. Srinivasa Aiyangar ...	s. c. 30 M. L. J. 508 ...	432
Gour Gopal Sinha v. Gosta Behari Pramanick ...	*Calcutta High Court ...	409
Gour Sundar Bhounmik v. Rakhal Raj Bhounmik ...	s. c. 20 C. W. N. 1165 ...	592

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Govind v. Chandrabhaga ...	s. c. 12 N. L. R. 100 ...	675
Govind Balvant Laghate v. Emperor ...	s. c. 18 Bom. L. R. 266; 17 Cr. L. J. 256 ...	76
Govinda Pillai v. Messrs. Best & Co., Ltd. ...	*Madras High Court ...	843
Govindasami Naidu v. Ethirajammal ...	s. c. (1916) 1 M. W. N. 180 ...	1
Govindaswamy Pillai v. Ramaswami Aiyar ...	s. c. 3 L. W. 408; 30 M. L. J. 492; (1916) 2 M. W. N. 79 ...	6
Gujar Singh v. Mehr Singh ...	*Punjab Chief Court ...	168
Gum Sone v. Cassim Dalla ...	*Lower Burma Chief Court ...	95
Gungadhar Bogla v. Hira Lal Bogla ...	s. c. 20 C. W. N. 489; 23 C. L. J. 372 ...	10
Gurdit Singh v. Emperor ...	s. c. 55 P. L. R. 1916; 25 P. W. R. 1916 Cr.; 17 Cr. L. J. 236 ...	652
Hansman Jha v. Bahuji Jha ...	s. c. 43 C. 225 ...	203
Har Bakhsh Singh v. Lalla ...	s. c. 3 O. L. J. 2 6 ...	640
Hardeo v. Sher Singh ...	*Court of the Board of Revenue, United Provinces ...	148
Hardeo Singh v. Ram Chariter Singh ...	s. c. 17 Cr. L. J. 286 ...	1006
Hardwari Lal v. Muhammad Salamat Ullah Khan ...	s. c. 14 A. L. J. 409; 38 A. 358 ...	272
Harihar Charan v. Jang Bahadur ...	*Patna High Court ...	183
Harkaran Singh v. Harnam Singh ...	s. c. 3 O. L. J. 38; 17 Cr. L. J. 223 ...	335
Harpal v. Ram Sarup ...	*Allahabad High Court ...	173
Hasmatullah v. Hari Mohan Sarma ...	*Calcutta High Court ...	942
Hira Lal v. Giribala Debi ...	s. c. 23 C. L. J. 429 ...	444
Hobibullah v. Abtiakallah ...	s. c. 23 C. L. J. 567 ...	633
Hori Lal v. Thakur Bhagwan Bakhsh ...	s. c. 19 O. C. 23 ...	281
Ibrahim v. Akbar ...	*Punjab Chief Court ...	209
Ilahi Bakhsh v. Rahim Bakhsh ...	s. c. 106 P. W. R. 1916 ...	219
Imami v. Kallu ...	s. c. 14 A. L. J. 645; 38 A. 433 ...	298
Imrit Mahton v. Bahadur Singh ...	*Patna High Court ...	857
Isa v. Samman ...	s. c. 29 P. R. 19 6 ...	936
Ismail Allarakhia v. Dattatraya R. Gandhi ...	s. c. 18 Bom. L. R. 201 ...	515
Jadab Sardar v. Gobinda Chandra ...	*Calcutta High Court ...	912
Jadav Chandra Sarkar v. Kailash Chandra Singh ...	*Calcutta High Court ...	929
Jadho Mahto v. Kali Prasonno Bhattacharjee ...	s. c. 1 P. L. J. 3 ...	733
Jadunandan Prasad v. Emperor ...	s. c. 1 P. L. J. 64; 17 Cr. L. J. 234 ...	650
Jagat Pal Singh v. Harnam Singh ...	s. c. 3 O. L. J. 244 ...	745
Jagat Ram v. Emperor ...	s. c. 52 P. L. R. 1916; 29 P. W. R. 1916 Cr.; 17 Cr. L. J. 273; 36 P. W. R. 1916 Cr. ...	993
Jagannath Prasad v. Jaikishun Prasad ...	s. c. 1 P. L. J. 16 ...	375
Jai Kishen Joshi v. Budhanand Joshi ...	s. c. 14 A. L. J. 41; 38 A. 138 ...	244
Jairo v. Emperor ...	s. c. 9 S. L. R. 204; 17 Cr. L. J. 239 ...	655
Jamadar Singh v. Jagat Kishore Acharya ...	s. c. 23 C. L. J. 557 ...	697

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Jamna Bai Saheb Mohitai Avergal v. Vasanta Rao	s. c. 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 452; 39 M. 409 P. C.	213
Jan Mahomed v. Manthar	s. c. 9 S. L. R. 213	492
Jatindra Nath Basu v. Peyer Deye Debi	s. c. 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248 P. C.	69
Jawahir Singh v. Mehr Singh	s. c. 14 P. W. R. 1916	250
Jawahir Thakur v. Emperor	s. c. 14 A. L. J. 643; 17 Cr. L. J. 203; 38 A. 430	315
Jhamman v. Emperor	s. c. 14 A. L. J. 604; 17 Cr. L. J. 269	989
Jhumak Lal v. Sarju Prasad	s. c. 3 O. L. J. 211	711
Jitendra Nath Palit v. Lokendra Nath Palit	s. c. 22 C. L. J. 593	657
Jiwach Raut v. Sumran Manwar	*Patna High Court	911
Jiwan Lal Deosay v. Ondh Commercial Bank, Ltd., Lucknow	s. c. 3 O. L. J. 132	190
Jiwanji & Co., v. Emperor	s. c. 9 S. L. R. 205; 17 Cr. L. J. 231	647
Jogendra Narain Roy v. Manmatha Nath	*Calcutta High Court	106
Jogendra Nath Dey v. Gour Singh Mura	s. c. 20 C. W. N. 582	385
Jogesh Chandra v. Bama Sundari Debi	*Calcutta High Court	138
Jogesh Chunder Patitunda v. Rohini Kumar Roy Chowdhury	s. c. 21 C. L. J. 65	215
Jugal Chandra, <i>In the matter of</i>	s. c. 20 C. W. N. 1016; 17 Cr. L. J. 229	645
Jugul Kishore v. Raghubar Singh	*Ondh Judicial Commissioner's Court	89
Jumo Allarakhio v. Emperor	s. c. 9 S. L. R. 223; 17 Cr. L. J. 233	649
Johur Lall Dey v. Dharendra Nath Dey	s. c. 20 C. W. N. 304; 23 C. L. J. 314	707
K. Y. K. M. Chetty Firm v. S. N. V. R. Chetty Firm	*Lower Burma Chief Court	125
Kahen Singh v. Mohan Lal	s. c. 44 P. W. R. 1916	177
Kaimi v. Emperor	s. c. 12 P. R. 1916 Cr.; 17 Cr. L. J. 267; 39 P. W. R. 1916 Cr.	987
Kali Chandra v. Kali Kumar Majumdar	*Calcutta High Court	537
Kalu v. Ram Lal	s. c. 71 P. L. R. 1916; 91 P. W. R. 1916	958
Kalu Khan v. Umda	s. c. 47 P. R. 1916; 136 P. W. R. 1916	546
Kandhai Prasad v. Suraj Bali Das	s. c. 3 O. L. J. 213	755
Kangali Molla v. Beni Madhab Biswas	*Calcutta High Court	534

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Kapini Goundan v. Sarangapani ...	s. c. 3 L. W. 287; (1916) 1 M. W. N. 288 ...	744
Karamat Ali v. Hanuman Das Marwari ...	*Calcutta High Court ...	56
Karm Singh v. Emperor ...	s. c. 32 P. W. R. 1916 Cr.; 17 Cr. L. J. 226 ...	642
Karmun v. Emperor ...	s. c. 6 P. R. 1916 Cr.; 17 Cr. L. J. 280; 37 P. W. R. 1916 Cr. ...	1000
Kassim Ebrahim Saleji v. Johurmull Khemka ...	s. c. 23 C. L. J. 183; 20 C. W. N. 173; 43 C. 447 ...	799
Kasthuri Aiyangar v. Arunachelam Chettiar ...	s. c. (1916) 1 M. W. N. 195 ...	350
Kattalai Michael Pillai v. J. M. Barthe ...	s. c. 19 M. L. T. 249; 30 M. L. J. 423; 3 L. W. 348; (1916) 1 M. W. N. 307 ...	557
Kheyali Prasad v. Nazarul Alum ...	s. c. 20 C. W. N. 1048; 1 P. L. J. 174 ...	210
Khobhari Sah v. Jhaman Sah ...	s. c. 23 C. L. J. 482 ...	220
Khohua Moran v. Emperor ...	s. c. 23 C. L. J. 596; 17 Cr. L. J. 238 ...	654
Khudadad v. Moriokhan ...	s. c. 9 S. L. R. 193 ...	867
Kirpia v. Hardeo ...	*Allahabad High Court ...	57
Kissendoyal Jitsaria v. Askaran Chowthmull ...	s. c. 23 C. L. J. 415 ...	290
Kodumal v. Aga Khan Sultan Mahomed Shah ...	s. c. 9 S. L. R. 191 ...	493
Kotigari Rangiah Chetti v. Chintalapalli Narasayya ...	s. c. 3 L. W. 267 ...	388
Krishna Charan Barman v. Sanat Kumar Das ...	*Calcutta High Court ...	609
Krishna Dayal Gir v. Sakina Bibi ...	s. c. C. W. N. 952 ...	27
Krishna Dhone v. Bhagaban Chandra ...	*Calcutta High Court ...	188
Krishnapal Singh v. Ram Dulari ...	s. c. 3 O. L. J. 234 ...	753
Kunwar Sen v. Darbari Lal ...	s. c. 38 A. 411 ...	171
Labha v. Tulsi ...	s. c. 1 P. R. 1916 Rev.; 3 P. W. R. 1916 Rev. ...	523
Lachman v. Kalya ...	s. c. 12 N. L. R. 66 ...	458
Ladha Singh v. Bhag Singh ...	s. c. 50 P. R. 1916; 135 P. W. R. 1916 ...	549
Lakhi Priya Dassi v. Rai Kissori Dassi ...	s. c. 20 C. W. N. 554; 23 C. L. J. 463 ...	435
Lakhimi Ram Gagoi v. Emperor ...	s. c. 23 C. L. J. 595; 17 Cr. L. J. 266 ...	986
Lakshmi Venkayamma v. Venkatanarasimha ...	s. c. 20 C. W. N. 054; 14 A. L. J. 797; 31 M. L. J. 58; (191) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509 P. C. ...	921
Lal Jagroop Singh v. Banktaishwar Rawan Bahadurpal Singh ...	s. c. 3 O. L. J. 137 ...	355

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Lalljee Mahomed v. Dadabhai Jivanji Guzdar	s. c. 23 C. L. J. 190	807
Lehna Singh v. Emperor	s. c. 63 P. L. R. 1916; 26 P. W. R. 1916 Cr.; 17 Cr. L. J. 282	1052
Ma Kyun v. Myaing Shin	*Lower Burma Chief Court	47
Ma Paik v. Ma Nwai Pauk	*Lower Burma Chief Court	153
Ma Pwa v. Yu Lwai	*Lower Burma Chief Court	99
Ma Sein v. Emperor	s. c. 17 Cr. L. J. 207	39
Mackenzie, K. L. v. Rameshwar Singh	s. c. 1 P. L. J. 37	754
Madan Chandra Pal v. Kritiram Biswas	*Calcutta High Court	163
Madan Mohan De Sarkar v. Rebati Mohan Poddar	s. c. 23 C. L. J. 115	953
Madan Mohun Nath Sahi Deo v. Pratap Udai Nath Sahi Deo	s. c. 20 C. W. N. 111	22
Maddali Venkataswami v. Velampalli Subbarayudu	*Madras High Court	435
Maddela Ramaniyamma, <i>In re</i>	s. c. 20 M. L. T. 2; 17 Cr. L. J. 195	307
Madhab Chandra Mandal v. Nagendra Nath Sen	*Calcutta High Court	841
Madhavji Dharamsey Mfg. Co., Ltd. v. Central India Spinning, Weaving and Mfg. Co., Ltd.	s. c. 18 Bom. L. R. 206	529
Mahadeo Prasad v. Ajodhya Prasad	s. c. 3 O. L. J. 218	760
Mahadeo Prasad v. Gagraj Singh	s. c. 3 O. L. J. 164	397
Maharaja of Venkatagiri v. Velikanti Rami Reddi	s. c. (1916) 2 M. W. N. 21; 3 L. W. 582; 31 M. L. J. 211	607
Mam Chand v. Emperor	s. c. 5 P. W. R. 1916 Cr.; 17 Cr. L. J. 212	324
Mandil Das v. Megh Narain Dubey	s. c. 1 P. L. J. 39	712
Maneckjee Palonjee v. Nederlandsche Handel	*Lower Burma Chief Court	176
Mangal Singh v. Mangal Singh	s. c. 15 P. W. R. 1916	253
Manikkam Pillai v. Thanikachalam Pillai	s. c. (1916) 2 M. W. N. 87	945
Marndanayakam Pillai v. Mohammad Rowthen	s. c. 17 Cr. L. J. 217	329
Mata Ghulam v. Rajpal Singh	s. c. 3 O. L. J. 173	422
Mathura Mohan Saha v. Nabin Chandra Dutt	s. c. 20 C. W. N. 749; 24 C. L. J. 34	180
Mathura Prasad v. Ganga	s. c. 3 O. L. J. 125	861
Mathura Sundari Dassi v. Haran Chandra Shaha	s. c. 20 C. W. N. 594; 23 C. L. J. 443	634
Maula Bakhsh v. Kalka Singh	*Court of the Board of Revenue, United Provinces	155
Maung Sein Kyi v. Ma E	*Lower Burma Chief Court	159
Maung Shwe Gyaw v. Ma Shwe Thet	*Lower Burma Chief Court	71
Meajan Mathor v. Alimuddin Mea	s. c. 20 C. W. N. 1217	571
Mehran v. Emperor	s. c. 53 P. L. R. 1916; 13 P. R. 1916 Cr.; 28 P. W. R. 1916 Cr.; 17 Cr. L. J. 283	1003

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Meyajan Buian v. Joy mala ...	* Calcutta High Court ...	■
Midnapore Zemindari Co. Ltd. v. Joyram Santal ...	s. c. 1 P. L. J. 185 ...	918
Miran Bakhsh v. Beli Ram ...	s. c. 67 P. L. R. 1916; 17 Cr. L. J. 238 ...	654
Mrs. Stewart v. Bank of Upper India Ltd. ...	s. c. 31 P. R. 1916 ...	937
Mrs. Stewart v. Bank of Upper India Ltd. ...	s. c. 32 P. R. 1916 ...	932
Mizaji Lal v. Hori Lal ...	* Allahabad High Court ...	162
Mogambara Pattan, <i>in re</i> ...	s. c. 28 M. L. J. 379; 17 Cr. L. J. 193 ...	305
Mohammad Husain Khan v. Sis Ram ...	* Court of the Board of Revenue, United Provinces ...	186
Monmohan Roy v. Hemanta Kumar ...	s. c. 23 C. L. J. 553 ...	777
Moothetuth Kanari v. Hari Shenoy ...	s. c. 3 L. W. 301; 19 M. L. T. 245; (1916) 1 M. W. N. 273 ...	428
Motilal Radhakissen v. Ganpatram ...	s. c. 23 C. L. J. 220 ...	792
Muhammad Abdul Jalil v. Ram Dayal ...	s. c. 14 A. L. J. 724 ...	357
Muhammad Abul Hasan Khan v. Raj Kumari ...	s. c. 3 O. L. J. 209 ...	706
Muhammad Ali v. Baldeo Pande ...	s. c. 14 A. L. J. 55; 38 A. 148 ...	183
Muhammad Ali Muhammad v. Shaukat Ali ...	s. c. 3 O. L. J. 229 ...	702
Muhammad Ali Muhammad v. Shaukat Ali ...	s. c. 3 O. L. J. 231 ...	713
Muhammad Ismail v. Ganri Parshad ...	s. c. 24 P. R. 1916 ...	916
Muhammad Maruf v. Sultan Ahmad ...	* Allahabad High Court ...	344
Muhammad Yunus Ali Khan v. Kaian Singh ...	* Allahabad High Court ...	369
Mukkoosa Nair Veetil v. Secretary of State ...	* Madras High Court ...	541
Mulk Shah v. Tara Singh ...	s. c. 13 P. W. R. 1916 ...	255
Muneshar Bakhsh Singh v. Arjun Singh ...	s. c. 3 O. L. J. 237 ...	738
Municipality of Belgaum v. Rudrappa Subrao Sutar ...	s. c. 1 Bom. L. R. 340 ...	21
Murari Lal v. Jalipa Sahai ...	s. c. 3 O. L. J. 180 ...	447
Muruga Pillay v. Krishnamoorthy Chetty ...	s. c. 3 L. W. 368 ...	547
Muthiah Chetti v. Perianan Chetti ...	s. c. 4 L. W. 228 ...	551
Muthuveerappa Chetti v. Ramaswami Chetti ...	s. c. 31 M. L. J. 264 ...	401
Mutsaddi Mian v. Mahomed Idris ...	s. c. 19 C. W. N. 764 ...	283
Nabin Chandra Aich v. Noakhali Municipality ...	s. c. 23 C. L. J. 588; 17 Cr. L. J. 265 ...	985
Nachiappa Chetty v. Thangavelu Chetty ...	s. c. 3 L. W. 495 ...	696
Nafar Chandra Pal v. Rahaman Sheikh ...	* Calcutta High Court ...	45
Nag Narain v. Jung Bahadur Sahai ...	* Patna High Court ...	905
Nageshar Prasad Pande v. Pateshri Partab Narain Singh ...	s. c. 3 L. W. 454; 20 C. W. N. 265; (1916) 1 M. W. N. 142 P. C. ...	673
Nageshar Sahai v. Mata Pershad ...	s. c. 3 O. L. J. 178 ...	496
Naik Pandey v. Bidya Pandey ...	s. c. 1 P. L. J. 149 ...	149
Nakulsao v. Ramadhinsao ...	s. c. 12 N. L. R. 86 ...	698
Namasivaya Kurukkal v. Subramania Ayyan ...	* Madras High Court ...	927

Names of cases reported.	Where reported.	Page of Ind. C. Vol. XXXIV.
Nanda Lal v. Abdul Aziz ...	*Calcutta High Court ...	115
Nanhu v. Narbada Prasad ...	s. c. 12 N. L. R. 83 ...	695
Narainbati Kunwari v. Ramdhari Singh ...	s. c. 20 C. W. N. 734; 1 P. L. J. 81 ...	277
Naraprath Kummali v. Paramboli Kandi ...	*Madras High Court ...	494
Narayan Ramkrishna Pandit v. Vigneshwar Ganap Hegde ...	s. c. 18 Bom. L. R. 250; 40 B. 378 ...	414
Narayanan Chettyar v. Vellayappa Chettyar ...	s. c. (1916) 1 M. W. N. 206; 19 M. L. T. 237 ...	347
Naresh Chandra Bose v. Hira Lal Bose ...	s. c. 20 C. W. N. 360; 43 C. 239 ...	263
Narsingdas v. Ratanlal ...	s. c. 12 N. L. R. 75 ...	471
Natesa Udayan v. Annasami Udayan ...	s. c. 3 L. W. 468 ...	756
National Bank of India Ltd. v. Ghuznavi ...	s. c. 43 C. 285 ...	287
Nga Kye v. Nga Kyu ...	s. c. U. B. R. (1916) II, 103 ...	247
Nga Kyet Sein v. Mi Kyin Mya ...	s. c. U. B. R. (1916) II, 105; 9 Bur. L. T. 38 ...	249
Nga Po Chein v. Emperor ...	s. c. 17 Cr. L. J. 209 ...	321
Nga Poona v. Emperor ...	s. c. 17 Cr. L. J. 213; 9 Bur. L. T. 136 ...	325
Nga Yein v. Nga So ...	s. c. U. B. R. (1916) II, 106 ...	264
Nidamarthi Krishnamoorthy v. Garigiparti Ganapatilingam ...	s. c. 3 L. W. 375 ...	741
Nikki v. Gujar Mal ...	*Punjab Chief Court ...	478
Niranjana Nath v. Afzal Hussain ...	s. c. 111 P. W. R. 1916 ...	822
Nishi Kanta Lahiri v. Emperor ...	s. c. 20 C. W. N. 732; 17 Cr. L. J. 202 ...	314
Nur Din v. Emperor ...	s. c. 8 P. W. R. 1916 Cr.; 17 Cr. L. J. 205 ...	317
Nur Muhammad v. Khuda Bakhsh ...	s. c. 93 P. W. R. 1916 ...	135
Nuri Miah v. Ambica Singh ...	s. c. 20 C. W. N. 1099 ...	869
Official Receiver of Trichinopoly v. Somasundaram Chettiar ...	s. c. 30 M. L. J. 415 ...	602
Ottapurakkal Thazath Suppi v. Alabi Mashur Koyanna Koya Kunhi Koya ...	s. c. 3 L. W. 430; 30 M. L. J. 523; 19 M. L. T. 314; (1916) 1 M. W. N. 328 ...	588
Pakaria v. Ranjita ...	*Allahabad High Court ...	165
Palaniandi Chettiar v. Appavu Chettiar ...	s. c. 30 M. L. J. 565; 19 M. L. T. 390 ...	778
Palaniyandi Pandaram v. Palaniappa Thevan ...	s. c. 17 Cr. L. J. 235 ...	651
Palavalasa Appalaswamy v. Dantaluri Narayana ...	s. c. (1916) 1 M. W. N. 276 ...	446
Palikandy Mammad v. Chingoran Keloth Valia Appa ...	s. c. 30 M. L. J. 361 ...	381
Panchkoti Ghosh v. Hari Das Jati ...	*Calcutta High Court ...	341
Panna Lal v. Dhumai Mal ...	*Punjab Chief Court ...	156

Names of cases reported.

Where reported.

Page of Ind. Cas.
Vol. XXXIV.

Paramasivam Pillai v. Periyannayagath Ammal	*Madras High Court	... 103
Parameswaram Munpu v. Narayanan Namboodri	s. c. 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279	... 384
Pardip Singh v. Emperor	s. c. 43 C. 270; 17 Cr. L. J. 197	... 309
Parukutti v. Kelappan Nair	*Madras High Court	... 818
Pearey Lal v. Hanifunnissa Bibi	s. c. 14 A. L. J. 302; 38 A. 240	... 308
Peari Mohan Kundu v. Mohini Kanta Saha Choudhury	*Calcutta High Court	... 855
Perumal Naicker v. Davood Rowther	*Madras High Court	... 393
Pilakkatan Chettiotan v. Vazhakarambath Moidin	s. c. 3 L. W. 467	... 755
Pitchayya v. Subba Rao	s. c. 3 L. W. 499	... 787
Poomalai v. Karuppa Sarvai	s. c. (1916) 2 M. W. N. 136	... 921
Puthenpurayil v. Kandiyal	s. c. (1916) 2 M. W. N. 31; 20 M. L. T. 127	... 906
Radha Sham Basak v. Secretary of State	*Calcutta High Court	... 130
Radhakrishna Mudaliar v. Subraya Mudaliar	s. c. 31 M. L. J. 357; 4 L. W. 255	... 849
Radhica Mohan Roy v. Manmotha Nath Mitter	s. c. 23 C. L. J. 603	... 111
Raghavachari v. Pakkiri Mahommed	s. c. 30 M. L. J. 497; 19 M. L. T. 381; (1916) 2 M. W. N. 73	... 760
Raghubhushana v. Vidiavaridhi	*Madras High Court	... 875
Raghunatha Chari v. Aravamuthaiyengar	*Madras High Court	... 617
Rahiman Bibi v. Mobarak Mondal	s. c. 20 C. W. N. 672; 17 Cr. L. J. 224	... 336
Rai Charan v. Kanai Kamar	s. c. 24 C. L. J. 21	... 72
Raja Ram Sahu v. Jhanti Gope	*Patna High Court	... 75
Rajab Ali v. Wazir Ali	s. c. 1 P. L. J. 188	... 85
Rajah of Ramnad v. Sellachami Tevar	s. c. 4 L. W. 173; (1916) 2 M. W. N. 247	... 500
Rajah of Vizayanagaram v. Poosapati Appala	s. c. 3 L. W. 517; 19 M. L. T. 374; (1916) 1 M. W. N. 391	... 480
Rajani Kanta Mukherjee v. Yusuf Ali	*Calcutta High Court	... 92
Rajendra Kumar Roy v. Maharaja Manindra Chandra Nandy	s. c. 24 C. L. J. 162	... 464
Rajendra Nath v. Baikuntha Nath	*Calcutta High Court	... 934
Rajpal Kuar v. Rudra Pratab Narain Singh	s. c. 3 O. L. J. 219	... 764
Ram Antar Shukul v. Bhagelu Sahai	*Allahabad High Court	... 204
Ram Bahadur Singh v. Ajodhya Singh	s. c. 1 P. L. J. 129; 20 C. W. N. 699	... 370
Ram Bhajan v. Sheo Darshan Singh	s. c. 3 O. L. J. 162	... 396
Ram Charan Lal v. Rahim Bakhsh	s. c. 14 A. L. J. 538; 38 A. 416	... 108
Ram Dhon Dhor v. Sharf-ud-din	*Lower Burma Chief Court	... 128
Ram Jawaya Mal v. Devi Ditta Mal	s. c. 107 P. W. R. 1916	... 192
Ram Narain v. Pati Ram Tewari	s. c. 1 P. L. J. 90	... 105

Names of ~~cases~~ reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Ram Narayan Singh v. Adhindra Nath ...	s. c. 20 C. W. N. 989; (191) 1 M. W. N. 428; 4 L. W. 15; 31 M. L. J. 251; 20 M. L. T. 216 P. C.	900
Ram Samajh Pande v. Ramjas ...	s. c. 3 O. L. J. 224	773
Ram Singh v. Emperor ...	s. c. 7 P. R. 1916 Cr.; 17 Cr. L. J. 273; 35 P. W. R. 1916 Cr.	993
Rama Row v. Kuttiya Gounden ...	s. c. 3 L. W. 331; 19 M. L. T. 275; 30 M. L. J. 514	294
Raman Lalji Maharaj v. Hari Das ...	s. c. 14 A. L. J. 677	364
Ramaswamy Chetty v. Madura Mills Co., Ltd. ...	s. c. (1916) 1 M. W. N. 265	338
Ramkhelawan Singh v. Sunder Raut ...	*Patna High Court	34
Rantahal v. Ganoo Sahu ...	*Patna High Court	909
Ramzan Ali Khan v. Muhammad Qayum Khan ...	s. c. 3 O. L. J. 247	749
Ranjita v. Musammat Rukmin ...	*Oudh Judicial Commissioner's Court	387
Rashbehary Lal Mandar v. Nand Ram ...	s. c. 43 C. 211	205
Ratan Bipari v. Hira Lal ...	*Calcutta High Court	527
Ratan Lal v. Bibi Kunria ...	*Allahabad High Court	144
Ravu Seshaya Garu v. Rajah of Pittapur ...	s. c. 3 L. W. 485; (1916) 1 M. W. N. 396; 31 M. L. J. 214	730
Ross, J. B. v. C. R. Scriven ...	s. c. 20 C. W. N. 1192	235
Rudrappa Achary v. Corporation of Madras ...	s. c. (1916) 1 M. W. N. 394	715
Rukmin Kuar v. Ashiq Husain ...	s. c. 3 O. L. J. 32	3
Sadho Lal v. Emperor ...	s. c. 17 Cr. L. J. 272	992
Safar Ali v. Mohesh Lal ...	s. c. 23 C. L. J. 122	956
Sahdeo Ojha v. Lachhmina Kuar ...	*Allahabad High Court	207
Sahib-un-Nissa v. Abdul Ghaffur ...	s. c. 3 O. L. J. 140; 19 O. C. 60	360
Sakhawatrai v. Partabrai ...	s. c. 9 S. L. R. 209	909
Sam v. Ramalinga Mudaliar ...	s. c. 30 M. L. J. 600	603
Sarada Prasad Roy v. Muhammad Yusuf ...	s. c. 24 C. L. J. 158	228
Sarju Din Pandey v. Kamta Singh ...	s. c. 3 O. L. J. 187	353
Sashi Bhusan Hazrah v. Srimati Deno Moyee Dasi ...	*Calcutta High Court.	301
Satikanth Banerjee v. Ram Chandra Chatterjee ...	*Calcutta High Court	556
Satis Ranjan Das v. Nasaraddi Patwari ...	*Calcutta High Court	145
Satish Chandra Mitra v. Jogendra Nath Mahalanobis ...	s. c. 20 C. W. N. 1044; 24 C. L. J. 175	862
Secretary of State v. Gulam Rusul ...	s. c. 18 Bom. L. R. 243; 40 B. 392	535
Sesha Iyer v. Arimuthu Vathyar ...	s. c. (1916) 1 M. W. N. 323	362
Seshappier v. Subramania Chettiar ...	s. c. 30 M. L. J. 587; 19 M. L. T. 386	751
Sethrucherla Rama Chandra v. Maharajah of Jeypore ...	s. c. (1916) 1 M. W. N. 354; 19 M. L. T. 360	411
Shahul v. Allah Bachayo ...	s. c. 9 S. L. R. 196	504
Shardaprasad v. Sikandar ...	s. c. 12 N. L. R. 69	461

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Sheo Narain Singh v. Bisai Singh ...	s. c. 3 O. L. J. 170 ...	416
Sheo Prasad v. Bisheshar Nath ...	s. c. 19 O. C. 12; 3 O. L. J. 129 ...	266
Sher Jan Khan v. Alimuddi ...	s. c. 20 C. W. N. 268; 23 C. L. J. 225; 43 C. 511 ...	598
Sher Singh v. Emperor ...	s. c. 10 P. R. 1916 Cr.; 15 P. W. R. 191 Cr.; 17 Cr. L. J. 225 ...	641
Sher Singh v. Emperor ...	s. c. 14 P. W. R. 1916 Cr.; 17 Cr. L. J. 278 ...	998
Singheswar Missir v. Rameshwar Jha ...	*Patna High Court ...	466
Sirdar Khatun v. Muradali ...	s. c. 9 S. L. R. 218 ...	928
Siryan v. Emperor ...	s. c. 69 P. L. R. 1916; 17 Cr. L. J. 270 ...	990
Sit Taw v. Maung Ye ...	s. c. 17 Cr. L. J. 222; 9 B. L. R. 128 ...	334
Sital Chandra Chaudhury v. Mrs. Allen J. Delanney ...	s. c. 20 C. W. N. 1158 ...	450
Sital Prasad v. Emperor ...	s. c. 20 C. W. N. 199; 23 C. L. J. 105; 43 C. 591; 17 Cr. L. J. 254 ...	974
Sivakolundu Pillai v. Ganapathi Iyyar ...	s. c. 3 L. W. 336 ...	302
Sobhanmal Pohumal v. Bachal ...	s. c. 9 S. L. R. 214 ...	890
Sohna Mal v. Nanak Chand ...	s. c. 22 P. R. 1916 ...	904
Somwarपुरी v. Matabadal ...	s. c. 14 A. L. J. 422; 38 A. 351 ...	280
Sonai Chutia v. Sonaram Chutia ...	s. c. 20 C. W. N. 195 ...	692
Soundararajan v. Saravana Pillai ...	s. c. 30 M. L. J. 592 ...	794
Sri Kishan Lal v. Kashmiro ...	s. c. 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362 P. C. ...	37
Sri Ram v. Mohan Lal ...	s. c. 19 O. C. 17 ...	280
Srikishen-Rochumal v. Relumal-Pariomal ...	s. c. 9 S. L. R. 123 ...	845
Subbai Goundan v. Palani Goundan ...	s. c. 30 M. L. J. 607 ...	825
Subbanna Achariar v. Gopalakrishna Achariar ...	*Madras High Court ...	354
Subbaroyar v. Kottaya Goundan ...	s. c. (1916) 1 M. W. N. 284 ...	737
Subramania Aiyar v. Subramania Pattar ...	s. c. (1916) 1 M. W. N. 351; 30 M. L. J. 615 ...	859
Subramanian v. Emperor ...	s. c. 3 L. W. 403; (1916) 1 M. W. N. 327; 17 Cr. L. J. 288 ...	1038
Sundara Reddi v. Varadharaja Pillai ...	s. c. (1916) 2 M. W. N. 273 ...	407
Suppu Nayakan v. Perumal Chetty ...	s. c. 19 M. L. T. 364; 30 M. L. J. 486; (1916) 1 M. W. N. 301 ...	372
Suraj Deo Narayan Singh v. Musahroo Raut ...	s. c. 20 C. W. N. 950 ...	504
Suraj Din v. Wajid Ali ...	s. c. 3 O. L. J. 444 ...	367
Surajpal Singh v. Debi Bakhsh Singh ...	s. c. 3 O. L. J. 156 ...	390
Surendra Narain v. Jagal Kishore Ghose ...	*Calcutta High Court ...	76
Swami Chetty v. Ethirajulu Naidu ...	s. c. 3 L. W. 585; (1916) 2 M. W. N. 84 ...	853
Syed Husain v. Sajjadi Begam ...	s. c. 3 O. L. J. 200 ...	686

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXIV.
Taj Muhammad v. Sayad Muhammad	s. c. 94 P. W. R. 1916	126
Tajoo v. Emperor	s. c. 22 P. W. R. 1916 Cr.; 17 Cr. L. J. 279	999
Tana Peena Chunu v. Mamakkantakath	*Lower Burma Chief Court	24
Taran Krishna Bhowmik v. Samiruddin	*Calcutta High Court	51
Tarap Ali v. Kalipada Bandopadhyaya	s. c. 23 C. L. J. 635	97
Tek Chand v. Soman Singh	s. c. 27 P. R. 1916	831
Thangavelu Mudaliar v. Mahomed Ibrahim	s. c. 3 L. W. 377	759
Thiruvambala Desikar v. Chinna Pandaram	s. c. 3 M. L. J. 274; (1916) 2 M. W. N. 43; 4 L. W. 306	57
Thiruvenkata Chariar v. Seshadri Iyengar	s. c. 3 L. W. 457; 30 M. L. J. 559; 19 M. L. T. 369	488
Tika v. Sheo Narain	s. c. 3 O. L. J. 175	426
Tirthabasi Sing Roy v. Bepin Krishna Roy	*Calcutta High Court	30
Tota Ram v. Emperor	s. c. 14 P. R. 1916 Cr.; 17 Cr. L. J. 242; 38 P. W. R. 1916 Cr.	962
Udhishter Singh v. Kausilla	s. c. 38 A. 398	79
Umakunta Sen v. Hira Lal Roy	*Calcutta High Court	86
Umar Abdul Rahiman v. Gustadi Muncherji Cooper	s. c. 3 L. W. 38; 20 C. W. N. 297; (1916) 1 M. W. N. 137; 30 M. L. J. 444 P. C.	268
Umatol Soghra v. Zohra	*Patna High Court	54
Umed Ali v. Anwar Husain	s. c. 3 O. L. J. 232	733
Umesh Chandra Ghose v. Kala Chand Guha	*Calcutta High Court	516
Varadaraja Appa Rao Babadur v. Gonepalle Punneyya	s. c. 30 M. L. J. 545; 19 M. L. T. 338	626
Veerakkal v. Thirumakkal	*Madras High Court	596
Venkitammal v. Alangat Raman Nair	*Madras High Court	931
Vepa Kamesam v. Varigonda Narasimham	*Madras High Court	701
Vishindas v. Municipality of Hyderabad	s. c. 9 S. L. R. 220	494
Vishvanath Ganesh Joshi v. Bala Kaku Kapadi	s. c. 18 Bom. L. R. 292	147
Vishwanath v. Shankerlal	s. c. 12 N. L. R. 90	704
Viswanathan v. Brahmanadban	*Madras High Court	900
Wasawa Singh v. S. Mahana Singh	s. c. 1 P. W. R. 1916 Rev.	248
Wasi Ali v. Jang Bahadur Singh	s. c. 2 O. L. J. 614	48
Yaddanapudi Lakshmi v. Repalle Seetharamaswami	s. c. 3 L. W. 405; 19 M. L. T. 336	2
Yado v. Emperor	s. c. 12 N. L. R. 94; 17 Cr. L. J. 245	965
Zamindar of Sanivarappet v. Zamindar of South Valluru	*Madras High Court	444
Ziada v. Jowai	s. c. 46 P. R. 1916; 134 P. W. R. 1916	538

11

Comparative Table

OF

Cases Reported in Volume XXXIV of Indian Cases, 1916.

Cases marked with an asterisk (*) have not yet been reported elsewhere.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
1	Govindasami Naidu v. Ethirajammal ...	s. c. (1916) 1 M. W. N. 180.
2	Yaddanapudi Lakshmi v. Repalle Seetharama-swami ...	s. c. 3 L. W. 405; 19 M. L. T. 336.
3	Rukmin Kuar v. Ashiq Husain ...	s. c. 3 O. L. J. 32.
6	Govindaswamy Pillai v. Ramaswami Aiyar ...	s. c. 3 L. W. 408; 30 M. L. J. 492; (1916) 2 M. W. N. 79.
9	Bakhtawar Singh v. Dharam Singh ...	s. c. 3 O. L. J. 40.
10	Gungadhar Bogla v. Hira Lal Bogla ...	s. c. 20 C. W. N. 489; 23 C. L. J. 372.
21	Municipality of Belgaum v. Rudrappa Subrao Sutar ...	s. c. 18 Bom. L. R. 340.
22	Madan Mohun Nath Sahi Deo v. Pratap Udai Nath Sahi Deo ...	s. c. 20 C. W. N. 111.
23	Bhagat Mal Sahu v. Abdul Karim ...	s. c. 1 P. L. J. 86.
24	Tana Peena Chuna v. Mamakkantakath ...	*Lower Burma Chief Court.
26	Dayalpuri v. Narayan Dutt ...	s. c. 14 A. L. J. 878.
27	Krishna Dayal Gir v. Sakina Bibi ...	s. c. 20 C. W. N. 952.
30	Tirthabasi Sing Roy v. Bepin Krishna Roy ...	*Calcutta High Court.
32	Meyajan Buin v. Joymala ...	*Calcutta High Court.
34	Ramkhelawan Singh v. Sunder Raut ...	*Patna High Court.
37	Sri Kishan Lal v. Kashmiro ...	s. c. 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362 P. C.
44	Dwarka Singh v. Layakat Ali Khan ...	*Patna High Court.
45	Nafar Chandra Pal v. Rahaman Sheikh ...	*Calcutta High Court.
47	Ma Kyun v. Myaing Shin ...	*Lower Burma Chief Court.
48	Wasi Ali v. Jang Bahadur Singh ...	s. c. 2 O. L. J. 614.
51	Taran Krishna Bhowmik v. Samiruddiu ...	*Calcutta High Court.
54	Umatol Soghra v. Zohra ...	*Patna High Court.
56	Karamat Ali v. Hanuman Das Marwari ...	*Calcutta High Court.
57	Kirpia v. Hardeo ...	*Allahabad High Court.
57	Thiruvambala Desikar v. Chinna Pandaram ...	s. c. 30 M. L. J. 274; (1916) 2 M. W. N. 43; 4 L. W. 306.
69	Jatindra Nath Basu v. Peyr Deye Debi ...	s. c. 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248 P. C.
71	Maung Shwe Gyaw v. Ma Shwe Thei ...	*Lower Burma Chief Court.
72	Rai Charan v. Kanai Kamar ...	s. c. 24 C. L. J. 21.
75	Raja Ram Sahu v. Jhanti Gope ...	*Patna High Court.
76	Surendra Narain v. Jagal Kishore Ghose ...	*Calcutta High Court.
79	Udbishter Singh v. Kausilla ...	s. c. 38 A. 398.
84	Asad Ali v. Mohamed Husain ...	*Calcutta High Court.
84	Beni Rai v. Ram Prasad Rai ...	*Court of the Board of Revenue, United Provinces.
85	Rajab Ali v. Wazir Ali ...	s. c. 1 P. L. J. 188.
86	Umakunta Sen v. Hira Lal Roy ...	*Calcutta High Court.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
88	Abu Muhammad Mian v. Mukut Pertap Narain ...	s. c. 1 P. L. J. 92.
89	Jugul Kishore v. Raghubar Singh ...	*Oudh Judicial Commissioner's Court.
91	Bindeshri Pe shad Chand v. Girdhar Das ...	*Allahabad High Court.
92	Rajani Kanta Mukherjee v. Yusuf Ali ...	*Calcutta High Court
95	Gum Sone v. Cassim Dalla ...	*Lower Burma Chief Court.
97	Tarap Ali v. Kalipada Bandopadhyaya ...	s. c. 23 C. L. J. 615.
99	Ma Pwa v. Yu Lwai ...	*Lower Burma Chief Court.
104	Alla-ud-din Hadi v. G. I. P. Ry. Co. ...	*Allahabad High Court.
105	Ram Narain Ram v. Pati Ram Tewari ...	s. c. 1 P. L. J. 90.
106	Jogendra Narain Roy v. Maumatha Nath ...	*Calcutta High Court.
108	Ram Charan Lal v. Bahim Bakhsh ...	s. c. 14 A. L. J. 538; 38 A. 416.
111	Radhica Mohan Roy v. Manmotha Nath Mitter ...	s. c. 23 C. L. J. 603.
113	Chhotey Lal v. Firm Lakhmi Chand ...	s. c. 14 A. L. J. 549; 38 A. 425.
115	Nanda Lal v. Abdul Aziz ...	*Calcutta High Court.
123	Baldeo Pershad v. Narain Halwai ...	*Allahabad High Court.
125	K. Y. K. M. Chetty Firm v. S. N. V. R. Chetty Firm ...	*Lower Burma Chief Court.
126	Taj Muhammad v. Sayad Muhammad ...	s. c. 94 P. W. R. 916.
128	Ram Dhon Dhor v. Sharf ud-din ...	*Lower Burma Chief Court.
140	Radha Sham Basak v. Secretary of State ...	*Calcutta High Court.
135	Nur Muhammad v. Khuda Bakhsh ...	s. c. 93 P. W. R. 1916.
134	Jogesh Chandra v. Bama Sundari Debi ...	*Calcutta High Court.
141	Abdullahai Lalji v. Executive Committee, Aden ...	s. c. 18 Bom. L. R. 296; 40 B. 446.
144	Ratan Lal v. Bibi Kunria ...	*Allahabad High Court.
145	Satis Ranjan Das v. Nasaradji Patwari ...	*Calcutta High Court.
147	Vishvanath Ganesh Joshi v. Bala Kaku Kapadi ...	s. c. 18 Bom. L. R. 292.
148	Hardeo v. Sher Singh ...	*Court of the Board of Revenue, United Provinces.
149	Naik Pandey v. Bidya Pandey ...	s. c. 1 P. L. R. 149.
152	Bhikariram Bhagat v. Mahataj Bahadur Singh ...	s. c. 43 C. 195.
153	Ma Paik v. Ma Nwai Pauk ...	*Lower Burma Chief Court.
155	Maula Bakhsh v. Kalka Singh ...	*Court of the Board of Revenue, United Provinces.
156	Panna Lal v. Dhumi Mal ...	*Punjab Chief Court.
157	Administrator-General of Bengal v. A. D. Christiana ...	s. c. 43 C. 201.
159	Maung Sein Kyi v. Ma E ...	*Lower Burma Chief Court.
162	Mizaji Lal v. Hori Lal ...	*Allahabad High Court.
163	Madan Chandra Pal v. Kritiram Biswas ...	*Calcutta High Court.
165	Pakaria v. Ranjita ...	*Allahabad High Court.
167	Bapuji Jagannath v. Govindlal Kasandas Shah ...	s. c. 1 Bom. L. R. 335; 40 B. 439.
168	Gujar Singh v. Mehr Singh ...	*Punjab Chief Court.
171	Kunwar Sen v. Darbari Lal ...	s. c. 38 A. 411.
173	Harpal v. Ram Sarup ...	*Allahabad Court Court.
176	Manekjee Palonjee v. Nederlandsche Handel ...	*Lower Burma Chief Court.
177	Khan Singh v. Mohan Lal ...	s. c. 44 P. W. R. 196.
180	Mathura Mohan Saha v. Nabin Chandra Dutt ...	s. c. 20 C. W. N. 749; 24 C. L. J. 34.
183	Harihar Charan v. Jang Bahadur ...	*Patna High Court.
183	Muhammad Ali v. Baldeo Pande ...	s. c. 14 A. L. J. 55; 38 A. 148.
185	Ganga Ram Rai v. Maula Baksh ...	*Patna High Court.
186	Mohammad Husain Khan v. Sis Ram ...	*Court of the Board of Revenue, United Provinces.
186	Brojendra Kumar Das v. Gobind Mohan Das ...	s. c. 20 C. W. N. 752.
188	Krishna Dhona v. Bhagaban handra ...	*Calcutta High Court.
191	Jiwan Lal Deosay v. Oudh Commercial Bank, Ltd., Lucknow ...	s. c. 3 O. L. J. 182.
192	Ram Jawaya Mal v. Devi Ditta Mal ...	s. c. 107 P. W. R. 1916.
198	Daluchand Fulchand Gandhi v. Ghulabbhai Kanthadji ...	s. c. 18 Bom. L. R. 323.

Pages of Vol. XXXIV of Ind. C.	Names of Parties.	Corresponding pages of other Reports and Journals.
203	Hansman Jha v. Bahuji Jha	s. c. 43 C. 225.
204	Ram Antar Shukul v. Bhagelu Sahai	*Allahabad High Court.
205	Rashbehary Lal Mandar v. Anand Ram	s. c. 43 C. 211.
207	Sahdeo Ojha v. Lachhmina Kuar	*Allahabad High Court.
209	Ibrahim v. Akbar	*Punjab Chief Court.
210	Kheyali Prasad v. Nazarul Alum	s. c. 20 C. W. N. 1048; 1 P. L. J. 174.
213	Jamna Bai Saheb Mohitai Avergal v. Vasanta Rao	s. c. 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 452; 39 M. 409 P. C.
215	Jogesh Chunder Patitunda v. Rohini Kumar Roy Chowdhury	s. c. 21 C. L. J. 65
219	Ilahi Bakhsh v. Rahim Bakhsh	s. c. 106 P. W. R. 1916.
220	Khobhari Sah v. Jhaman Sah	s. c. 23 C. L. J. 482.
221	Cassim Ahmad Molla v. Eusuf Haji Ajam Pepardi	s. c. 23 C. L. J. 453
227	Anila Bala Dasi v. Rajendra Nath Dalal	s. c. 23 C. L. J. 480; 43 C. 300.
228	Sarada Prasad Roy v. Muhammad Yusuf	s. c. 24 C. L. J. 158.
231	Abdul Karim v. Islamunnisa Bibi	s. c. 14 A. L. J. 401; 38 A. 339.
234	Dat Prasad Singh v. Gopal Ram	s. c. 14 A. L. J. 57.
235	J. B. Ross v. C. R. Scriven	s. c. 20 C. W. N. 1192.
244	Jai Kishen Joshi v. Budhanand Joshi	s. c. 14 A. L. J. 41; 38 A. 138.
247	Nga Kye v. Nga Kyu	s. c. U. B. R. (1916), II, 103.
248	Wasawa Singh v. S. Mahana Singh	s. c. 1 P. W. R. 1916 Rev.
249	Nga Kyet Sein v. Mi Kyin Mya	s. c. U. B. R. (1916), II, 105; 9 Bur. L. T. 28.
250	Jawahir Singh v. Mehr Singh	s. c. 14 P. W. R. 1916.
251	Ali Mahamud v. Aftabuddin Bhuya	s. c. 20 C. W. N. 355.
253	Mangal Singh v. Mangal Singh	s. c. 15 P. W. R. 1916.
253	Amrita Lal Kundu v. Anukul Chandra Das	s. c. 20 C. W. N. 358; 43 C. 586.
255	Mulk Shah v. Tara Singh	s. c. 13 P. W. R. 1916.
257	Ganesha v. Nageshar Bakhsh Singh	s. c. 19 O. C. 1.
263	Naresh Chandra Bose v. Hira Lal Bose	s. c. 20 C. W. N. 360; 43 C. 239.
263	Abhoy Pado Bose v. Managing Committee, Etc.	s. c. 19 O. C. 15.
264	Nga Yein v. Nga So	s. c. U. B. R. (1916), II, 106.
266	Sheo Prasad v. Bisheshar Nath	s. c. 19 O. C. 12; 3 O. L. J. 129.
268	Umar Abdul Rahiman v. Gustadi Muncherji Cooper	s. c. 3 L. W. 308; 20 C. W. N. 297; (1916) 1 M. W. N. 137; 30 M. L. J. 444 P. C.
272	Hardwari Lal v. Muhammad Salamat Ullah Khan	s. c. 14 A. L. J. 409; 38 A. 358.
273	British South Africa Company v. Lennon, Lim.	* P. C.
276	Digbijai Singh v. Hira Devi	s. c. 14 A. L. J. 419; 38 A. 322.
277	Narainbati Kunware v. Ramdhari Singh	s. c. 20 C. W. N. 734; 1 P. L. J. 81.
280	Sri Ram v. Mohan Lal	s. c. 19 O. C. 17.
280	Somwarpuri v. Matabadal	s. c. 14 A. L. J. 422; 38 A. 351.
251	Hori Lal v. Thakur Bhagwan Bakhsh	s. c. 19 O. C. 23.
283	Mutsaddi Mian v. Mahomed Idris	s. c. 19 C. W. N. 764.
287	National Bank of India Ltd. v. Ghuznavi	s. c. 43 C. 285.
288	Bhola Jha v. Kali Prasad	s. c. 1 P. L. J. 180.
290	Kissendoyal Jitsaria v. Askanan Chowthmull	s. c. 23 C. L. J. 415.
294	Rama Row v. Kuttiya Gounden	s. c. 3 L. W. 331; 19 M. L. T. 275; 30 M. L. J. 514.
297	Ebrahim Ahmed v. Samuel Balthazar	*Lower Burma Chief Court.
298	Imami v. Kallu	s. c. 14 A. L. J. 645; 38 A. 433.
301	Sashi Bhusan Hazrah v. Srimati Deno Moyee Dasi	*Calcutta High Court.
302	Sivakolundu Pillai v. Ganpathi Iyyar	s. c. 3 L. W. 336.
303	Pearey Lal v. Hanifunnissa Bibi	s. c. 14 A. L. J. 302; 38 A. 240.
304	Bandi Bakhsh v. Indar Pal	s. c. 3 O. L. J. 191.
305	Mogambara Pattan, <i>In re</i>	s. c. 28 M. L. J. 379; 17 Cr. L. J. 193.
305	Alexander v. Connors	s. c. 20 C. W. N. 698; 17 Cr. L. J. 193.
306	Emperor v. Nawab	s. c. 15 P. R. 1916 Cr.; 17 Cr. L. J. 194; 46 P. W. R. 1916 Cr.
307	Maddela Ramaniyamma, <i>In re</i>	s. c. 20 M. L. T. 21; 17 Cr. L. J. 195.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
309	Pardip Singh v. Emperor	s. c. 43 C. 270; 17 Cr. L. J. 197.
311	Emperor v. Dharma Shah	s. c. 8 P. R. 1916 Cr.; 13 P. W. R. 1916 Cr.; 17 Cr. L. J. 199.
312	Bishessur Chuckerbutty v. Emperor	s. c. 20 C. W. N. 758; 17 Cr. L. J. 200; 24 C. L. J. 272.
313	Emperor v. Po Yin	s. c. 17 Cr. L. J. 201.
314	Nishi Kanta Lahiri v. Emperor	s. c. 20 C. W. N. 732; 17 Cr. L. J. 202.
315	Jawahir Thakur v. Emperor	s. c. 14 A. L. J. 643; 17 Cr. L. J. 203; 38 A. 430.
317	Nur Din v. Emperor	s. c. 8 P. W. R. 1916 Cr.; 17 Cr. L. J. 205.
319	Ma Sein v. Emperor	s. c. 17 Cr. L. J. 207.
320	Ambica Tewari v. Emperor	s. c. 17 Cr. L. J. 208.
321	Nga Po Choin v. Emperor	s. c. 17 Cr. L. J. 209.
324	Mam Chand v. Emperor	s. c. 5 P. W. R. 1916 Cr.; 17 Cr. L. J. 212.
325	Nga Poona v. Emperor	s. c. 17 Cr. L. J. 213; 9 Bur. L. T. 136.
329	Marudanayakam Pillai v. Mohammad Rowthen	s. c. 17 Cr. L. J. 217.
332	Ghulam Rasul v. Emperor	s. c. 17 Cr. L. J. 220; 31 P. W. R. 1916 Cr.
334	Sit Taw v. Maung Ye	s. c. 17 Cr. L. J. 222; 9 B. L. R. 128.
335	Harkaran Singh v. Harnam Singh	s. c. 3 O. L. J. 38; 17 Cr. L. J. 223.
336	Rahiman Bibi v. Mobarak Mondal	s. c. 20 C. W. N. 672; 17 Cr. L. J. 224.
337	Bharat Chander Galui v. Pramotha Nath Roy	*Calcutta High Court.
338	Ramaswamy Chetty v. Madura Mills Co. Ltd.	s. c. (1916) 1 M. W. N. 265.
341	Panchikori Ghosh v. Hari Das Jati	*Calcutta High Court.
344	Muhammad Maruf v. Sultan Ahmad	*Allahabad High Court.
347	Narayanan Chettyar v. Vellayappa Chettyar	s. c. (1916) 1 M. W. N. 206; 19 M. L. T. 237.
349	Bisheshar Singh v. Bikramjit Singh	s. c. 3 O. L. J. 189; 19 O. C. 30.
350	Kasthuri Aiyangar v. Arunachelam Chettiar	s. c. (1916) 1 M. W. N. 195.
353	Sarju Din Pandey v. Kamta Singh	s. c. 3 O. L. J. 187.
354	Subbanna Achariar v. Gopalakrishna Achariar	*Madras High Court.
355	Lal Jagroop Singh v. Banktaishwar Rawan Bahadurpal Singh	s. c. 3 O. L. J. 137.
357	Muhammad Abdul Jalil v. Ram Dayal	s. c. 14 A. L. J. 724.
360	Sahib-un-nissa v. Abdul Ghaffur	s. c. 3 O. L. J. 140; 19 O. C. 60.
362	Sesha Iyer v. Arimuthu Vathiyar	s. c. (1916) 1 M. W. N. 323.
364	Raman Lalji Maharaj v. Hari Das	s. c. 14 A. L. J. 677.
367	Suraj Din v. Wajid Ali	s. c. 3 O. L. J. 494.
369	Muhammad Yunus Ali Khan v. Kaian Singh	*Allahabad High Court.
370	Ram Bahadur Singh v. Ajodhya Singh	s. c. 1 P. L. J. 129; 20 C. W. N. 699.
372	Suppu Nayakan v. Perumal Chetty	s. c. 19 M. L. T. 364; 30 M. L. J. 486; (1916) 1 M. W. N. 301.
375	Jagarnath Prasad v. Jaikishun Prasad	s. c. 1 P. L. J. 16.
381	Palikandy Mammad v. Chingoran Keloth Valia Appa	s. c. 30 M. L. J. 361.
384	Parameswaram Munpu v. Narayanan Namboodri	s. c. 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279
385	Jogendra Nath Dey v. Gour Singh Mura	s. c. 20 C. W. N. 582.
387	Musammatt Ranjita v. Musammatt Rukmin	*Oudh Judicial Commissioner's Court.
388	Kotigari Rangiah Chetti v. Chintalapalli Narasayya	s. c. 3 L. W. 267.
390	Surajpal Singh v. Debi Bakhsh Singh	s. c. 3 O. L. J. 156.
393	Perumal Naicker v. Davood Rowther	*Madras High Court.
394	Chatterjee Brahmin v. Dhurgadutt Agarwalla	s. c. 23 C. L. J. 436; 20 C. W. N. 943.
396	Ram Bhajan v. Sheo Darshan Singh	s. c. 3 O. L. J. 162.
397	Mahadeo Prasad v. Gajraj Singh	s. c. 3 O. L. J. 164.
401	Muthuverappa Chetti v. Ramaswami Chetti	s. c. 31 M. L. J. 264.
405	Gobind Rani Dasi v. Briunda Rani Dasi	s. c. 23 C. L. J. 440.
406	Gautam Jayachand Gujar v. Malhari Bapu Bhong	s. c. 18 Bom. L. R. 247; 40 B. 397.
407	Sundara Reddi v. Varadharaja Pillai	s. c. (1916) 2 M. W. N. 273.
409	Gour Gopal Sinha v. Gosta Behari Pramanick	*Calcutta High Court.
411	Sethrucherla Rama Chandra v. Maharajah of Jeypore	s. c. (1916) 1 M. W. N. 354; 19 M. L. T. 360

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
414	Narayan Ramkrishna Pandit v. Vigneshwar Ganap Hegde	s. c. 18 Bom. L. R. 250; 40 B. 378.
416	Sheo Narain Singh v. Bisai Singh	s. c. 3 O. L. J. 170.
417	Chokkalingam Chetty v. Annamalai Chetty	*Madras High Court.
422	Mata Ghulam v. Rajpal Singh	s. c. 3 O. L. J. 173.
423	Dattatraya Sakharam Devli v. Govind Sambhaji Kulkarni	s. c. 18 Bom. L. R. 258; 40 B. 429.
426	Tika v. Sheo Narain	s. c. 3 O. L. J. 175.
428	Moothetuth Kanari v. Hari Shenoy	s. c. 3 L. W. 501; 19 M. L. T. 245; (1916) 1 M. W. N. 273.
431	Aiyasami Chetty v. Chinnia Nainar	s. c. 3 L. W. 338.
432	Goppaammal v. Srinivasa Aiyangar	s. c. 30 M. L. J. 508.
435	Maddali Venkataswamy v. Velampalli Subbarayudu	*Madras High Court.
435	Lakhi Priya Dassi v. Rai Kissori Dassi	s. c. 20 C. W. N. 554; 23 C. L. J. 463.
441	Bhairon Prasad v. Samarpuri	*Allahabad High Court.
444	Zamindar of Sanivarappet v. Zamindar of South Valluru	*Madras High Court.
444	Hira Lal v. Giribala Debi	s. c. 23 C. L. J. 429.
446	Palavalasa Appalaswamy v. Dantaluri Narayana	s. c. (1916) 1 M. W. N. 276.
447	Murari Lal v. Jalipa Sahai	s. c. 3 O. L. J. 180.
450	Sital Chandra Chaudhury v. Mrs. Allen J. Delanney	s. c. 20 C. W. N. 1158.
456	Gariya Rangaswamy Patrudu v. Majji Appalaswamy	s. c. (1916) 1 M. W. N. 286.
458	Lachman v. Kalya	s. c. 12 N. L. R. 66.
460	Andi Thevan v. Zemindar of Sivagiri	*Court of the Board of Revenue, Madras.
461	Shardaprasad v. Sikandar	s. c. 12 N. L. R. 69.
464	Rajendra Kumar Roy v. Maharaja Manindra Chandra Nandy	s. c. 24 C. L. J. 162.
466	Singheswar Missir v. Rameswar Jha	*Patna High Court.
470	Chuto v. Khuda Bux	s. c. 9 S. L. R. 199.
471	Narsingdas v. Ratanlal	s. c. 12 N. L. R. 75.
475	Bikkina Ramayya v. Adabala Seshayya	s. c. 30 M. L. J. 338.
478	Nikki v. Gujar Mal	*Punjab Chief Court.
480	Rajah of Vizayanagaram v. Poosapati Appala	s. c. 3 L. W. 517; 19 M. L. T. 374; (1916) 1 M. W. N. 391.
482	Daya Bhai v. Maharaj Bahadur Singh	s. c. 1 P. L. J. 238.
488	Thiruvankata Chariar v. Seshadri Iyengar	s. c. 3 L. W. 457; 30 M. L. J. 559; 19 M. L. T. 369.
492	Jan Mahomed v. Manthar	s. c. 9 S. L. R. 213.
493	Kodumal v. Aga Khan Sultan Mahomed Shah	s. c. 9 S. L. R. 191.
494	Naraprath Kummali v. Paramboli Kandi	*Madras High Court.
494	Vishindas v. Municipality of Hyderabad	s. c. 9 S. L. R. 220.
496	Nageshar Sahai v. Mata Pershad	s. c. 3 O. L. J. 178.
497	Afiladdi v. Satish Chandra Banerji	*Calcutta High Court.
500	Bajah of Ramnad v. Sellachami Tevar	s. c. 4 L. W. 173; (1916) 2 M. W. N. 247.
502	Ganga Ram v. Ram Saran	*Allahabad High Court.
503	Paramasivam Pillai v. Periyannayagath Annal	*Madras High Court.
504	Suraj Doo Narayan Singh v. Musabreo Raut	s. c. 20 C. W. N. 950.
504	Shahul v. Allah Bachayo	s. c. 9 S. L. R. 196.
506	Biseswar Singh v. Parbhoo Nath Pathuk	*Patna High Court.
507	Chinnu Pillai v. Venkatasamy Chettiar	s. c. 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217.
515	Ismail Allurukhia v. Dattatraya R. Gandhi	s. c. 18 Bom. L. R. 201.
516	Unesh Chandra Ghose v. Kala Chand Guha	*Calcutta High Court.
518	Achama Naidu v. Krishnaswami Naidu	*Madras High Court.
520	Gani Latif v. Manilal Mulji	s. c. 18 Bom. L. R. 217.
523	Labhah v. Tulsi	s. c. 1 P. R. 1916 Rev.; 3 P. W. R. 1916 Rev.
525	Bombay & Africa Steam Navigation Co., Ltd. v. Ajum Goolam Hooscin	s. c. 18 Bom. L. R. 230.
527	Ratau Bipari v. Hira La'	*Calcutta High Court.

Pages o Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
529	Madhavji Dharamsey Mfg. Co., Ltd. v. Central India Spinning, Weaving and Mfg. Co., Ltd. ...	s. c. 18 Bom. L. R. 206.
534	Kangali Molla v. Beni Madhab Biswas ...	*Calcutta High Court.
535	Secretary of State for India v. Gulam Rusul ...	s. c. 18 Bom. L. R. 243; 40 B. 392.
537	Kali Chandra v. Kali Kumar Majumdar ...	*Calcutta High Court.
538	Ziada v. Jowai ...	s. c. 46 P. R. 1916; 134 P. W. R. 1916.
539	Devaraja Naicken v. Ammani Ammal ...	s. c. ■ L. W. 319.
541	Mukkoosa Nair Veetil v. Secretary of State ...	*Madras High Court.
542	Bevan Petman v. Ganesh Das ...	s. c. 49 P. R. 1916; 144 P. W. R. 1916.
543	Chidambaram Chetty v. Karuthan Chetty ...	s. c. (1916) ■ M. W. N. 18; 4 L. W. 10; 20 M. L. T. 134.
546	Kalu Khan v. Umda ...	s. c. 47 P. R. 1916; 136 P. W. R. 1916 Cr.
547	Muruga Pillay v. Krishnamoorthy Chetty ...	s. c. 3 L. W. 369.
548	Dinabandhu Nandi v. Chamiraddi Miji ...	*Calcutta High Court.
549	Ladha Singh v. Bhag Singh ...	s. c. 50 P. R. 1916; 135 P. W. R. 1916.
551	Muthiah Chetti v. Periannan Chetti ...	s. c. 4 L. W. 228.
556	Satikanth Banerjee v. Ram Chandra Chatterjee ...	*Calcutta High Court.
557	Kattalai Michael Pillai v. J. M. Barthe ...	s. c. 19 M. L. T. 249; 30 M. L. J. 423; 3 L. W. 248; (1916) 1 M. W. N. 307.
570	Balu Mudali v. Durvasalu Pillai ...	s. c. 4 L. W. 74; (1916) 2 M. W. N. 276.
571	Meajan Matbor v. Alimuddin Mea ...	s. c. 20 C. W. N. 1217.
578	Ammiraju v. Seshamma ...	s. c. 3 L. W. 490; (1916) 1 M. W. N. 368;
581	Ashutosh Mookherjee v. Akhoy Kumari Debi ...	*Calcutta High Court.
581	Dalipa v. Suraj Kaur ...	s. c. 48 P. R. 1916; 142 P. W. R. 1916.
584	Adwaitya Charan v. Sorajranjan ...	*Calcutta High Court.
585	Bibi Sodhan v. Harsa Singh ...	s. c. 51 P. R. 1916; 138 P. W. R. 1916 Cr.
587	Fatteh Chand v. Bilas Rai ...	s. c. 61 P. L. R. 1916; 89 P. W. R. 1916; 96 P. R. 1916; 140 P. W. R. 1916.
588	Ottapurakkal Thazath Suppi v. Alabi Mashur Koyanna Koya Kunhi Koya ...	s. c. 3 L. W. 430; 30 M. L. J. 523; 19 M. L. T. 314; (1916) 1 M. W. N. 328.
592	Gour Sundar Bhounik v. Rakhal Raj Bhounik ...	s. c. 20 C. W. N. 1165.
596	Veerakkal v. Thirumakkal ...	*Madras High Court.
598	Sher Jan Khan v. Alimuddi ...	s. c. 20 C. W. N. 268; 23 C. L. J. 225; 43 C. 511.
602	Official Receiver of Trichinopoly v. Somasundaram Chettiar ...	s. c. 30 M. L. J. 415.
606	Eusuffzeman Sarkar v. Sauchia Lal Nahata ...	s. c. 43 C. 207; 20 C. W. N. 272; 23 C. L. J. 390;
607	Maharaja of Venkatagiri v. Velikanti Rami Reddi ...	s. c. (1916) 2 M. W. N. 21; 3 L. W. 582; 31 M. L. J. 211.
609	Krishna Charan Barman v. Sanat Kumar Das ...	*Calcutta High Court.
616	Central Karkend Coal Co., Ltd. v. Kartic Rewani ...	s. c. 1 P. L. J. 47.
617	Raghunatha Chari v. Aravamuthaiyangar ...	*Madras High Court.
625	Gopal Proshad Bhagat v. Rajendra Lal Panja ...	s. c. 20 C. W. N. 615.
626	Varadaraja Appa Rao Bahadur v. Goncepalle Punneya ...	s. c. 30 M. L. J. 545; 19 M. L. T. 338.
632	Dwijapada Karmakar v. Miss Baileau ...	s. c. 20 C. W. N. 608.
634	Mathura Sundari Dassi v. Haran Chandra Shaha ...	s. c. 20 C. W. N. 594; 23 C. L. J. 443.
640	Har Bakhsh Singh v. Lalla ...	s. c. 3 O. L. J. 236.
641	Sher Singh v. Emperor ...	s. c. 10 P. R. 1916 Cr.; 15 P. W. R. 1916 Cr.; 17 Cr. L. J. 225.
642	Karm Singh v. Emperor ...	s. c. 32 P. W. R. 1916 Cr.; 17 Cr. L. J. 226.
645	Jugal Chandra, In the matter of ...	s. c. 20 C. W. N. 1016; 17 Cr. L. J. 229.
647	Jiwanji & Co. v. Emperor ...	s. c. 9 S. L. R. 205; 17 Cr. L. J. 231.
649	Jumo Allarakhio v. Emperor ...	s. c. 9 S. L. R. 223; 17 Cr. L. J. 233.
650	Jadunandan Prasad v. Emperor ...	s. c. 1 P. L. J. 64; 17 Cr. L. J. 234.
651	Palaniyandi Pandaram v. Palaniappa Thevan ...	s. c. 17 Cr. L. J. 235.
652	Gurdit Singh v. Emperor ...	s. c. 55 P. L. R. 1916; 25 P. W. R. 1916, Cr. 17 Cr. L. J. 236.
654	Khobua Moran v. Emperor ...	s. c. 23 C. L. J. 596; 17 Cr. L. J. 238.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
654	Miran Bakhsh v. Beli Ram	s. c. 67 P. L. R. 1916; 17 Cr. L. J. 238.
655	Jairo v. Emperor	s. c. 9 S. L. R. 204; 17 Cr. L. J. 239.
656	Girdharimal v. Emperor	s. c. 9 S. L. R. 202; 17 Cr. L. J. 240.
657	Jitendra Nath Palit v. Lokendra Nath Palit	s. c. 22 C. L. J. 593.
672	Girdhar Gopal v. Gaya Prasad	s. c. 3 O. L. J. 235.
673	Nageshar Prasad Pande v. Pateshri Partab Narain Singh	s. c. 3 L. W. 454; 20 C. W. N. 265; (1916) 1 M. W. N. 142 P. C.
675	Govind v. Chandrabhaga	s. c. 12 N. J. R. 100.
682	Gajodhar v. Udit Narain Singh	s. c. 3 O. L. J. 193.
686	Syed Husain v. Sajjadi Begam	s. c. 3 O. L. J. 200.
686	Brahmadat Tewari v. Chaudan Bibi	s. c. 20 C. W. N. 192.
689	Amirul Rahman v. Dhan Kumar Das	s. c. 3 O. L. J. 201.
690	Gauri Shankar v. Abu Jafar Khan	s. c. 3 O. L. J. 204.
692	Sonai Chutia v. Sonaram Chutia	s. c. 20 C. W. N. 195.
693	Bitto v. Ram Nidh	s. c. 3 O. L. J. 208.
693	Hobibullah v. Abtiakallah	s. c. 23 C. L. J. 567.
695	Nanhu v. Narbada Prasad	s. c. 12 N. L. R. 83.
696	Nachiappa Chetty v. Thangavelu Chetty	s. c. 3 L. W. 495.
697	Jamadar Singh v. Jagat Kishore Acharya	s. c. 23 C. L. J. 557.
698	Nakulsao v. Ramadhinsoo	s. c. 12 N. L. R. 86.
701	Vepa Kamesam v. Varigonda Narasimham	*Madras High Court.
702	Muhammad Ali Muhammad v. Shaukat Ali	s. c. 3 O. L. J. 229.
702	Dina Nath Das v. Ram Nath Das	s. c. 23 C. L. J. 561.
704	Vishwanath v. Shankarlal	s. c. 12 N. L. R. 90.
706	Muhammad Abul Hasan Khan v. Raj Kumari	s. c. 3 O. L. J. 209.
707	Johur Lall Dey v. Dharendra Nath Dey	s. c. 20 C. W. N. 304; 23 C. L. J. 314.
711	Jhumak Lal v. Sarju Prasad	s. c. 3 O. L. J. 211.
712	Duraiswami Reddiar v. Rajagopala Reddiar	s. c. 4 L. W. 329.
713	Muhammad Ali Muhammad v. Shaukat Ali	s. c. 3 O. L. J. 231.
714	Gokal Chand v. Hukam Chand-Nathu Mal	s. c. 109 P. W. R. 1916.
730	Ravu Seshaya Garu v. Rajah of Pittapur	s. c. 3 L. W. 485; (1916) 1 M. W. N. 396; 31 M. L. J. 214.
733	Umed Ali v. Anwar Husain	s. c. 3 O. L. J. 232.
733	Jadho Mahto v. Kali Prasonuo Bhattacharjee	s. c. 1 P. L. J. 33.
735	Rudrappa Achary v. Corporation of Madras	s. c. (1916) 1 M. W. N. 394.
737	Subraroyar v. Kottaya Goundan	s. c. (1916) 1 M. W. N. 284.
738	Muneshar Bakhsh Singh v. Arjun Singh	s. c. 3 O. L. J. 237.
741	Nidamarthi Krishnamoorthy v. Garigiparti Ganapati-lingam	s. c. 3 L. W. 375.
742	Mundil Das v. Megh Narain Dubey	s. c. 1 P. L. J. 39.
744	Kapini Goundan v. Sarangapani	s. c. 3 L. W. 287; (1916) 1 M. W. N. 288.
745	Jugat Pal Singh v. Harnam Lingh	s. c. 3 O. L. J. 244.
747	Chintaman Singh v. Chuni Sahu	s. c. 1 P. L. J. 43.
748	Betireddi Somireddi v. Betireddi Tatayya	*Madras High Court.
749	Ramzan Ali Khan v. Muhammad Qayum Khan	s. c. 3 O. L. J. 247.
751	Seshappier v. Subramania Chettiar	s. c. 30 M. L. J. 587; 19 M. L. T. 386.
753	Krishnapal Singh v. Ram Dulari	s. c. 3 O. L. J. 234.
754	Mackenzie, K. L. v. Rameshwar Singh	s. c. 1 P. L. J. 37.
755	Pilakkatan Chettiotan v. Vazhakarambath Moidin	s. c. 3 L. W. 467.
755	Kandhai Prasad v. Suraj Bali Das	s. c. 3 O. L. J. 213.
756	Natesa Udayan v. Annasami Udayan	s. c. 3 L. W. 468.
757	Budhan Lal v. Jagan Nath	s. c. 3 O. L. J. 214.
759	Thangavelu Mudaliar v. Mahomed Ibrahim	s. c. 3 L. W. 377.
760	Mahadeo Prasad v. Ajodhya Prasad	s. c. 3 O. L. J. 218.
760	Raghavachari v. Pakkiri Mahommed	s. c. 30 M. L. J. 497; 19 M. L. T. 381; (1916) 2 M. W. N. 73.
764	Rajpal Kuar v. Rudra Pratab Narain Singh	s. c. 3 O. L. J. 219.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
766	Alagappa Iyengar v. Mangathai Ammangar ...	s. c. 30 M. L. J. 504.
768	Bisheshar Singh v. Tirbhawan Bahadur Singh ...	s. c. 3 O. L. J. 222.
769	Gangadara Mudali v. Sambasiva Mudali ...	s. c. 19 M. L. T. 397; (1916) 2 M. W. N. 38.
773	Ram Samajh Pande v. Ramjas ...	s. c. 3 O. L. J. 224.
774	Gopiseti Narayanaswamy Naidu Garu v. Kuna- paraju China Venkataraju ...	*Madras High Court.
775	Ali Husain Khan v. Bandi Bibi ...	s. c. 3 O. L. J. 226.
777	Monmohan Roy v. Hemanta Kumar ...	s. c. 23 C. L. J. 553.
778	Palaniandi Chettiar v. Appavu Chettiar ...	s. c. 30 M. L. J. 565; 19 M. L. T. 390.
783	Ganes Dutt Singh v. Lachmi Narain Singh ...	s. c. 23 C. L. J. 209.
787	Pitchayya v. Subba Rao ...	s. c. 3 L. W. 499.
789	Eastern Mortgage Agency Co. Ltd. v. Premananda Saha ...	s. c. 23 C. L. J. 217.
791	Ari Chetty v. Theerthamalai Chetty ...	s. c. 3 L. W. 521.
792	Motilal Radhakissen v. Ganpatram ...	s. c. 23 C. L. J. 220.
794	Soundararajan v. Saravana Pillai ...	s. c. 30 M. L. J. 592.
799	Kassim Ebrahim Saleji v. Johurmull Khemka ...	s. c. 23 C. L. J. 183; 20 C. W. N. 173; 43 C. 447.
803	Sam v. Ramalinga Mudaliar ...	s. c. 30 M. L. J. 600.
807	Lalljee Mahomed v. Dadabhai Jivanji Guzdar ...	s. c. 23 C. L. J. 190.
818	Parukutti v. Kelappan Nair ...	*Madras High Court.
822	Niranjana Nath v. Afzal Hussain ...	s. c. 111 P. W. R. 1916.
825	Subbai Goundan v. Palani Goundan ...	s. c. 30 M. L. J. 607.
827	Durga Bai v. Sobha Singh ...	*Patna High Court
829	Anantharama Iyer v. Vettath Kuttimalu Kovilam- mal ...	s. c. 19 M. L. T. 357; 3 L. W. 504; 30 M. L. J. 611.
831	Tek Chand v. Soman Singh ...	s. c. 27 P. R. 1916.
833	Dwarika Nath Roy v. Mathura Nath Roy ...	s. c. 24 C. L. J. 40.
841	Madhab Chandra Mandal v. Nagendra Nath Sen ...	*Calcutta High Court.
843	Govinda Pillai v. Messrs. Best & Co., Ltd. ...	*Madras High Court.
845	Srikishin Rochumal v. Relumal-Parimal ...	s. c. 9 S. L. R. 183.
849	Radhakrishna Mudaliar v. Subraya Mudaliar ...	s. c. 31 M. L. J. 357; 4 L. W. 255.
851	Dina Nath Das v. Sarat Chandra Chackerbutty ...	*Calcutta High Court.
853	Swami Chetty v. Ethirajulu Naidu ...	s. c. 3 L. W. 585; (1916) ■ M. W. N. 89.
855	Peari Mohan Kundu v. Mohini Kanta Saha Chou- dhury ...	*Calcutta High Court.
857	Imrit Mahton v. Bahadur Singh ...	*Patna High Court.
859	Subramania Aiyar v. Subramania Pattar ...	s. c. (1916) 1 M. W. N. 351; 30 M. L. J. 615.
861	Mathura Prasad v. Ganga ...	s. c. 3 O. L. J. 125.
862	Satish Chandra Mitra v. Jogendra Nath Mahal- anobis ...	s. c. 20 C. W. N. 1044; 24 C. L. J. 175.
865	Bismilla Beg v. Azam Ali Beg ...	s. c. 3 O. L. J. 127.
866	Abdul Samad v. Municipal Committee, Delhi ...	s. c. 26 P. R. 1916
867	Khudadad v. Moriokhan ...	s. c. 9 S. L. R. 193.
869	Nuri Miah v. Ambica Singh ...	s. c. 20 C. W. N. 1099.
875	Raghubhushana v. Vidiavaridhi ...	*Madras High Court.
890	Sobhanmal Pohumal v. Bachal ...	s. c. 9 S. L. R. 214.
892	Bhupendra Krishna Ghose v. Amarendra Nath Dey ...	s. c. 19 M. L. T. 97; 20 C. W. N. 169; 30 M. L. J. 110; 23 C. L. J. 169; 14 A. L. J. 167; 3 L. W. 252; (1916) 1 M. W. N. 73; 18 Bom. L. R. 347; 43 C. 432. P. C.
897	Bankey Behary Lal v. Bhagwan Das Marwari ...	*Patna High Court.
898	Dinvahi Lakshmipati v. Pingali Narasimham ...	s. c. (1916) 1 M. W. N. 473; 3 L. W. 590.
899	Brij Kumar Lal v. Munshi Sahai ...	*Calcutta High Court.
900	Viswanathan v. Brahmanadhan ...	*Madras High Court.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
900	Ram Narayan Singh v. Adhindra Nath ...	s. c. 20 C. W. N. 989; (1916) 1 M. W. N. 428; 4 L. W. 15; 31 M. L. J. 251; 20 M. L. T. 216 P. C.
904	Sohna Mal v. Nanak Chand ...	s. c. 22 P. R. 1916.
905	Nag Narain v. Jung Bahadur Sahai ...	*Patna High Court.
906	Puthenpurayil v. Kandiyal ...	s. c. (1916) 2 M. W. N. 31; 20 M. L. T. 127.
909	Ramtahal v. Ganoo Sahu ...	*Patna High Court.
909	Sakhawatrai v. Partabrai ...	s. c. 9 S. L. R. 209.
911	Jiwach Raut v. Sumran Manwar ...	*Patna High Court.
912	Jadab Sardar v. Gobinda Chandra ...	*Calcutta High Court.
916	Muhammad Ismail v. Gauri Parshad ...	s. c. 24 P. R. 1916.
918	Midnapore Zemindari Co., Ltd. v. Joyram Santal ...	s. c. 1 P. L. J. 185.
920	Dost Muhammad Khan v. Dost Muhammad Khan ...	s. c. 30 P. R. 1916.
921	Poomalai v. Karuppa Sarvai ...	s. c. (1916) 2 M. W. N. 136.
921	Lakshmi Venkayamma v. Venkatanarasimha ...	s. c. 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509 P. C.
927	Namasivaya Kurukkal v. Subramania Ayyan ...	*Madras High Court.
928	Sirdar Khatun v. Muradali ...	s. c. 9 S. L. R. 218.
929	Jadav Chandra Sarkar v. Kailash Chandra Singh ...	*Calcutta High Court.
931	Venkitammal v. Alangat Raman Nair ...	*Madras High Court.
932	Mrs. Stewart v. Bank of Upper India, Ltd. ...	s. c. 32 P. R. 1916.
934	Rajendra Nath v. Baikuntha Nath ...	*Calcutta High Court.
935	Gopala Krishna Aiyar v. Srinivasa Row Sahib ...	*Court of the Board of Revenue, Madras.
936	Isa v. Samman ...	s. c. 29 P. R. 1916.
937	Mrs. Stewart v. Bank of Upper India, Ltd. ...	s. c. 31 P. R. 1916.
942	Hasmatullah v. Hari Mohan Sarma ...	*Calcutta High Court.
945	Manikkam Pillai v. Thanikachalam Pillai ...	s. c. (1916) 2 M. W. N. 87.
946	Baikuntha Nath Rai v. Basanta Kumari Dasi ...	s. c. 23 C. L. J. 151.
952	Anand Sarup v. Chawwa ...	s. c. 14 A. L. J. 115.
953	Madan Mohan De Sarkar v. Rebati Mohan Poodar ...	s. c. 23 C. L. J. 115.
955	Baldeo Sahai v. Kanhaya Lal ...	s. c. 65 P. L. R. 1916.
956	Safar Ali v. Mohesh Lal ...	s. c. 23 C. L. J. 122.
957	Amir Chand v. Durga Das ...	s. c. 70 P. L. R. 1916; 92 P. W. R. 1916.
958	Kalu v. Ram Lal ...	s. c. 71 P. L. R. 1916; 91 P. W. R. 1916.
959	Gangahari Chakrabarti v. Nabin Chandra Bani- kya ...	s. c. 20 C. W. N. 232; 23 C. L. J. 145.
961	Abdul Ali Choudhury v. Emperor ...	s. c. 20 C. W. N. 197; 23 C. L. J. 108; 43 C. 671; 17 Cr. L. J. 241.
962	Tota Ram v. Emperor ...	s. c. 14 P. R. 1916 Cr.; 17 Cr. L. J. 242; 38 P. W. R. 1916 Cr.
965	Yado v. Emperor ...	s. c. 12 N. L. R. 94; 17 Cr. L. J. 245.
969	Bakir Saheb Amir Saheb v. Emperor ...	s. c. 18 Bom. L. R. 284; 17 Cr. L. J. 249.
971	Baijnath Marwari v. W. S. Street ...	s. c. 20 C. W. N. 518; 17 Cr. L. J. 251.
973	Anna Laxman Bhintade v. Emperor ...	s. c. 18 Bom. L. R. 289; 17 Cr. L. J. 253.
974	Emperor v. Salimi ...	s. c. 11 P. R. 1916 Cr.; 17 Cr. L. J. 254.
974	Sital Prasad v. Emperor ...	s. c. 20 C. W. N. 199; 23 C. L. J. 105; 43 C. 591; 17 Cr. L. J. 254.
976	Govind Balvant Laghate v. Emperor ...	s. c. 18 Bom. L. R. 266; 17 Cr. L. J. 256.
985	Nabin Chandra Aich v. Noakhali Municipality ...	s. c. 23 C. L. J. 598; 17 Cr. L. J. 265.
986	Lakhimi Ram Gagoi v. Emperor ...	s. c. 23 C. L. J. 595; 17 Cr. L. J. 266.
987	Kaimi v. Emperor ...	s. c. 12 P. R. 1916 Cr.; 17 Cr. L. J. 267; 39 P. W. R. 1916 Cr.
989	Jhamman v. Emperor ...	s. c. 14 A. L. J. 604; 17 Cr. L. J. 269.
990	Siryan v. Emperor ...	s. c. 69 P. L. R. 1916; 17 Cr. L. J. 270.
992	Sadho Lal v. Emperor ...	s. c. 17 Cr. L. J. 272.

Pages of Vol. XXXIV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
993	Jagat Ram v. Emperor ...	s. c. 52 P. L. R. 1916; 29 P. W. R. 1916 Cr.; 17 Cr. L. J. 273; 36 P. W. R. 1916 Cr.
993	Ram Singh v. Emperor ...	s. c. 7 P. R. 1916 Cr.; 17 Cr. L. J. 273; 35 P. W. R. 1916 Cr.
998	Sher Singh v. Emperor ...	s. c. 14 P. W. R. 1916 Cr.; 17 Cr. L. J. 278.
999	Tajoo v. Emperor ...	s. c. 22 P. W. R. 1916 Cr.; 17 Cr. L. J. 279.
1000	Karmun v. Emperor ...	s. c. 6 P. R. 1916 Cr.; 17 Cr. L. J. 260; 37 P. W. R. 1916 Cr.
1002	Lehna Singh v. Emperor ...	s. c. 63 P. L. R. 1916; 26 P. W. R. 1916 Cr.; 17 Cr. L. J. 282.
1003	Mehran v. Emperor ...	s. c. 53 P. L. R. 1916; 13 P. R. 1916 Cr.; P. W. R. 1916 Cr.; 17 Cr. L. J. 283.
1004	Bela Singh v. Emperor ...	s. c. 54 P. L. R. 1916; 17 Cr. L. J. 284.
1006	Hardeo Singh v. Ram Chariter Singh ...	s. c. 17 Cr. L. J. 286.
1008	Subramanian v. Emperor ...	s. c. 3 L. W. 403; (1916) 1 M. W. N. 327; 17 Cr. L. J. 288.

TABLE

OF

Cases Cited in Volume XXXIV of Indian Cases, 1916.

A

	Page.
Abbas v. Fassih-ud-din, 24 C. 413	174
Abdul Aziz v. Tafaj-addin, 23 Ind. Cas. 839; 19 C. W. N. 326	272
Abdul Ghani v. Musammat Babni, 25 A. 256; A. W. N. 1903) 18	446
Abdul Hye v. Mir Mohammed Mozaffar Hossein, 11 I. A. 10; 10 C. 610; 8 Ind. Jur. 157; 4 Sar. P. C. J. 500	440
Abdul Kadhar Sahib v. Official Assignee of Madras, 20 Ind. Cas. 485; (1913) M. W. N. 876; 14 M. L. T. 51; 25 M. L. J. 303	604
Abdul Karim v. Saliman, 27 C. 190	282
Abdul Majid v. Ksherode Chandra Pal, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809	615
Abdul Mazumdar v. Mahomed Gazi Chowdhry, 21 C. 605	265
Abdul Rahaman Sodagur v. Dullaram Marwari, 14 C. 348; 11 Ind. Jur. 377	393
Abdul Rahman v. Cassum Ebrahim, 11 Ind. Cas. 726; 6 B. 168; 13 Bom. L. R. 583	385
Abdulla Kaka v. Ya Sein, C. R. No. 28 of 1914	265
Abdullah v. Kunja Behari Lal, 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252	535
Abdur Rahman v. Kishna Mal, 11 Ind. Cas. 869; 161 P. W. R. 1911; 247 P. L. R. 1911	934
Aberdeen Glen Line Steamship Co. v. Macken, ss. Gairloch, (1899) 2 I. R. 1 at p. 18; 32 I. L. T. R. 33; 4 Ir. L. Rep. 620	816
Abhayessari Debi v. Shidhessari Debi, 16 C. 513	331
Abhiram Goswami Mohant v. Shyama Charan Nandi, 4 Ind. Cas. 449; 36 I. A. 148 at p. 167; 14 C. W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857; 19 M. L. J. 530; 10 C. L. J. 284; 36 C. 1003	838
Abhoy Charan v. Dwarka Nath Malo, 11 Ind. Cas. 180; 39 C. 53 at p. 57; 15 C. W. N. 972	230
Administrator-General of Bengal v. Kristo Kamini Dassee, 31 C. 519; 8 C. W. N. 500	960
Afar v. Surja Kumar Ghose, 7 Ind. Cas. 812; 15 C. W. N. 249; 12 C. L. J. 619	98
Afsarudin v. Musammat Shorashibala Debi, Marsh. 558; 2 Hay, 664	466
Ahinsa Bibi v. Abdul Kader Saheb, 25 M. 26	577
Ahmad v. Karamdad, 11 P. W. R. 1908	547
Ahmad Din v. Atlas Trading Company of Delhi, 31 Ind. Cas. 80; 66 P. R. 1915; 146 P. W. R. 1915	194
Ahmadi Begum v. Mahasy Taraknath Ghosh, 21 Ind. Cas. 232; 17 C. W. N. 1173 at p. 1178; 18 C. L. J. 399	229
Ahmed v. Ayeshabai, 2 Ind. Cas. 167; 11 Bom. L. R. 248	638

A—contd.

	Page.
Ahmed Hossain v. Queen-Empress, 27 C. 692; 4 C. W. N. 750	322
Aiyanna Chariar v. Lakshmi Ammal, 10 Ind. Cas. 194; 21 M. L. J. 500; 10 M. L. T. 19; (1911) 2 M. W. N. 62	677
Ajodhia Parshad v. Ram Lal, 13 Ind. Cas. 284; 34 A. 197; 9 A. L. J. 124; 13 Cr. L. J. 44	321
Ajodhya Singh v. Jauno Lal, 6 Ind. Cas. 341; 14 C. W. N. 699	341
Akatti Moidin Kutty v. Chirayil Ambu, 26 M. 486	513
Akbar Khan v. Turaban, 1 Ind. Cas. 557; 31 A. 9; 5 A. L. J. 537; A. W. N. (1908) 252; 4 M. L. T. 444	703
Akhoy Kumari Debi v. Kanai Lal Kundu, 16 Ind. Cas. 618; 17 C. W. N. 224	118
Aladad Khan v. Daula Rajput, 9 C. P. L. R. 101	700
Alderson v. White, (1858) 2 DeG. & J. 97 at p. 105; 4 Jur. (N. S.) 125; 6 W. R. 24; 41 E. R. 924; 119 R. R. 38	415
Aldin v. Latimer Clark, Muirhead & Co., (1894) 2 Ch. 437 at p. 448; 63 L. J. Ch. 601; 8 R. 352; 71 L. T. 119; 42 W. R. 453	474
Alford v. Vickery, (1842) Car. & Mar. 280; 66 R. R. 867	226
Alger v. Anderson, (1897) 78 Fed. 709	601
Alice and the Princess Alice, (1868) 2 P. C. 245; 19 L. T. 678; 17 W. R. 209; 8 L. J. Adm. 5	816
'Alice' and the 'Rosita' (1868) 2 P. C. 24; 5 Moore P. C. N. S.) 300; 38 L. J. Adm. 20; 19 L. T. 753; 16 E. R. 528	268
Alim v. Moledino, 19 Ind. Cas. 348; 6 S. L. R. 168	847
Allah Bakhsh v. Emperor, 92 P. L. R. 1902	998
Allahdad Khan v. Saut Ram, 17 Ind. Cas. 486; 35 A. 74; 10 A. L. J. 506	364
Amar Nath v. Gurdas Mal, 22 Ind. Cas. 716; 63 P. W. R. 1914; 94 P. L. R. 1914	719
Ambica Charan Chakravarti v. Joy Chandra Ghosh, 4 Ind. Cas. 470; 13 C. W. N. 210	34
Amir Begam v. Badrud-din Husain, 23 Ind. Cas. 625; 18 C. W. N. 755; 1 O. L. J. 24; 12 A. L. J. 537; 9 C. L. J. 494; 17 O. C. 120; 16 Bom. L. R. 413; 26 A. 336; 1914 M. W. N. 172; 16 M. L. T. 35; 27 M. L. J. 181; 1 L. W. 1015	198
Amir Chand v. Haritar Prashad Singh, 32 Ind. Cas. 354; 3 L. W. 257; 30 M. L. J. 238	830
Amir Dulhin v. Baij Nath Singh, 21 C. 311	129
Amirullah Mahomed v. Nazir Mahomed, 34 C. 104; 3 C. L. J. 155	913
Amirullah Mahomed v. Nazir Mahomed, 31 C. 932	916
Amjadnessa Bibi v. Rahim Baksh Sikdar, 28 Ind. Cas. 713; 42 C. 286; 19 C. W. N. 38; 21 C. L. J. 642	404

A—contd.

	Page.
Ammana v. Gurumurthi, 16 M. 64; 2 M. L. J. 155	477
Amrit Lal v. Jang Bahadur Singh, 11 Ind. Cas. 920; 14 O. C. 196	304
Amritanath v. Dhunpat Singh, ■ B. L. R. 44; 15 W. R. 503	236
Amrito Lall Dutt v. Surnomoni Dasi, 25 C. 662 at pp. 690, 691; 2 C. W. N. 389	894
Amuthu v. Muthayya, 16 M. 339	431
Ananda Chandra Roy v. Makram Ali, ■ Ind. Cas. 204; 10 C. L. J. 144	98
Anandamoyee v. Lakhi Chandra Mitra, 33 C. 339; 3 C. L. J. 274	835
Anandi Ram v. Hari Suba Pai, 3 Ind. Cas. 745; 33 B. 404; 11 Bom. L. R. 641	20
Anant Singh v. Durga Singh, 6 Ind. Cas. 787; 13 O. C. 163; 14 C. W. N. 770 (P. C.); 7 A. L. J. 704; 32 A. 363; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; 20 M. L. J. 604; (1910) M. W. N. 324; 37 I. A. 191	262
Anath Nath Maitra v. Kumar Keshab Narain Ray, 5 Ind. Cas. 487; 14 C. W. N. 601	486
Anantha Tirtha Chariar v. Nagamuthu Ambatagaren, 4 M. 200	487
Andrews v. Ramsay & Co., (1903) 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 19 T. L. R. 620; 52 W. R. 126	763
Andrews v. Solomon, (1816) Peter, C. C. 360; 1 Fed. Cas. 378	601
Anker v. Franklin, (1880) 43 L. T. R. 317; 44 J. P. 80	8
Annamalai Chetti v. Murugasa Chetty, 30 I. A. 220 at p. 228; 26 M. 544; 7 C. W. N. 754; 8 Sar. P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494	740
Annapurni Nachiar v. Collector of Tinnevely, 18 M. 277 at p. 281; 5 M. L. J. 121	20
Annapurni Nachiar v. Forbes, 26 I. A. 246 at p. 253; 3 C. W. N. 730; 23 M. 1; 9 M. L. J. 209; 1 Bom. L. R. 611; 7 Sar. P. C. J. 591	14
Anund Chunder Chuckerbutty v. Rutnessur Doss Sen, 25 W. R. 50	815
Anund Moyee Chowdhraïn v. Boykantnath Roy, 8 W. R. 193	910
Anup Pande v. Sadho Pande, A. W. N. (1888) 19	547
Appa Rao v. Krishna Ayyangar, 25 M. 537	756
Appandai Vathiyar v. Ragubali Mudaliar, 5 Ind. Cas. 280; 33 M. 439; 7 M. L. T. 203; 20 M. L. J. 275; 1910) M. W. N. 44	109
Appayya v. Rangavya, 31 M. 49; 18 M. L. J. 229; 3 M. L. T. 257	359
Ariyaputhira Padayachi v. Muthukumarasawmy Padayachi, 15 Ind. Cas. 343; 37 M. 43; 1912) M. W. N. 854; 23 M. L. J. 339; 1 M. L. T. 425	749
Arthanari Chettiar v. Nagoji Rao, 14 Ind. Cas. 836; (1912) M. W. N. 53	764
Arthur Henry Forbes v. Maharaj Bahadur Singh, 23 Ind. Cas. 632; 41 C. 920; (P. C.); 18 C. W. N. 747; 15 M. L. T. 380; 1914) M. W. N. 397; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059	146
Arzan v. Rakhal Chunder Roy, 10 C. 214	229
Asa Ram v. Paras Ram, 9 P. R. 904	54
Asad Ali Molla v. Haidar Ali, 6 Ind. Cas. 826; 12 C. L. J. 100; 14 C. W. N. 918; 38 C. 13	382
Ashfaq Ahmad v. Wazir Ali, 14 A. 1; 11 A. 423; A. W. N. (1891) 211 (F. B.)	245

A—concl'd.

	Page.
Ashok Bhuiyan v. Karim Bepari, 9 C. W. N. 843	337
Ashutosh Sikdar v. Behari Lal Kirtania, ■ C. 61 at p. 74; 11 C. W. N. 1011; 6 C. L. J. 320	409
Ashworth, <i>Ex parte</i> , Hoare, <i>In re</i> , (1874) 18 Eq. 705; 43 L. J. Bk. 142; 30 L. T. 906; 22 W. R. 925	793
Askari Mirza v. Jai Kishori, 16 Ind. Cas. 844; 15 O. C. 92	579
Aslatt v. Corporation of Southampton, (1880) 16 Ch. D. 143 at p. 148; 50 L. J. Ch. 33; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111	694
Athan Sadagopa Chariar Swamigal v. Eliavalli Srinivasa Chariar, 19 Ind. Cas. 257; (1913) M. W. N. 289; 13 M. L. T. 340	569
Atkinson v. Denby, (1861) 6 H. & N. 78; 123 R. 824; 30 L. J. Ex. 361; 7 Jur. (N. s.) 1205; ■ L. T. N. s.) 252; 9 W. R. 539	404
Atmaram Yekoba Vani v. Bhila Ganpat Vani, 19 Ind. Cas. 424; 15 Bom. L. R. 223	846
Attorney-General v. Landerfield, (1743) ■ Mod. 286; 88 E. R. 456	68
Atul Krishna Sircar v. Sanyasi Churn Sircar, 32 C. 1051; 2 C. L. J. 50; ■ C. W. N. 784	378
Aubhoy Churn Mohunt v. Shamont Lochan Mohunt, 16 C. 788	639
Avery v. Bowden, 5 El. & Bl. 714; 19 E. R. 647; 25 L. J. Q. B. 49; 1 Jur. (N. s.) 1167; ■ W. R. 93; 27 L. T. (O. s.) 119; 103 R. R. 695	845
Avula Charamudi v. Marriboyina Raghavulu, 28 Ind. Cas. 871; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 691	484
Azgar Ali v. Asaboddin Kazi, ■ C. W. N. 134	337
Azizan v. Matuk Lal Sahu, 21 C. 437	265

B

Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee, 12 M. I. A. 1 at pp. 87, 88; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241	594
Baboo Lekraj Roy v. Baboo Mahtab Chand, 14 M. I. A. 393; 7 W. R. 117; 10 B. L. R. 85; 2 Suth. P. C. J. 526; ■ Sar. P. C. J. 43; 20 E. R. 833	817
Babu Lal v. Nanku Ram, 22 C. 339	183
Baburam Bag v. Madhab Chandra Palley, 19 Ind. Cas. 9; 40 C. 565; 8 C. W. N. 341	10
Bachha Jha v. Jugmon Jha, 12 O. 348	18
Bachoo Harkissondas v. Khushaldas, 4 Bom. L. R. 893	543
Bachoo Harkissondas v. Nagindas, 23 Ind. Cas. 912; 16 Bom. L. R. 263	20
Badan Chandra Das v. Rajeswari Debya, ■ C. L. J. 170	915
Badham, <i>Ex parte</i> Palmer, <i>In re</i> , (1893) 10 Correll 52; 69 L. T. 356; 5 R. 521	441
Badri Das v. Inayat Khan, 22 A. 404; A. W. N. 1900 12	51
Badri Prasad v. Abdul Karim, 19 Ind. Cas. 250; 35 A. 254; 11 A. L. J. 260	371
Badri Prasad v. Bhim Sen, Selected Decision No. 2 of 1892	■

B—contd.

	Page.
Badul Singh v. Chutterdharee Singh, ■ W. R. 558	829
Bahadur Khan v. Sardar, 89 P. R. 1895	269
Bai Devkore v. Amritram Jamiatram, 10 B. 372	296
Bai Gulabbai v. Shri Datgarji Mhangarji, 9 Bom. L. R. 393	543, 816
Bai Kesser Bai v. Hansraj Moraji, 33 I. A. 176; 10 O. W. N. 802; 30 B. 431; 4 C. L. J. 9; 8 Bom. L. R. 446; 3 A. L. J. 484; 1 M. L. T. 211; 16 M. L. J. 446	18
Bai Manchha v. Narotamdas Kashidas, 6 B. H. C. R. A. C. 1	728
Bai Motivahoo v. Bai Mamobai, 24 I. A. 93 at pp. 104, 105; 21 B. 709; 1 C. W. N. 366	894
Baij Nath Singh v. Paltu, 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96	106
Baijnath Goenka v. F. H. Holloway, 1 C. L. J. 315	203
Baird v. Wells, (1890) 44 Ch. D. 661; 59 L. J. Ch. 673; 63 L. T. 312; 39 W. R. 61	66
Balaji Rao v. Harirama Chetty, 32 Ind. Cas. 39	757
Balaji Sakharan v. Merwanji Nowroji, 21 B. 279	21
Balambhat v. Narayanbhat, 25 B. 74; 2 Bom. L. R. 511	929
Baldeo Singh v. Beni Singh, A. W. N. (1899) 57	276
Balgobind Das v. Barkat Ali, A. W. N. (1888) 15	174
Balkishen Das v. Simpson, 25 I. A. 151; 25 C. 833; 2 C. W. N. 513	285
Balmakund v. Dalu, 25 A. 498; A. W. N. (1903) 112	446
Balmokand v. Emperor, 28 Ind. Cas. 738; 11 P. W. R. 1915 Cr.; 17 P. R. 1915 Cr.; 16 Cr. L. J. 354	333
Balu Bai v. Tanu Bai, 24 Ind. Cas. 808; 10 N. L. R. 51	681
Balvant Ramchandra v. Secretary of State for India, 29 B. ■ at pp. 488, 489; 7 Bom. L. R. 497	536
Balwant Singh v. Aman Singh, 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852	289
Balwant Singh v. Rev. Rockwell Clancy, 14 Ind. Cas. 629; 1912; M. W. N. 46; 11 M. L. T. 344; 9 A. L. J. 609; 15 C. L. J. 475; 16 C. W. N. 577; 14 Bom. L. R. 422; 23 M. L. J. 18; 39 I. A. 10; 34 A. 296	299
Bandon (Earl) v. Becher, (1853) 3 Cl. & F. 479 at p. 512; 9 Bligh. (N. S.) 532; 6 E. R. 1517	816
Baness v. Turton, 23 P. R. 1883	955
Banna Mal v. Jamna Das, 15 A. 183; A. W. N. (1883) 68	244
Bansi v. Girdhar Lal, A. W. N. (1894) 143	184
Bansidhar v. Ganeshi, 22 A. 338; A. W. N. (1900) 107	586
Barada Proshad Banerjee v. Gajendra Nath Banerjee, 1 Ind. Cas. 289; 13 C. W. N. 557; 9 C. L. J. 383	190
Barindra Kumar Ghose v. Emperor, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453	650
Barkat Ram v. Jagat Ram, 17 Ind. Cas. 379; 249; P. W. R. 1912 (F. B.)	832
Barlow v. Gobindram, 24 C. 364; 1 C. W. N. 281	532

B—contd.

	Page.
Barnmanund Mahanti v. Chowdhry Krishna Charan Patnaik, 12 Ind. Cas. 6; 14 C. L. J. 183	20
Barned's Banking Company, <i>In re</i> , Contract Corporation Co., <i>Ex parte</i> , (1867) 3 Ch. 105 at p. 116; 37 L. J. Ch. 81; 17 L. T. 269; 16 W. R. 193	671
Barnhart v. Greenshields, 9 Moore P. C. 18; 105 R. R. 1; 14 E. R. 204	908
Barrow, <i>Ex parte</i> , 2 Rose 252	545
Barwick v. English Joint Stock Bank, (1867) 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877	599
Basanta Kumari Dasi v. Mobesh Chandra Laha, 19 Ind. Cas. 541; 17 C. W. N. 944; 14 Cr. L. J. 269; 40 C. 982	972
Basarat Ali Khan v. Manirulla, 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49	498, 839
Basava v. Lingangauda, 19 B. 428	887
Basdeo v. John Smidt, 22 A. 55 at p. 60; A. W. N. (1899) 172	237
Basir Sheikh v. Fazale Karim, 28 Ind. Cas. 703; 19 C. W. N. 290	139
Baso Kooer v. Hurry Dass, 9 C. 495; 12 C. L. R. 292; 7 Ind. Jur. 472	24
Bateson, <i>Ex parte</i> 1 Mont. D. & D. 289; 4 Jur. 994	422
Beddow v. Beddow, (1878) 9 Ch. D. 89 at p. 93; 47 L. J. Ch. 588; 26 W. R. 570	694
Beer Chunder Manikkya v. Raj Coomar Nobodeep Chunder Deb Burmono, 9 C. 535 at p. 553; 12 C. L. R. 465	65
Beer, <i>In re</i> , Beer, <i>Ex parte</i> , (1903) 1 K. B. 628; 72 L. J. K. B. 366; 51 W. R. 422; 88 L. T. 334; 19 T. L. R. 319; 10 Manson 136	793
Begam v. Muhammad Yakub, 16 A. 344; A. W. N. (1894) 101	211
Behari Lal v. Salik Ram, 1 A. 675	280
Behari Lal Laha v. Kailas Chunder Laha, 1 C. W. N. 121	425
Bejoy Chandra Nag v. Banku Behari Mazumdar, 4 Ind. Cas. 116; 13 C. W. N. 451; 9 C. L. J. 336	451
Bellcairn, The (1885) 10 P. D. 161; 55 L. J. P. 3. 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503	68
Belshaw v. Bush, (1851) 22 L. J. C. P. 24; 11 C. B. 191; 17 Jur. 67; 138 E. R. 444; 87 R. R. 639	421
Bengal Coal Co. Ltd. v. Homee Wadia & Co., 24 B. 97	521
Beni Madho v. Indar Sahai, 3 Ind. Cas. 707; 32 A. 67; 6 A. L. J. 991	584
Beni Pershad v. Sarju Pershad, 9 Ind. Cas. 982; 33 A. 51; 8 A. L. J. 429; 12 Cr. L. J. 174	334
Berhamdeo Pershad v. Tara Chand, 33 C. 92 at p. 97; 9 C. W. N. 989	363, 705
Berhamdeo Prasad v. Tarachand, 21 Ind. Cas. 961; 15 M. L. T. 62; (1914) M. W. N. 38; 19 C. L. J. 132; 18 C. W. N. 345; 12 A. L. J. 82; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 C. 654 at p. 660	705
Beti Maharani v. Collector of Etawah, 17 A. 198; 22 I. A. 31 (P. C.); 6 Sar. P. C. J. 551	206
Bhagwan Jethiram v. Dhondi, 22 B. 83	280

B—contd.

	Page.
Bhagwan Sahai v. Narsingh Sahai, 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871	96, 451, 473
Bha. Kahan Singh v. Rai Bahadur Lala Mohan Lal, 34 Ind. Cas. 177; 44 P. W. R. 1916	195
Bhaiji Thakur v. Jharula Das, 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1020; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 350; 16 Bom. L. R. 845	898
Bhikaji Ramchandra v. Parshotam, 10 B. 220 373, 823	823
Bhikharee Ram Mohoori v. Dhakeswar Pershad Narain Singh, 7 C. L. J. 483; 35 C. 807	834
Bhimacharya v. Ramacharya, 3 Ind. Cas. 750; 33 B. 452 at pp. 460, 411; 11 Bom. L. R. 654	14
Bhimaji Govind v. Rakmabai, 10 B. 338	396
Bhoba Tarini Debya v. Beary Lall Sanyal, 24 C. 646; 1 C. W. N. 578	379
Bhobo Sundari Debi v. Rakhal Chander Bose, 12 C. 583	477
Bhola v. Fathu, 15 C. P. L. R. 17	609
Bhola v. Gobind Dayal, 6 A. 196 (F. B.); A. W. N. (1884) 31	196
Bhola v. Mohammad Habibul Rahman Khan, 10 Ind. Cas. 465	413
Bhola Nath Nundi v. Midnapore Zemindary Company, 31 C. 503 at p. 509; 31 L. A. 75; 8 C. W. N. 425; 14 M. L. J. 15	541
Bholanath Khettry v. Kartick Kissen Das Khettry, 34 C. 374; 11 C. W. N. 462	799
Bhooban Moyee Debia v. Ram Kishore Acharj Chowdhry, 10 M. L. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978	425
Bhoopendra Narain Dutt v. Romou Krishna Dutt, 27 C. 417; 4 C. W. N. 107	140
Bhoopendro Narain Dutt v. Baroda Prosad Roy Chowdhry, 18 C. 500	88
Bhubaneshwari Koer v. Ajodhya Singh, 11 Ind. Cas. 102 15 C. L. J. 339	595
Bhugwandeon Doobey v. Myna Bae, 11 M. J. A. 457; at p. 499; 9 W. R. 23 (P. C.); 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184	395, 681
Bhupati Nath Smrititirtho v. Ram Lal Mitra, 3 Ind. Cas. 642; 37 C. 128 (F. B.); 10 C. L. J. 355; 14 C. W. N. 18	548
Bhupendra Kumar Ghosh v. Amarendra Nath Dey, 24 Ind. Cas. 458; 4 C. 642; 18 C. W. N. 360	893
Bhyah Ram Singh v. Bhyah Ugur Singh, 13 M. L. A. 373 at pp. 390, 393; 14 W. R. 1 (P. C.); 5 B. L. R. 293 (P. C.); 2 Suth. P. C. J. 320; 2 Sar. P. C. J. 566; 20 E. R. 591	296
Bhyrub Chunder Mojomondar v. Huro Prosunao Bhattacharjee Chowdhry, 17 W. R. 257	3
Bibb d. Mole v. Thomas, (1749) 2 W. Bl. 1043; 96 E. R. 613	7.0
Bibee Solomon v. Abdool Azeez, 6 C. 687; 8 C. L. R. 169	396
Bibi Jawahir Kumari v. Chatterput Singh, 2 C. L. J. 243	485
Bibi Sahodra v. Rai Jang Bahadur, 8 L. A. 210; 8 C. 224; 1 Sar. P. C. J. 294; 6 Ind. Jur. 1	839
Biddomoye Dabee Dabee v. Sittaram, 4 C. 497; 3 C. L. R. 398	752
Bigsby v. Dickinson, (1876) 4 Ch. D. 24 at p. 29; 55 L. T. 678; 25 W. R. 83; 46 L. J. Ch. 280	816

B—contd.

	Page.
Birbhadra Rath v. Kalpataru Panda, 1 C. L. J. 388 at p. 400	20, 425*
Birch v. Williams, (1876) 24 W. R. 700	640
Bireswar Das Dey v. Kamal Kumar Dutt, 16 Ind. Cas. 437; 17 C. W. N. 337	1
Birmingham Ninegar Brewery Company v. Powell, (1897) A. C. 710 at p. 713; 66 L. J. Ch. 763; 76 L. T. 792	538
Biroj Mahammad v. Muhabut Mahammad, 11 Ind. Cas. 32	528
Bishambhar Nath v. Fateh Lal, 29 A. 176; A. L. J. 94; A. W. N. (1907) 13	717
Bisheshwar Dayal v. Harbans Sahay, 6 C. L. J. 659; 3 M. L. J. 38	623
Bishun Chand Bachhot v. Bijoy Singh Dudhuria, 11 Ind. Cas. 399; 15 C. W. N. 648; (P. C.); 13 C. L. J. 583; 8 A. L. J. 587; 18 Bom. L. R. 440; 21 M. L. J. 652; 10 M. L. T. 335; 1911) 1 M. W. N. 418	817
Biseshur Sonamat v. Jasoda Lal Chowdhry, 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622	28, 757
Blenkinsopp v. Blenkinsopp, (1852) 1 DeG. M. & G. 495; 42 E. R. 614; 21 L. J. Ch. 401; 16 Jur. 787; 12 Reav. 568	779
Blyth v. Dennett, (1853) 13 C. B. 178 at p. 180; 22 L. J. C. P. 22; 128 E. R. 1165; 93 R. R. 480	835
Boisegomoff v. Nahapiet Jute Company, 29 C. 323; 6 C. W. N. 495	785
Bolland <i>Ex parte</i> , Dyeart <i>In re</i> , (1878) 9 Ch. D. 312; 47 L. J. Bk. 74; 38 L. T. 693; 26 W. R. 807	440
Bombay-Burma Trading Corporation Limited v. Mirza Mahomed Ally, 5 L. A. 130; 4 C. 116; 3 Suth. P. C. J. 525; 3 Sar. P. C. J. 823; 2 Ind. Jur. 501	599
Bottomley v. Nuttall, (1858) 28 L. J. C. P. 110; 5 C. B. (N. S.) 122; 5 Jur. (N. S.) 315; 141 E. R. 48; 116 R. R. 592	421
Bouwang Raja Chhalla Pharoo v. Banga Behary Sen, 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 458	615
Bowles v. Stewart (1803) 1 Sch. & Lef. 209	600
Bowser v. Colby, (1841) 1 Hare 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969	839
Brall, <i>Ex parte</i> , Norton, <i>In re</i> , (1893) 2 Q. B. 381; 5 R. 440; 63 L. T. 323; 41 W. R. 623; 10 Morrell 166	441
Branson, <i>Ex parte</i> , Moore, <i>In re</i> , 3 K. B. 1086; 83 L. J. K. B. 1673; 30 T. L. R. 604	441
Bray v. Fromont, 6 Madd. 5; 22 R. R. 224; 56 E. R. 9.0; 1 Gl. & Jam. 74	545
Bree v. Holbech, (1781) 1 Dougl. 854; 93 E. R. 415	516
Brinkley v. Attorney-General, (1890) 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911	162
British Mutual Banking Company v. Charnwood Forest Railway Company, (1887) 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 550; 52 J. P. 150	599
Broadbent, <i>Ex parte</i> , Barrow, <i>In re</i> , 1 M. & A. 635; D. & C. 3; 3 L. J. Bk. 95	940
Brocklesby v. Temperance Permanent Building Society, 1895 A. C. 174; 64 L. J. Ch. 433; 11 R. 159. 72 L. T. 477; 43 W. R. 606; 59 J. P. 676	600

B—concl'd.

Page.

Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji, 3 C. L. J. 183	557
Brook v. Brook (1861) 9 H. L. Cas. 193; 7 Jur. (N. S.) 422; 4 L. T. 93; 9 W. R. 431; 11 E. R. 703; 131 R. R. 123	161
Brown v. Cure et Marguilliers de Notre Dame de Montreal, (1874) 6 P. C. 157; 44 L. J. P. C. 1; 31 L. T. 555; 23 W. R. 184	562
Brown v. De Testet, (1821) Jac. 284; 37 E. R. 858; 23 R. R. 59	545
Brown v. Hawkes, (1891) 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823	151
Brown v. Watts, 1 Taunt. 353; 9 R. R. 793; 127 E. R. 870	421
Buddha Singh v. Lattu Singh, 30 Ind. Cas. 529; 37 A. 604 (P. C.); 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 C. W. N. 1; 22 C. L. J. 481; (1915) M. W. N. 772; 42 I. A. 208.	111, 183
Budhai Sirdar v. Sonaula Mridha, 23 Ind. Cas. 385; 19 C. L. J. 60; 18 C. W. N. 890; 41 C. 943	211
Budhan Shah v. Sita Nath Shah, 7 Ind. Cas. 578; 13 C. L. J. 78	626
Buddhimanta Pramanik v. Sarat Chandra Banerjee, 6 Ind. Cas. 147; 13 C. L. J. 672	498, 837
Budree Das Mukim v. Chooni Lal Johurry, 33 C. 789; 10 C. W. N. 581	385
Burbett v. Spilsbury, (1842) 10 Cl. & F. 347; 59 R. R. 195; 8 E. R. 772	371
Burgoine v. Taylor, (1878) 9 Ch. D. 1; 47 L. J. Ch. 542; 38 L. T. 438; 26 W. R. 568	640
Burgoyne v. Showler, (1844) 1 Rob. 5	688
Burjorji Dorabji Patel v. Danubai, 16 B. 1	779
Burra Ranga Reddi v. Kalapatti Sithaya, 6 M. 368	195
Burra Fukeer Doss Bera v. Fukeer Doss Bera, 20 W. R. 180	503
Byjnath Sahoy v. Wuzeer Narain, 24 W. R. 427	595

C

Cangayam Venkataramana Iyer v. Henry James Colley Gompertz, 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298	508
Carter and Kinderdine's Contract, <i>In re</i> , (1897) 1 Ch. 776; 63 L. J. Ch. 403; 76 L. T. 476; 45 W. R. 484; 4 Manson 34	441
Casborne v. Scharfe, (1737) 1 Atk. 603; 2 Wh. & T. L. C. (7th ed.) 6; 26 E. R. 377	172
Castle v. Wilkinson, (1870) 5 Ch. 534; 39 L. J. Ch. 843; 18 W. R. 586	453
Chalakonda Alasani v. Chalakonda Ratnachalam, 2 M. H. C. R. 56	722
Chalamayya v. Varadayya, 22 M. 166; 9 M. L. J. 3	717
Challho Singh v. Jharo Singh, 18 Ind. Cas. 61; 39 C. 995	572
Chamatkarini Dasi v. Triguna Nath Sardar, 19 Ind. Cas. 89; 17 C. W. N. 833	139
Chanda v. Queen-Empress, 6 P. R. 1894 Cr.	633
Chandi Churn Barua v. Sidheswari Debi, 16 C. 71; 15 I. A. 159; 12 Ind. Jur. 329; 15 Sar. P. C. J. 231	484

C—cont'd.

Page.

Chandra Nath Tewari v. Protap Udai Nath Sahe, 23 Ind. Cas. 105; 18 C. W. N. 170	22
Chanmalswami v. Gangadharappa, 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954	374
Chapsey Cooverji v. Jethabhai Nuresy, 9 Bom. L. R. 514	553
Charles Seton Guthrie v. Abool Mozuffer, 14 M. I. A. 53; 15 W. R. (P. C.) 50; 7 B. L. R. 630; 2 Snth. P. C. J. 429; 2 Sar. P. C. J. 660; 20 E. R. 706	817
Chatarbhuj Das v. Ganesh Ram, 20 A. 474; A. W. N. (1898) 132	817
Chatterput Singh v. Maharaj Bahadur, 32 C. 193 at p. 217; 9 C. W. N. 225; 2 A. L. J. 190; 32 I. A. 1 (P. C.)	781
Chellappa Chetty v. Chellappa Chetty, 1 Bur. L. T. 65	48
Chhabila Ram v. Durga Prasad, 28 Ind. Cas. 681; 37 A. 293; 13 A. L. J. 373	385
Chhitar Mal v. Jagan Nath Prasad, 29 A. 213; A. W. N. (1907) 25; 4 A. L. J. 24	299
Chhoto Rakhal Das v. Jogendra Narain, 3 Ind. Cas. 39; 10 C. L. J. 467 at p. 470	626
Chidambara Gurukkal v. Sengoda Gounden, 25 Ind. Cas. 909; 16 M. L. T. 427; 27 M. L. J. 587; 15 Cr. L. J. 671	651
Chidambaram Chettiar v. Sami Aiyar, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351	779
Chidambaram Chetty v. Karuppan Chetty, 8 Ind. Cas. 543; (1910) M. W. N. 711; 9 M. L. T. 75; 35 M. 678	477
Chinnam Rajamannar v. Tadikonda Ramachandra Rao, 29 M. 155	158
Chinnam v. Ramachandra, 15 M. 54	125
Chinnayya Rawutan v. Chidambaram Chetti, 2 M. 212	860
Chinnu Pillai v. Kalimuthu Chetti, 9 Ind. Cas. 596; 35 M. 47; 21 M. L. J. 243; (1911) 1 M. W. N. 23; 9 M. L. T. 389	795
Chintamanrav Mehendale v. Kashinath, 14 B. 32	24
Chintamani Dutt v. Rash Behari Mondal, 19 C. 17	252
Chitto Sheik v. Muzzur Hossain, 2 Hyde. 212	639
Chotey Narain Singh v. Ratan Koer, 22 C. 519; 22 I. A. 12	817
Chundee Churn Roy v. Shib Chunder, 5 C. 945; 6 C. L. R. 69; 3 Shome, L. R. 123	229
Chuni Lal v. Ram Krishan Sahu, 15 C. 460; 12 Ind. Jur. 425	454
Chunilal Parvatishankar v. Bai Samrath, 23 Ind. Cas. 645; 38 B. 393; 16 M. L. T. 59; 18 C. W. N. 844; 26 M. L. J. 647; 19 C. L. J. 563; 16 Bom. L. R. 366; 1 L. W. 762; 12 A. L. J. 742; (1914) M. W. N. 441	894
Chunilal Virchand v. Ahmedabad Municipality, Case, 12 Ind. Cas. 510; 13 Bom. L. R. 958; 36 B. 47	21
Chunni Lal v. Nizam's Guaranteed State Railway Company, Limited, 2 A. 228; 2 M. L. T. 42; A. W. N. (1907) 24; 4 A. L. J. 81; F. B.	104
Church v. Browne, (1808) 15 Ves 258; 10 R. R. 74; 33 E. R. 752	839
Citizen's Life Assurance Company Ltd. v. Brown, (1904) A. C. 433; 73 L. J. P. C. 102; 90 L. T. 739; 20 T. L. R. 407; 53 W. R. 176	600

C—conold.

	Page.
Clare v. Lamb, (1875) 10 C. P. 334; 44 L. J. O. P. 177; 32 L. T. 196; 23 W. R. 389	516
Clark v. Mundal, 1 Salk, 124; 91 E. R. 116	421
Clark v. Woods, 2 Ex. 395; 3 New Sess. Cas. 253; 17 L. J. M. C. 189	404
Clarke v. Scripps, 2 Rob. Ecc. 563	711
Claverley Vicar v. Claverley Parishioners, (1909) P. 195	569
Clegg v. Bromley, (1912) 3 K. B. 474; 81 L. J. K. B. 108; 106 L. T. 825	782
Clough v. London N.-W. Railway Co., (1871) 7 Ex. 26 at p. 34; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189	840
Cocker v. Cowper, (1834) 1 Cr. M. & R. 418; 40 R. R. 626; 5 Tyr. 103; 149 E. R. 1143	474
Cocks v. Masterman, (1829) 9 B. & C. 302; 109 E. R. 335; 4 Man. & Ry. 676; 1 L. J. K. B. (o. s.) 77	404
Coggan v. Pogose, 11 C. 158	941
Coghlan v. Cumberland, (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540	815
Cohen v. Hale, 3 Q. B. D. 371; 47 L. J. Q. B. 496; 39 L. T. 35; 25 W. R. 680	422
Cohen v. Nursing Dass Auddy, 19 C. 201	801
Collector of Madura v. Mootoo Ramalinga Sathupathy, 12 M. L. A. 397 at p. 436; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 20 Eng. Rep. 389	16
Collector of Moradabad v. Harbans Singh, 21 A. 17; A. W. N. (1898) 183	257
Colonial Sugar Refining Company v. Irving, (1905) App. Cas. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513	922
Colyer v. Finch, 5 H. L. Cas. 905 at p. 924; 26 L. J. Ch. 65; 3 Jur. (N. s.) 25; 10 E. R. 1169; 101 R. R. 442	123
Commercial Steam Ship Company v. Boulton, (1875) 10 Q. B. 346; 44 L. J. Q. B. 219; 33 L. T. 707; 23 W. R. 854; 3 Asp. M. C. 111	826
Connecticut Fire Insurance Company v. Kavanagh, (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21	872
Cooper v. Bockett, (1846) 4 Moore P. C. 419; 10 Jur. 931; 13 E. R. 365	683
Cooper, <i>Ex parte</i> Green, <i>In re</i> (1878) 30 L. T. 260	440
Cooper v. Wandsworth Board of Works, (1863) 14 C. B. (N. s.) 180; 32 L. J. C. P. 185; 9 Jur. (N. s.) 1155; 8 L. T. 278; 11 W. R. 646; 143 E. R. 414; 135 R. R. 643	61
Cooper v. Wyatt, (1821) 5 Madd. 482; 21 R. R. 336; 56 E. R. 980	838
Corven's case, (1612) 12 Co. Rep. 105; 77 E. R. 1380	569
Cottingham v. Earl of Shrewsbury, 3 Hare, 627; 15 L. J. Ch. 441; 67 E. R. 530	929
Croft v. Lumley, (1855) 5 El. & Bl. 648 at p. 679; 103 R. R. 663 at p. 681; 119 E. R. 622; 25 L. J. Q. B. 73; 3 Jur. (N. s.) 62; 4 W. R. 94; 26 L. T. (o. s.) 123	838
Croft v. Lumley, (1858) 6 H. L. C. 672 at p. 742; 108 R. R. 252 at p. 289; 27 L. J. Q. B. 321; 4 Jur. (N. s.) 903; 6 W. R. 523; 10 E. R. 1459	838
Currie v. Misa, 10 Ex. 153 at p. 162	606

D

	Page.
Dakhni Din v. Syed Ali Asghar, 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995	584
Damodardas Maneklal v. Uttamram Maneklal, 17 E. 271 at p. 288	911
Damodra Nadar v. Manicka Vachaka Desika Gammam Pandara Sannadhi, 3 Ind. Cas. 468; 83 M. 65; 6 M. L. T. 177; 19 M. L. J. 725	503
Daniels v. Davison, 17 Ves. 433; 34 E. R. 167	490
Daniels v. Davison, 10 R. R. 171; 16 Ves. 249; 33 E. R. 978	908
Danmull v. British India Steam Navigation Co., 12 C. 477	132
Dattatraya Vishnu Dhamankar v. Vishnu Narayan Dhamankar, 12 Ind. Cas. 949; 36 B. 68; 13 Bom. L. 1161	24
Datto Atmaram Hasabnis v. Shankar Dattatraya, 21 Ind. Cas. 316; 38 B. 82; 15 Bom. L. R. 341	757
Davenport v. Reg., (1877) 1 A. C. 115 at p. 128; 27 L. J. P. C. 8; 37 L. T. 727	836
Davis v. Eyton, (1880) 7 Bing. 154; 33 R. R. 408; 4 Moo. & P. 820; 9 L. J. (o. s.) C. P. 44; 181 E. R. 60	838
Daya Nand v. Bakhtawar Singh, 1 A. 333 (F. B.); A. W. N. (1883) 56	196
Daya Ram v. Sohail Singh, 110 P. R. 1908 (F. B.); 31 P. L. R. 107; 59 P. W. R. 907	127, 188
Daya Shankar v. Syed Mazhar Husain, Selected Decision No. 6 of 1909	755
De Souza v. Coles, 3 M. H. C. R. 384	
Deb Narain Dutt v. Narendra Krishna, 16 C. 267	380
Debendra Nath Sen v. Mirza Abdul Samed Seraji, 1 Ind. Cas. 261; 10 C. L. J. 150 at p. 159	363, 616
Deo d Kindersley v. Hughes, (1810) 7 M. & W. 139; 10 L. J. Ex. 185; 151 E. R. 711; 56 R. R. 69	226
Deo Dat v. Ram Autar, 8 A. 502 at p. 508; A. W. N. (1886) 149	826
Derry v. Peek, 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 205; 38 W. R. 33; 51 J. P. 148; 1 Meg. 292	119
Dhani v. Narain Singh, 82 P. R. 1908; 147 P. W. R. 1908	569
Dhanjibhai Kharsetji Ratnagar, <i>In re</i> , 10 B. H. C. R. 327	608
Dharam Kunwar v. Balwant Singh, 30 A. 649; 5 A. L. J. 568; A. W. N. (1903) 231; 4 M. L. T. 385	677
Dharam Kunwar v. Balwant Singh, 15 Ind. Cas. 673; 24 A. 398; 16 C. W. N. 675 (P. C.); 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142	677
Dhonkal Singh v. Phakkar Singh, 15 A. 84; A. W. N. (1893) 36	280
Dhunookdhari Lall v. Gunput Lall, 10 W. R. 122; 11 B. L. R. 201	722
Dhunput Singh v. Paresah Nath Singh, 21 C. 180	484
Dhuronidhur v. Agra Bank, 5 C. 86; 4 C. L. R. 44	595
Dilbar Sardar v. Hosein Ali Bepari, 26 C. 553	841
Dinamoyee Debi v. Bon Bahari Kapur, 7 C. W. N. 160	371

D—contd.

	Page.
Dinesh Chunder Roy v. Golam Mostapha, 16 C. 89	87
Dinonath Mukerji v. Gopal Churn Mukerji, 8 C. L. R. 57; 9 C. L. R. 379	20
Dirgopal Lal v. Bolakee, 5 C. 269	513
Disa Singh v. Juala Singh, A. W. N. (1891) 165	205
Diwali v. Apaji Ganesh, 10 B. 342	839
Dixon ■ Clark, (1847) 5 C. B. 365; 16 L. J. C. P. 237; 5 D. & L. 155; 136 E. R. 919	826
Dixon v. Winch, (1900) 1 Ch. 736 at p. 747; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276	860
Dr. George Albrecht v. Bathee Jellamma, 13 Ind. Cas. 453; 22 M. L. J. 247; (1912) M. W. N. 53; 11 M. L. T. 53	767
Doe v. Bancks, (1821) 4 B. & Ald. 401 at p. 406; Gow. M. P. 220; 23 R. R. 318; 106 E. R. 934	839
Doe v. Carter, (1798) 8 T. R. 57; 101 E. R. 1264; 4 R. R. 586	838
Doe v. Carter, (1799) 8 T. R. 300; 101 E. R. 1400; 4 R. R. 586	838
Doe v. Godwin, (1815) 16 B. R. 463; 4 M. & S. 265; 105 E. R. 833	839
Doe v. Hawke, (1802) 2 East 481; 102 E. R. 453	838
Doe d. Aslin v. Summersett, (1830) 1 B. & Ad. 135; 8 L. J. (o. s.) K. B. 369; 109 E. R. 738	226
Doe d. Lyster v. Goldwin, (1841) 2 Q. B. 143; 1 G. & D. 463; 10 L. J. Q. B. 275; 114 E. R. 57; 57 R. R. 621	226
Doe d. Mann v. Walters, (1830) 10 B. & C. 626; 5 M. & Ry. 357; 8 L. J. (o. s.) K. B. 297; 34 R. R. 522; 109 E. R. 583	226
Doe d. Rhodes v. Robinson, (1837) 3 Bing. (N. s.) 677; 4 Scott. 396; 3 Hodges, 84; 6 L. J. C. P. 235; 1 Jur. 356; 12 E. R. 571; 43 R. R. 759	226
Doe d. Tones v. Chamberlaine, (1839) 5 M. & W. 14; 9 L. J. Ex. 38 151 E. R. 7	492
Dorabji Jehangir Randiva v. Munchorji Bomanji Panthaki, 19 ■ 352	318
Doraisami Sirumadan v. Nondisami Saluvan, 21 Ind. Cas. 410; 14 M. L. T. 401; 38 M. 118; 25 M. L. J. 405	797
Drake v. Mitchell, 3 East 252; 7 R. R. 447; 102 E. R. 594	421
Drew v. Willis, (1891) ■ Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373	503
Dukhi Sahu v. Mahomed Bikhui, 10 C. 284 at p. 296; 13 C. L. R. 445	431
Dulichand v. Ramkishan, 7 C. 648 (P. C.); 8 I. A. 93; 4 Sar. P. C. J. 245; 5 Ind. Jur. 493	493
Dulla v. Empress, ■ P. R. 1901 Cr.; 2 P. L. R. 1901	968
Duncan v. Kimball, ■ Wallace 37; 70 U. S. XVIII, 50	421
Dunkley & son, <i>Ex parte</i> , Waller, <i>In re</i> ; (1975) 2 K. B. 693; 74 L. J. K. B. 963; 93 L. T. 248; 21 T. L. R. 707; 54 W. R. 171; 12 Manson, 364	441
Durga Charan Mahto v. Raghunath Mahto, 20 Ind. Cas. 810; 18 C. L. J. 559; 18 C. W. N. 55	887
Durga Chowdhurani v. Jewahir Singh, 18 C. 23; 17 I. A. 122	541

D—conold.

	Page.
Durga Dutt v. Gita, 9 Ind. Cas. 498; 33 A. 443; 8 A. L. J. 220	681
Durga Dutt Joshi v. Ganesh Dutt Joshi, 5 Ind. Cas. 400; 32 A. 305; 7 A. L. J. 216	725
Durga Prasad Singh v. Rajendra Narayan Bagchi, 21 Ind. Cas. 750; 4 C. 493; 18 C. W. N. 66; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42	464
Durvasula Gangadharudu v. Durvasula Narasammah, 7 M. H. C. R. 47 at p. 50	718
Dwarka Doss Govardana Doss v. Danakotti Ammal, 23 Ind. Cas. 129; 15 M. L. T. 198	861
Dwarka Nath Ray v. Sarat Chandra Singh Ray, 11 Ind. Cas. 872; 15 C. W. N. 1036; 15 C. L. J. 23; 39 C. 319	19
Dwarkanath Mitter v. Sarat Kumari Dasi, 7 B. L. R. 55	854
Dwarkananth Roy v. Ram Chand Aich, 26 C. 428; 3 C. W. N. 266	125

E

East Indian Railway Company v. Jethmull Ramanand, 26 B. 669; 4 Bom. L. R. 495	131
East Indian Railway Co. v. Madhu Mal, 19 Ind. Cas. 673; 18 C. L. J. 147; 17 C. W. N. 1134	132
East Indian Railway Co. v. Ramgati Ram, 23 Ind. Cas. 142; 19 C. L. J. 180	132
Eastern Trust Company v. Mackenzie Mann and Company Limited, (1915) A. C. 750; 81 L. J. P. C. 152	591
Ebbs v. Boulnois, (1875) 10 Ch. App. 479 at p. 484; 44 L. J. Ch. 691; 23 W. R. 820; 32 L. T. 650	20
Edmonds v. Foster, (1895) 45 L. J. M. C. 4; 33 L. T. 610; 24 W. R. 368	963
Edulji v. Vullebhoy, 7 B. 167	189
Edwards v. Edwards, (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 464	894
Ellesmere Brewery Co., v. Cooper, (1896) 1 Q. B. 75 at p. 82; 65 L. J. Q. B. 173; 73 L. T. 567; 44 W. R. 254	214
Ellis v. Arnison, 1 B. & O. 70; 2 D. & R. 161; 5 B. & Ald. 47; 1 L. J. (o. s.) K. B. 24; 25 R. R. 314; 106 E. R. 1111	736
Elms v. Elms, (1858) 1 Sw. & Tr. 155; 27 L. J. P. 96; 4 Jur. (N. s.) 765; 6 W. R. 864	710
Emperor v. Annappa Bharamganda, 9 Bom. L. R. 347; 5 Cr. L. J. 323	650
— v. Chatter Singh, 7 P. R. 1904 Cr.; 97 P. L. R. 1904; 1 Cr. L. J. 781	307
— v. Debidas 14 C. P. L. R. 161	967
— v. Gurditta, 13 P. R. 1903 Cr.; 171 P. L. R. 1903	311
— v. Hla Gyi, 2 L. B. R. 285; 10 Bur. L. R. 306; 1 Cr. L. J. 1010	314
— v. Jetha Nathoo, 6 Bom. L. R. 785; 1 Cr. L. J. 931	653
— v. Mohant Ramdas, 9 C. W. N. 816; 2 Cr. L. J. 532	151
— v. Naraindas Bikhchand, Sind Sadar Court Criminal Reference No. 2 of 1902	649

F—concl'd.

	Page.
Emperor v. Narayan, 32 B. 111 at p. 120; 9 Bom. L. R. 789; (F. B.); 6 Cr. L. J. 164; 2 M. L. T. 414	595
— v. Nilakanta, 14 Ind. Cas. 849; 35 M. 247; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp	709
— v. Po Thein, 2 L. B. n. 314; 1 Cr. L. J. 1121	974
— v. Po Thwe, 4 L. B. R. 282; 8 Cr. L. J. 478	314
— v. Shib Das, 8 Ind. Cas. 190; 35 P. W. R. 1910 Cr.; 11 Cr. L. J. 577	963
Empress v. Bhagwan, 2 C. P. L. R. 82	967
— v. Durant, 23 B. 213	979
Engleback v. Nixon, (1875) 10 C. P. 645; 44 L. J. C. P. 396; 32 L. T. 881	440
Eshenchander Singh v. Shamachurn Bhutto, 11 M. I. A. 7 at p. 23; 6 W. R. 57 (P. C.); 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3	268, 445
Evans v. Bagshaw, 5 Ch. App. 340; 39 L. J. Ch. 145; 15 W. R. 657	413
Evans v. Davis, (1879) 10 Ch. D. 747 at p. 763; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285	840
F	
Fadu Jhala v. Gaur Mohun Jhala, 19 C. 544	454
Faez Rahaman v. Ramsukh Bajpai, 21 C. 169	182
Faiz Baksh v. Ramjidas, 34 P. R. 1875	874
Fakirchand Lallu Bhai v. Naginchand Kalidas, 33 Ind. Cas. 423; 17 Bom. L. R. 116; 40 B. 10	930
Fateh Chand v. Narasing Das, 16 Ind. Cas. 288; 22 C. L. J. 353	60
Fathuma Bivi Ammal v. Hanumantha Row, 17 M. L. J. 26	713
Fatima Khatoon Chowdrain v. Mahomed Jan, Chowdhry, 12 M. I. A. 65; 10 W. R. 29 (P. C.); 1 B. L. R. 21 (P. C.); 2 Suth. P. C. J. 149; 2 Sar. P. C. J. 350; 20 E. R. 265	481
Faviell v. Eastern Counties Railway Company, (1848) 17 L. J. Ex. 297; 2 Ex. 344; 6 D. & L. 54	848, 928
Fazal Imam v. Sukor Mahton, 25 Ind. Cas. 442; 19 C. L. J. 333	99
Fazel Sheikh v. Keramuddi Sheikh, 6 C. W. N. 916	914
Fitzsimons v. Duncan, (1908) 2 L. R. 483; 10 Irish Law Reports 58	600
Flatau, <i>In re</i> , Official Receiver, <i>Ex parte</i> , (1893) 2 Q. B. 219; 62 L. J. Q. B. 569; 4 R. 414; 68 L. T. 740; 41 W. R. 529; 10 Mor. 151	794
Fletcher v. Nokes, (1897) 1 Ch. 271; 66 L. J. Ch. 177; 76 L. T. 107; 45 W. R. 471; 61 J. P. 232	537
Flower v. Sadler, 9 Q. B. D. 83; 46 J. P. 503; affirmed, 10 Q. B. D. 572	404
Fone Lan v. Ma Gyeo, 2 L. B. R. 95	100
Foster v. Essex Bank, (1821) 17 Mass. 479; 1 Am. Dec. 168	601
Francis Cursetji v. Goculdas Madhowji, 16 B. 338	515
Francis Legge v. Rambaran Singh, 20 A. 35; A. W. N. 1897 93	703
Fryer v. Ewart, (1902) A. C. 187; 71 L. J. Ch. 433; 86 L. T. 212; 18 T. L. 426; 9 Manson, 281	839

G

	Page.
Gaffur v. Bhikaji, 26 B. 159; 1 Bom. L. R. 596	490
Gagan Chand Sardar v. A. Casperz, 4 O. W. N. 44	801
Gajapathi Nilamani v. Gajapathi Radhamani, 1 M. 290; 1 Ind. Jur. 519; 4 I. A. 212; 1 C. L. R. 97; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 365	682
Galstaun v. Hutchison, 15 Ind. Cas. 279; 39 O. 789; 16 C. W. N. 945	236
Ganesh Row v. Tulja Ram Row, 24 Ind. Cas. 696; 26 M. L. J. 460	796
Ganga Sahai v. Kishen Sahai, 6 A. 262; A. W. N. (1884) 79	477
Gangamoyi Debi v. Troiluchhya Nath Chowdhry, 33 C. 537; 3 C. L. J. 319; 10 C. W. N. 522; 8 Bom. L. R. 375; 1 M. L. T. 131; 16 M. L. J. 161	817
Gangara v. Sayava, 21 699	772
Gangineni Kondiah v. Gottipati Pedda Kondappa Naidu, 5 Ind. Cas. 1; 33 M. 56; 7 M. L. T. 282; 20 M. L. J. 41	960
Gangiseti Ramaya v. Kallika Peraya, 16 Ind. Cas. 411; (1912) M. W. N. 959	623
Gangu v. Chandra Bhagabai, 32 B. 275; 10 Bom. L. R. 149	20
Gaya Din Singh v. Syed Mumtaz Husain, 10 O. C. 136	354
Genda Puri v. Chatar Puri, 9 A. 1; 13 I. A. 100; 4 Sar. P. C. J. 726	502
Ghafur Hasan Khan v. Muhammad Kifayatullah Khan, 28 A. 19; A. W. N. (1905) 165; 2 A. L. J. 413	51
Ghasiram Mondal v. Asirbad Mahto, 9 Ind. Cas. 69; 15 C. W. N. 259; 13 C. L. J. 660	835
Gholam Mohiuddin Hossein v. Khairan, 31 C. 786; 1 C. W. N. 325	836
Ghulam Hassan v. Fazal Din, 1 Ind. Cas. 453; 15 P. R. 1909; 35 P. L. R. 1909; 23 P. W. R. 1909	135
Ghulam Jilani v. Muhammad Hassan, 25 P. R. 1902 (P. C.); 12 M. L. J. 77; 4 Bom. L. R. 161; 6 O. W. N. 226; 29 C. 167; 29 I. A. 51	105, 194, 743, 847
Ghulam Muhammad Khan v. Narain Das, A. W. N. (1901) 32	145
Ghulam Sarvar v. Muhammad Ambar Ali Khan, 25 Ind. Cas. 594; 1 O. L. J. 325	673
Gibson v. Barton, (1875) 10 Q. B. 329; 44 L. J. M. C. 81; 32 L. T. 396; 23 W. R. 838	1111
Gibson v. Kirk, 113 E. R. 1357; 1 G. & D. 252; 10 L. J. Q. B. 297; 1 Q. B. 850; 6 Jur. 99	8
Girindra Chandra Ganguli v. Rajendra Nath Chatterjee, 1 C. W. N. 530	534
Girish Chandra Guho v. Khagendra Nath, 1 Ind. Cas. 1001; 16 C. W. N. 64; 13 C. L. J. 613	252
Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran, 10 M. 375	66
Glannibanta, The, 1876, 1 P. D. 283 at p. 287; 34 L. 1 934; 24 W. R. 1033; 3 Asp. M. C. 339	816
Glasgow Corporation v. Morimer, (1911) A. C. 203; 80 L. J. P. C. 175; 104 L. T. 354	630
Gloucester Municipal Election Petition, <i>In re</i> , Ford v. Newth, (1901) K. B. 684; 70 L. J. K. B. 459; 65 G. P. 391; 49 W. R. 545; 84 L. T. 354; 17 T. L. R. 325	

(†—contd.)

	Page.
Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 23 M. 271 at p. 279; 27 I. A. 69; 4 C. W. N. 329; 10 M. L. J. 29; ■ Bom. L. R. 597	191
Gobind Mandar v. Banarsi Prasad, 21 Ind. Cas. 351; 18 C. L. J. 74.	97
Gobind Nath Shaba v. Reily, 13 C. 1	217
Gobind Singh v. Zalim Singh, 6 A. 33; A. W. N. (1883) 183	36
Gobinda Lal Das v. Shiba Das Chatterji, 33 C. 1323; 10 C. W. N. 986; 3 C. L. J. 545	635
Gokul Dass v. Eastern Mortgage and Agency Company, 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102	942
Golak Nath Roy Chowdhry v. Mathura Nath Roy Chowdhry, 20 C. 273	839
Golam Gaffar Mandal v. Goljan Bibi, 25 C. 109	504
Golam Mohiuddin Hossein v. Parbati, 1 Ind. Cas. 520; 36 C. 665; 13 C. W. N. 596	452
Golam Mowla v. Abdool Sowar Mondul, 9 Ind. Cas. 922; 13 C. L. J. 255	152
Golap Coomary Dossee v. Soondur Narain. Deo, 4 C. L. R. 36	263
Goode v. Harrison, (1821) 24 R. R. 307; 5 B. & Ald. 147; 106 E. R. 1147	721
Goodright d. Hare v. Carto, (1780) 2 Deuglas 477; 99 E. R. 304	840
Goodtitle d. King v. Woodward, (1820) 3 B. & Ald. 689; 106 E. R. 813	226
Gopal Chandra Bhattacharya v. Secretary of State, 1 Ind. Cas. 735, 26 C. 647; 13 C. W. N. 619	601
Gopal Dei v. Kanno Dei, 26 A. 162; A. W. N. (1903) 227	385
Gopal Ganesh Abhyankar v. Ramohandra Sadashiv Sahasrabudhe, 26 B. 597; 4 Bom. L. R. 325	250
Gopal Siddeshwar Deshpande, <i>In re</i> , 32 B. 203; 10 Bom. L. R. 95; 3 M. L. T. 170; 7 Cr. L. J. 120	655
Gopala v. Saminathayyan, 12 M. 255	340
Gopala Aiyar v. Ramasami, 31 M. 49; 2 M. L. T. 519; 17 M. L. J. 693	595
Gopala Iyengar v. Venkatakrishna Iyengar, 17 Ind. Cas. 744; (1912) M. W. N. 1227	9
Gopala Mooppanar v. Subramania Iyer, 26 Ind. Cas. 7; (1914) ■ W. N. 822; 27 M. L. J. 254; 1 L. W. 675	169
Gopalayyan v. Raghupatiayyan, 7 M. H. C. R. 250	677
Gopammal v. Sreenivasa Iyengar, 27 Ind. Cas. 921; 28 M. L. J. 96	435
Gopee Lall v. Chundraoleo Buhoojee, 11 B. L. R. 391; 19 W. R. 12; 1 A. Sup. 131	678
Gopee Nath Nookerjee v. Bodhumunt Mal, 25 W. R. 26	815
Gopeshwar Pal v. Jiban Chandra, 24 Ind. Cas. 37; 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 549	477
Gopeswar Saha v. Jadab Chaudra, 32 Ind. Cas. 537; 22 C. L. J. 252 20 C. W. N. 689	615
Gopi Krishna Mandal v. Ram Lal Mandal, 5 Ind. Cas. 524; 14 C. W. N. 481; 12 C. L. J. 468	705
Gopi Nath Chattopadhyaya v. Sajani Kanta Singh, 10 C. W. N. 240	337
Gorakh Babaji v. Vithal Narayan Joshi, 11 B. 435 at p. 438	268

(†—contd.)

	Page.
Gordhandas v. Bai Ramcoovar, 26 B. 419 at p. 467; 3 Bom. L. R. 857	894
Gostho Behary Ghosh v. Rohini Gwalini, 4 Ind. Cas. 541; 13 C. W. N. 692.	107
Governors of Bridewell Hospital v. Fawcner, (1892) 8 T. L. R. 637	839
Govind Rao v. Supajee, 12 C. P. L. R. 45	475
Govinda v. Perundevi, 12 M. 136	413
Govinda Pillay v. Meeunatchi Achi, 11 Ind. Cas. 152; 22 M. L. J. 204; (1911) 2 M. W. N. 563; 10 M. L. T. 493	382
Govindrav v. Jiwanji, 2 Bom. L. R. 201	173
Grant, W. M. v. Ram Rekha Bhaghat, 6 Ind. Cas. 501; 14 C. L. J. 10	47
Gray v. Turnbull, 1876 2 H. L. Sc. 53	816
Great Indian Peninsular Railway Company v. Chandra Bai, 28 A. 552 at p. 553; A. W. N. (1906) 101; 3 A. L. J. 329	131
Great Indian Peninsular Railway v. Ganpat Rai, 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543	132
Great North-West Central Railway v. Charlebois (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35	63
Great-Northern Railway Co., v. Witham, (1877) 9 C. P. 16; 43 L. J. C. P. 1; 29 L. T. 471; 22 W. R. 48	521
Great-Western Railway Co., v. Smith, (1876) 2 Ch. D. 235 at p. 253; 45 L. J. Ch. 235; 34 L. T. 267; 24 W. R. 443	840
Greedharee Doss v. Nundokissore Doss Mohunt, 11 M. L. A. 405; 8 W. R. 25 P. C.); 2 Suth. P. C. J. 86; 2 Sar. P. C. J. 306; 20 E. R. 154	64
Green v. Howell, (1910) 1 Ch. 495; 79 L. J. Ch. 542; 102 L. T. 347	66
Greenwood v. Holquette, 12 B. L. R. 42; 20 W. R. 467	752
Gregg v. Wells, (1839) 10 Ad. & E. 90; 2 P. & D. 296; 8 L. J. Q. B. 193; 113 E. R. 35; 50 R. R. 347	379
Gridhari Lall Roy v. Bengal Government, 12 M. L. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408.	109, 295
Grimwood v. Moss, (1872) 7 C. P. 560; 41 L. J. C. P. 239; 27 L. T. 26; 20 W. R. 972	840
Guddappa v. Tirkappa, 25 B. 189; 2 Bom. L. R. 869	930
Gudur Ranga Reddi v. Gundala Pitchi Reddi, 25 Ind. Cas. 973; 1 L. W. 879	490
Guiram Ghoshal v. Lal Behary Das, 6 Ind. Cas. 182; 14 C. W. N. 611; 11 Cr. L. J. 292; 12 C. L. J. 22; 37 C. 578	651
Gujja Lall v. Fatteh Lall, 6 C. 171 (F. B.); 6 C. L. R. 439; 5 Shome, L. R. 132	165
Gulab Kuor v. Ram Ratan Pandey, 27 Ind. Cas. 229; 18 C. W. N. 895	858
Gunga Narain Ghose v. Ramchand Ghose, 20 W. R. 311	848
Gunga Prosad v. Brojonath Das, 12 C. W. N. 642	■
Guunaiyan v. Kamakehi Ayyar, 26 M. 339	898
Hardeo Singh v. Chandrika Singh; 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611	929

G—concl'd.

	Page.
Gurulingaswami v. Ramalakshamma, 18 M. 53 at p. 5r; 4 M. L. J. 237	679
Gururajammah v. Venkatakrishnama Chetti, 24 M. 350	584
Gyll, <i>In re</i> , Board of Trade, <i>Ex parte</i> , (1888) 5 Mor. 272; 111 L. J. Q. B. 8; 59 L. T. 778; 37 W. R. 164	793

H

Habibullah v. Queen-Empress, 10 C. 937	656
Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed, 13 B. L. R. 91; 21 W. R. 303	638
Hafiz Muhammad Abdul Rahim v. Lala Tulshi Prasad, S. A. No. 1721 of 1903, decided on the 22nd of June 1905	184
Haji Abdul Rahiman v. Khoja Khaki Aruth, 11 B. 6.	265
Haji Abdul Rahman v. Haji Noor Mahomed, 16 II 141	826
Hakim Lal v. Mooshahar Sahu, 34 C. 999; 11 C. L. J. 410; 11 C. W. N. 889	779
Hakim Lal v. Ram Lal, 11 C. L. J. 11	616
Hale v. Lewis, (1838) 2 Keen, 318; 48 E. R. 651	640
Hamida Bibi v. Ali Husen Khan, 17 A. 172; A. W. N. (1895) 42	373, 823
Hamidunnessa Bibi v. Zohiruddin Sheikh, 17 C. 670	470
Hammersley v. De Biel, (1845) 12 Cl. & F. 45; 8 E. R. 1312; 69 R. R. 18	922
Hanco v. Harding, (1888) 20 Q. B. D. 732 at p. 736; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629	605
Hansraj v. Ganga Ram, 11 P. R. 1902; 119 P. L. R. 1902	194
Har Din Singh v. Lachman Singh, 25 A. 343; A. W. N. 1901 59	233
Har Lal v. Musammatt Gohri, 6 Ind. Cas. 942; 3 P. R. 1910 Rev.	523
Har Shankar Partab v. Lal Raghuraj Singh, 29 A. 59 (P. C.); 2 M. L. T. 391; 6 O. L. J. 13; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 34 I. A. 125	261
Haradhan Chattoraj v. Kartik Chandra Chattopadhyaya, 6 C. W. N. 77	182
Haradhan Rakshit v. Girish Chandra Mukerji, 4 Ind. Cas. 326; 13 C. W. N. 98	337
Harak Singh v. Kirat Narayan Singh, 4 Ind. Cas. 734; 10 C. L. J. 595	498
Harding v. Jones, 1 Tyr. & Gr. 125	677
Hari Chand v. Jiwan Mal, 28 P. R. 1903; 65 P. L. R. 1903	588
Hari Das Jati v. Panchkowri Ghosh, 9 Ind. Cas. 615	841
Hari Narayan Jog v. Vitai, 31 B. 560; 9 Bom. L. R. 1019	681
Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry, 27 C. 38; 4 C. W. N. 87	382
Harihar Chattopadhyaya v. Dinu Bera, 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536	153
Harish Chander Neogy v. Nishi Kanta Banerjee, 28 C. 591	151

H—contd.

	Page.
Harripria Debi v. Rukmini [Debi, 19 C. 438 (P. O.); 19 I. A. 79	154
Harris v. Best-Ryley & Co., (1892) 68 L. T. 76; 11 R. 222; 7 Asp. M. C. 272	525
Harris v. Knight (1890) 15 P. D. 170 at p. 179; 62 L. T. 507	688
Harrison v. Bush, (1855) 25 L. J. Q. B. 25; 5 El. & Bl. 344; 1 Jur. (N. S.) 846; 3 W. R. 474; 119 E. R. 509; 103 R. R. 507	329
Harrison v. Delhi and London Bank, 4 A. 437; A. W. N. (1882) 87	545
Harsuhai v. Bhawani Das, 43 P. R. 1869	478
Hart, <i>In re</i> , Grun, <i>Ex parte</i> , (1912) 3 K. B. 6; 81 L. J. K. 1213; 107 L. T. 368; 56 S. J. 615; 11 T. L. R. 11	438
Hassan Kuli Khan v. Nakohbedi Nonia, 33 O. 200	97
Hay v. Gordon, (1872) 1 A. Sup. Vol. 106; 10 B. L. R. 301; 18 W. R. 480	817
Hayman v. Governors of Rugby School, (1874) 18 Eq. 28; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587	66
Hays v. Padmanand Singh, 32 C. 118	174
Hemendra Nath Mukerji v. Kumar Nath Roy, 12 C. W. N. 478	252
Hern v. Nichols, (1708) 1 Salkeld, 289; 91 E. R. 256	600
Hester, <i>In re</i> , Hester, <i>Ex parte</i> , (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 Mer. 85	793
Hewitt v. Isham, (1851) 21 L. J. (N. S.) Ex. 35; 86 R. R. 576; 7 Ex. 77	473
Hewlins v. Shippam, 1826; 31 R. R. 757; 7 D. & R. 783; 5 B. & C. 221; 4 L. J. (O. S.) K. B. 241; 108 E. R. 82	474
Higgins v. Watervaliet, (1871) 46 N. Y. 23; 7 Am. Rep. 293	600
High Court Proceedings 5th August 1873, 7 M. H. O. R. App. XXVI	317
Hill v. Reg. (1854) 8 M. P. C. 138; 14 E. R. 53; 97 R. R. 39	66
Himalaya Bank, Limited v. F. W. Quarry, 17 A. 252 at p. 260; A. W. N. (1895) 97	941
Hinghan Khan v. Ganga Pershad, 1 A. 293	205
Hirada Karibasappa v. Gadigi Mudappa, 6 M. H. C. R. 197	431
Holmes v. Millage, (1893) 1 Q. B. 551; 62 L. J. Q. B. 380; 4 K. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 51	382
Hosseia Mahomed v. Fakir Mahomed, 4 Ind. Cas. 740; 10 C. L. J. 418	835
Houldsworth v. City of Glasgow Bank, (1880) 5 A. C. 317; 42 L. T. 194; 28 W. R. 677	600
Huguenin v. Baseley, 14 Ves. (Jun.) 273; 11 R. B. 276; 33 E. R. 526; 1 Wh. & T. L. C. (7th Ed.) 247	38
Hukeem Patto Muhammad v. Sheikh Davood, 20 Ind. Cas. 569; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. 852	476
Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree, 6 M. I. A. 393; 18 W. R. 81 note; Sevestre, 25 th n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147	740
Hunt v. Elmes, 2 DeG. F. & J. 578; 30 L. J. Ch. 255; 7 Jur. (N. S.) 200; 3 L. T. 796; 9 W. R. 362; 45 E. R. 745; 129 R. R. 204	122

H—conold.

	Page.
<i>Haradhun Mookurjia v. Muthoranath Mookurjia</i> , 4 M. I. A. 414; 7 W. R. 71 (P. C.); 1 Suth. P. C. J. 213; 1 Sar. P. C. J. 375; 8 E. R. 758 ...	817
<i>Hurban Sahye v. Thakoor Purshad</i> , 9 C. 209; 7 Ind. Jur. 306; 5 Shome, L. R. 22 ...	595
<i>Hurish Chunder Chowdhry v. Kali Sunderi Debi</i> , 10 I. A. 4; 9 C. 482; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406 ...	635
<i>Hurro Chunder Chuckerbutty v. Ramkissore Chuckerbutty</i> , W. R. (1864) 141 ...	595
<i>Hurry Ram v. Nursingh Lal</i> , 21 C. 129 ...	834

I

<i>Imandi Appalaswami v. Rajah of Vizianagaram</i> , 20 Ind. Cas. 838; 25 M. L. J. 50; (1913) M. W. N. 806 ...	732
<i>Imdad Ahmad v. Pateshri Partab Narain Singh</i> , 6 Ind. Cas. 981; 14 C. W. N. 842; 12 Bom. L. R. 419; 7 M. L. T. 414 (P. C.); 32 A. 241 ...	817
<i>Imperial Bank of Canada v. Bank of Hamilton</i> , (1903) A. C. 49; 72 L. J. P. C. 1; 51 W. R. 289; 87 L. T. 457; 19 T. L. R. 56 ...	404
<i>Inayat Khan v. Rahmat Bibi</i> , 2 A. 97 ...	124
<i>Indal Sah v. Bhabuti Singh</i> , 25 Ind. Cas. 6 ...	427
<i>Ishan Chunder Das Sarkar v. Bishu Sirdar</i> , 24 C. 825; 1 C. W. N. 665 ...	783
<i>Ishwar Chunder Dutt v. Ram Krishna Dass</i> , 5 C. 902; 6 C. L. R. 421; 3 Shome, L. R. 132 ...	410
<i>Ishwar Timappa v. Devar Venkappa</i> , 27 B. 146; 5 Bom. L. R. 19 ...	779
<i>Ismail Alibhai v. Emperor</i> , 26 Ind. Cas. 995; 39 B. 326; 16 Bom. L. R. 934; 16 Cr. L. J. 83 ...	1008
<i>Ismail Ariff v. Mahomed Ghouse</i> , 20 C. 834; 20 I. A. 99 ...	495
<i>Iswar Chunder Santra v. Satish Chunder Giri</i> , 30 C. 207; 7 C. W. N. 126 ...	601
<i>Iswaram Pillai v. Taregan</i> , 23 Ind. Cas. 951; 38 M. 758; 25 M. L. J. 127 ...	348

J

<i>Jackson, In re, Jackson v. Ward</i> , (1907) 2 Ch. D. 354; 76 L. J. Ch. 553 ...	380
<i>Jackson v. American Telephone Company</i> , (1905) 139 N. O. 347; 51 S. E. 1017; 70 L. R. A. 738 ...	601
<i>Jadu Lal v. Janki Koer</i> , 35 C. 575 ...	211
<i>Jafri Begam v. Amir Muhammad Khan</i> , 7 A. 822; A. W. N. (1885) 248 ...	129
<i>Jagadamba Chaudhrani v. Dakhina Mohun Roy</i> , 13 C. 308; 13 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715 ...	191
<i>Jagadindra Nath Roy v. Hemanta Kumari Debi</i> , 32 C. 129; 7 Bom. L. R. 765; 31 I. A. 202; 8 C. W. N. 809; 1 A. L. J. 585 ...	549, 945
<i>Jagdish Singh v. Narain Singh</i> , 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912 (F. B.); 173 P. L. R. 1912 ...	256
<i>Jagan Nath v. Champa</i> , 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87 ...	596
<i>Jagan Nath v. Nanak Chand</i> , 16 Ind. Cas. 996; 9 P. R. 1913; 248 P. L. R. 1913 ...	194

J—contd.

<i>Jagat Tarini Dasi v. Naba Gopal Chaki</i> , 5 C. L. J. 270; 34 C. 305 at p. 315 ...	694
<i>Jageshar Singh v. Raja Bhagwan Bakhsh Singh</i> , 9 Ind. Cas. 337; 14 O. C. 10 ...	850
<i>Jaggar Nath Pande v. Jokhu Tewari</i> , 18 A. 22; A. W. N. (1896) 43 ...	89
<i>Jagraj Kunwar v. Ganga Din</i> , 18 Ind. Cas. 38 ...	765
<i>Jagwant Singh v. Silan Singh</i> , 21 A. 285; A. W. N. (1899) 66 ...	678
<i>Jai Kishn v. Bhola Nath</i> , 14 A. 529; A. W. N. (1892) 106 ...	89
<i>Jaimangalbat Misrain v. Badan Chand Das</i> , 19 Ind. Cas. 899 ...	28
<i>Jaloo v. Emperor</i> , 15 P. R. 1904 Cr.; 1 Cr. L. J. 1063; 131 P. L. R. 1904 ...	967
<i>James v. Young</i> , (1884) 27 Ch. D. 652 at p. 662; 53 L. J. Ch. 793; 51 L. T. 75; 32 W. N. 981 ...	839
<i>Jamsedji Sorabji v. Lakshmiram Rajaram</i> , 13 B. 323 ...	72
<i>Janakdhari Lal v. Mohant Gossain Lal</i> , 1 Ind. Cas. 871; 37 C. 107; 13 C. W. N. 710; 11 C. L. J. 254 ...	351
<i>Janardan Dobey v. Ramdhone Singh</i> , 23 C. 738 ...	493
<i>Janga Nath v. Chet Ram</i> , 28 A. 470; A. W. N. (1906) 93; 3 A. L. J. 318 ...	114
<i>Janki v. Girjadar</i> , 7 A. 482; A. W. N. (1885) 97 ...	211
<i>Janki Das v. Bengal Nagpur Railway Company</i> , 13 Ind. Cas. 509; 16 C. W. N. 356 at p. 358; 15 C. L. J. 211 ...	121
<i>Janki Nath v. Prabhasini Dasi</i> , 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 173 ...	595
<i>Janki Prasad v. Ishar Das</i> , 21 A. 374; A. W. N. (1899) 126 ...	870
<i>Janoki Nath v. Mothuranath</i> , 9 C. 580; 12 C. L. R. 215 ...	681
<i>Jarat Kumari Dassi v. Bissessur Dutt</i> , 13 Ind. Cas. 577; 39 C. 245; 16 C. W. N. 265 ...	785
<i>Jarmain v. Chatterton</i> , 20 Ch. D. 494; 51 L. J. Ch. 471; 30 W. R. 461 ...	591
<i>Jaswant Rai v. Emperor</i> , 10 P. R. 1907 Cr.; 5 Cr. L. J. 439; 14 P. W. R. 1907 Cr.; 2 M. L. T. 272 ...	975
<i>Jatindra Mohan Tagore v. Ganendra Mohan Tagore</i> , (1872) L. R. I. A. Sup. Vol. 47 at pp. 66 & 67; 9 B. L. R. (P. C.) 377; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85 ...	894
<i>Jehan Kadr v. Afsar Banu Begum</i> , 12 C. 1; 12 I. A. 124; 9 Ind. Jur. 32; 4 Sar. P. C. J. 630; Refique & Jackson's P. C. No. 91 ...	260
<i>Jeolal Mahton v. Ioke Narayan Mahton</i> , 15 Ind. Cas. 184; 16 C. W. N. 466 ...	817
<i>Jethabhai Purbhudas v. Nathabhai Bavaji</i> , 28 B. 399 at p. 407; 6 Bom. L. R. 428 ...	678
<i>Jhangi Ram v. Budho Bai</i> , 84 P. R. 1901; 112 P. L. R. 1901 ...	196
<i>Jhoti Sahu v. Bhubun Gir</i> , 11 C. 143 ...	393
<i>Jhuman Karti v. Debu Lal Singh</i> , 16 Ind. Cas. 898; 22 C. L. J. 45 ...	703
<i>Jhunka Prasad v. Nathu</i> , 18 Ind. Cas. 960; 35 A. 263; 11 A. L. J. 293 ...	677
<i>Jhunku Singh v. Chatkan Singh</i> , 2 Ind. Cas. 221; 6 A. L. J. 247; 31 A. 325 ...	174
<i>Jib Lal Gir v. Jogmohan Gir</i> , 26 C. 576 ...	961

J—concl.

	Page.
Jiban Krishna Roy v. Brojo Lal Sen, 30 C. 550; 5 Bom. L. R. 428; 30 I. A. 81 (P. C.); 7 C. W. N. 425	581
Jiwar Singh v. Maharaja Jagat Singh, 1 P. R. 1898 Rev.	524
Jiwan Singh v. Misri Lal, A. W. N. (1894) 48	174
Jogdamba Koer v. Secretary of State, 16 C. 367; 13 Ind. Jur. 385	586
Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundopadhyaya, 7 C. W. N. 354	863
Jogeswar Narain Deo v. Ram Chandra Dutt, 23 C. 670; 23 I. A. 37	745
Johnson v. Johnson, (1802) 3 B. & P. 162; 127 E. R. 89; 6 R. R. 736	516
Johurra Bibee v. Sreegopal Misser, 1 C. 470	717
Jolliffe v. Baker, (1853) 11 Q. B. D. 255 at p. 269; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678	148
Jonardan Dobey v. Ramdhone Singh, 23 C. 738	
Jones v. Carter, (1846) 15 M. & W. 718; 71 R. R. 800; 153 E. R. 1040	840
Jones v. Gibbons, (1804) 9 Ves. 407; 7 R. R. 247; 32 E. R. 659	860
Jones v. Merionethshire Building Society, (1892) 1 Ch. 173; 6 L. J. Ch. 158; 63 L. T. 685; 40 W. R. 273; 17 Cox, C. C. 389	403
Jones v. Smith, 1 Hare, 43 at p. 62; 11 L. J. Ch. 83; 6 Jur. 8; 58 R. R. 22; 63 E. R. 943; affirmed, 1 Ph. 244; 12 L. J. Ch. 381; 7 Jur. 431; 41 E. R. 624	907
Jordon v. Money, (1854) 5 H. L. C. 185 at p. 245; 23 L. J. Ch. 845; 10 E. R. 868; 101 R. R. 116	577, 923
Joti Lal v. Durani Kower, Sup. B. L. R. 67 (F. B.); W. R. (F. B.) 173	18
Jotindra Mohun Tagore v. Jarao Kumari, 33 C. 140; 3 C. L. J. 7; 10 C. W. N. 201; 1 M. L. T. 8	410
Joy Chandra Sarkar v. Emperor, 10 Ind. Cas. 948; 38 C. 214 at p. 225; 12 Cr. L. J. 348	975
Joykishore v. Panchoo Baboo, 4 C. L. R. 538 at p. 555	14
Jugal Kishore Sahu v. Kedar Nath, 16 Ind. Cas. 401; 34 A. 606; 10 A. L. J. 211	51
Juggurnath v. Mukhun Koonwar, 3 W. R. 24	20
Jukes, <i>Ex parte</i> , Official Receiver, <i>In re</i> , (1902) 2 K. B. 58; 7 L. J. K. B. 710; 50 W. R. 560; 86 L. T. 456; 9 Manson, 249	441
Julia, Bland v. Ross, (186) 14 Moo. P. C. 210; Lush. 224; 15 E. R. 284; 134 R. R. 43	816
Justices of the Peace for Calcutta v. Oriental Gas Co., 8 B. L. R. 432; 17 W. R. 364	638

K

Kadala Reddi v. Narisi, 24 M. 504	430
Kade Mandal v. Abadali Molla, 6 Ind. Cas. 594; 14 C. W. N. 629	528
Kader Batcha v. Kader Batcha Rowthan, 29 M. 237; 4 Cr. L. J. 58	651
Kalawati v. Bukhan, 17 Ind. Cas. 254; 215 P. L. R. 1912; 187 P. W. R. 1912	539
Kali Charan Sirdar v. Sarat Chunder Chowdhury, 30 C. 397 (F. B.); 7 C. W. N. 545	194

K—contd.

	Page.
Kali Kishore Chowdhury v. Gopi Mohan Roy Chowdhury, 2 C. W. N. 166	573
Kali Krishna Tagore v. Secretary of State for India, 16 C. 173; 15 I. A. 186; 12 Ind. Jur. 413; 5 Sar. P. C. J. 237	124
Kalidas Mullick v. Kanhaya Lal Pundit, 11 I. A. 218; 11 C. 121	895
Kalikomul v. Uma Sunker, 10 C. 232; 10 I. A. 135; 13 C. L. R. 379; 7 Ind. Jur. 553; 4 Sar. P. C. J. 453	
Kallinath Chakravarti v. Upendra Chunder Chowdhury, 24 C. 212; 1 C. W. N. 163	835
Kalka Prasad v. Mathura Prasad, 30 A. 510; A. L. J. 701; 18 M. L. J. 424; 8 C. L. J. 447; 10 Bom. L. R. 1088; 13 C. W. N. 1; 11 I. A. 166; 11 O. C. 362; 4 M. L. T. 380	297
Kalka Singh v. Paras Ram, 22 I. A. 68; 22 O. 434	
Kalliyani v. Narayana, 9 M. 266	820
Kally Prosonno Ghose v. Gocool Chunder Mitter, 2 C. 295	
Kaly Soudery Dabia v. Hurris Chunder Chowdhury, 6 C. 594; 7 C. L. R. 543	638
Kalyan Singh v. Jagan Prasad, 30 Ind. Cas. 523; 13 A. L. J. 828; 37 A. 5-9	145
Kamakshi Nayakan v. Ramasami Nayakan, 7 M. L. J. 131	190
Kamala Kant Sen v. Abul Barkat, 27 O. 180	705
Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal, 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 4 9; 12 M. L. T. 439; (1912) M. W. N. 115; 13 Cr. L. J. 753	830
Kambinayani Javvaji Timmaji Anna Garu v. Kambinayani Javvaji Subbaraju Nayanivaru, 5 Ind. Cas. 640; (1910) M. W. N. 60; 22 M. L. J. 204; 7 M. L. T. 340; 33 M. 473	692
Kamla Kuar v. Har Sahai, A. W. N. (1898) 187	206
Kamma Narayanappa, <i>In re</i> , 8 Ind. Cas. 670; 11 Cr. L. J. 699; (1910) M. W. N. 100; 9 M. L. T. 97	324
Kamta Prasad v. Saiyed Ahmad, 1 Ind. Cas. 799; 31 A. 373; 6 A. L. J. 451	51
Kanakasabai Mudaliar v. Ponnusami Mudaliar, 21 Ind. Cas. 848	768
Kandasami Asari v. Somaskanta Ela Nidhi, 5 Ind. Cas. 922; 20 M. L. J. 371; 35 M. 177; (1910) M. W. N. 580; 7 L. J. 165	763
Kangasami v. Mattusami, 11 M. 144	847
Kanhaya Lal v. National Bank of India Ltd., 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104 (P. C.); 40 I. A. 56	402, 493
Kanhaya Lal v. Sardar Singh, A. 284; 4 A. L. J. 17; A. W. N. (1917) 46	772
Kannammal v. Virasami, 5 M. 486; 2 M. L. J. 114	677
Kanni Ammal v. Ammakannu Ammal, 23 M. 504; 10 M. L. J. 253	681
Kannu v. Natesa, 14 M. 477	412
Kapideo v. Thakur Prasad, 21 Ind. Cas. 839; 11 A. L. J. 96; 36 A. 17	741
Kapuria v. Mangal, 149 P. R. 1903; 192 P. W. R. 1908	832

K—contd.

	Page.
Karam Khan v. Nathan Khan, A. W. N. (1883) 4	205
Karupamaya Ananga Bheema v. Sondi Prahaladha Bissoyi Ratno, 21 Ind. Cas. 833; 14 M. L. T. 562; (1914) M. W. N. 179	731
Karvirappa, <i>In re</i> , 16 Ind. Cas. 497; 14 Bom. L. R. 587; 13 Cr. L. J. 689; 1 Bom. Cr. C. 154	970
Karyan Kandy Patupurail Cherla Chirikandan v. Ayliath Kushitath Krishnan Nambiar, 16 Ind. Cas. 391; 12 M. L. T. 600; 27 M. L. J. 690	932
Kasturchand Lakhmaji v. Jakhia Padia Patil, 31 Ind. Cas. 388; 17 Bom. L. R. 928; 4 B. 74	416
Kaveri v. Ananthayya, 10 M. 129; 11 Ind. Jur. 138	477
Kazee Syud Naser Ali v. Musammat Tinoo Dassia, 6 W. R. 95.	105
Kearney v. Whitehaven Colliery Company, (1893) 1 Q. B. 700; 62 L. J. M. C. 129; 4 R. 384; 68 L. T. 690; 41 W. R. 594; 57 J. P. 615	60
Kedarnath Dutt v. Sham Lal Khettry, 11 B. L. R. 405; 20 W. R. 150	554
Keet, <i>In re</i> , Official Receiver, <i>Ex parte</i> , (1908) 2 K. B. 666; 74 L. J. K. B. 694; 54 W. R. 20; 93 L. T. 259; 21 T. L. R. 315; 12 Manson 235	793
Keighley Maxsted & Co. v. Durant, (1901) A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527	763
Kenath Puthen Vittil Tavazhi v. Narayanan, 28 M. 182 at p. 194 (F. B.)	819
Kendall v. Hamilton, (1879) 4 A. C. 504 at p. 516; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97	214
Keshab Lal Nag v. Madhu Sudan Pal, 6 Ind. Cas. 685; 12 C. L. J. 126	497
Keshob Lal Nag Mozamdar v. Jnanendra Nath Ghose, 24 Ind. Cas. 538; 20 C. L. J. 332	497, 839
Keshav Lal Nag Mozamdar v. Harasit Ghose, Ind. Cas. 685; 12 C. L. J. 126	839
Khagaram Das v. Ram Sankar Das Pramanik, 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775	612
Khagendra Nath Chatterjee v. Sonatan Guha, 31 Ind. Cas. 987; 20 C. W. N. 149	492
Khajooroonissa v. Rowshan Jehan, 2 C. 184 at p. 191; 3 I. A. 291; 26 W. R. 36	396
Khettermanni Dasi v. Jiban Krishna Kundoo, 28 Ind. Cas. 510; 21 C. L. J. 315; 19 C. W. N. 516	464
Khierajmal v. Daim, 32 C. 296; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 20; 7 Bom. L. R. 1; 32 I. A. 28 (P. C.)	428
Khoo Kwat Siew v. Woi Taik Hwat, 19 C. 223 (P. C.); 19 I. A. 15	603
Khoo Sit Hoh v. Lim Thean Tong, (1912) App. Cas. 32; 81 L. J. P. C. 176; 106 L. T. 470	816
Khoorshedjee Manikjee v. Mehrwanjee Khoorshedjee, 1 M. L. A. 431 at p. 442; 5 W. R. 57 (P. C.); 1 Suth. P. C. J. 73; 1 Sar. P. C. J. 138; 18 E. R. 173	816
Khunni Lal v. Gobind Krishna Narain, 10 Ind. Cas. 477; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; 33 A. 356; (1911) 1 M. W. N. 432	477, 652

K—contd.

	Page.
Khurshaid Ali v. Mahbub Ali, Select Cases No. 226	776
King v. Henderson, (1898) A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 14 T. L. R. 490; 47 W. R. 157 (P. C.)	143
King v. Hoare, 1844) 13 M. & W. 494 at pp. 501, 508; 2 D. & L. 382; 14 L. J. Ex. 29; Jur. 1127; 153 E. R. 206; 67 R. R. 694	214
King-Emperor v. Alexander Allan, 25 M. 627; 12 M. L. J. 393; 1 Weir 727	731
Kishen Pershad Pandey v. Tiluckdhari Lall, 18 C. 182	639
Kishori Lal v. Chunni Lal, 1 Ind. Cas. 128; 31 A. 116; 9 C. L. J. 172 (P. C.); 5 M. L. T. 58, 13 C. W. N. 370; 11 Bom. L. R. 196; 19 M. L. J. 183; 36 I. A. 9	723
Kishori Mohan Rose v. Sheikh Uzir, 6 Ind. Cas. 335; 37 C. 610; 14 C. W. N. 693.	98
Kocharla Seetamma v. Pillala Venkataramanayya, 21 Ind. Cas. 387; 38 M. 308 at p. 309; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918	284
Kolathu Aiyar v. Rangavadhyar, 18 Ind. Cas. 203; 24 M. L. J. 84 at p. 87; (1913) M. W. N. 163; 13 M. L. T. 179	491
Kolha Koer v. Muneswar Tewari, 34 C. 840; 6 Cr. L. J. 452	331
Kondamodalu Linga Reddi v. Alluri Sarvarayudu, 6 Ind. Cas. 497; 34 M. 221; 8 M. L. T. 105; (1910) M. W. N. 453; 20 M. L. J. 608	207
Kondiba v. Nana Shidrao, 27 B. 408; 5 Bom. L. R. 269	908
Konsilla v. Ishri Singh, 6 Ind. Cas. 188 32 A. 499; 7 A. L. J. 420	28
Korapalu v. Narayana, 20 Ind. Cas. 930; 25 M. L. J. 315; (1913) M. W. N. 655; 38 M. 445	836
Kowsulliah Sundari Dasi v. Mukta Sunderi Dasi, 11 C. 588	572
Koylashbashiny Dossee v. Gocoolmoni Dossee, 8 C. 230; 10 C. L. R. 41	217
Kripa Nath Chakarabutty v. Sheikh Anu, 10 C. W. N. 944; 4 C. L. J. 332	153
Krishan v. Chadayan Kutti Haji, 17 M. 17	513
Krishna v. Akilanda, 13 M. 54	452
Krishna v. Rayappa Shanbhaga, 4 M. H. C. R. 98	96, 473
Krishna Aiyar v. Chakrapani, 29 Ind. Cas. 475	768
Krishna Iyer v. Balammal, Ind. Cas. 412; 34 M. 394; M. L. T. 314	471
Krishna Pershad Singh v. Gosta Bohari Kundu, 5 C. L. J. 434 at p. 436	86
Krishna Reddy v. Emperor, 5 Ind. Cas. 881; 33 M. 90; 11 Cr. L. J. 250; 20 M. L. J. 102; 7 M. L. T. 128	334
Krishnabai v. Sonubai, 2 B. H. C. R. 310	188
Krishnaji Mahadev Mahajan v. Moro Mahadev Mahajan, 15 B. 32	725
Krishnan Embrandri v. Marakkar, 1 M. L. T. 432	126
Krishnaswami Chettyar v. Thippa Ramaswami Chettyar, 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131 at p. 260; (1911) 1 M. W. N. 89	827
Krishnayya v. Unnissa Begam, 15 M. 399	830
Kristnam Sooraya v. Pathma Bee, 29 M. 151	126
Kristnama Chariar v. Mangammal, 26 M. 91 at p. 94	79

K—concl'd.

	Page.
Kristo Bulluv Ghose v. Kristo Lal Singh, 16 C. 642	252
Kristo Gobind v. Hem Chunder, 16 C. 511	581
Kristo Kamini Dassi v. Administrstor-General, Bengal, 7 C. W. N. 476	960
Kristodhone Ghose v. Brojo Gobindo Roy, 24 C. 895; 1 W. N. 442	46
Kristodhone Mitter v. Nandarani Dassea, 12 C. W. N. 969; 35 C. 889	452
Kshetra Mohan v. Man Gobinda Pal, 6 Ind. Cas. 12; 14 C. W. N. 558	396
Kuarmani Singha Mandhata v. Wasif Ali Murza, 28 Ind. Cas. 818; 9 C. W. N. 1193	548
Kudrathi Begum v. Najibunnessa, 25 C. 93	772
Kumara Venkata Perumal v. Thatha Ramasawmy Chetty, 9 Ind. Cas. 875; 35 M. 75; 21 M. L. J. 709, (1911) 1 M. W. N. 290; 9 M. L. T. 487	68
Kunj Bihari Prasadji v. Keshavalal Hiralal, 28 B. 567 at p. 572; 6 Bom. L. R. 475	706
Kuram Krishnama Chariar v. Veeravelli Krishnama Chariar, 19 Ind. Cas. 452; 38 M. 166; 24 M. L. J. 517; 1913 M. W. N. 355; 3 M. L. T. 385	767
Kuria v. Nanak, 7 P. R. 1905 Rev; 68 P. L. R. 1906	524
Kurri Veerareddi v. Kurri Bapireddi, 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153	489
Kurupam Zemindar v. Merangi Zemindar, 5 M. 253; 6 Ind. Jur. 465	229
Kutti Ammal v. Radakristna Aiyar, 8 M. H. C. R. 88	297
Kutti Chettiar v. Subramania Chettiar, 32 M. 485	513

L

Lachmi Chand Jhavar v. Hemendra Prosad Ghosh, 26 Ind. Cas. 736, 935 18 C. W. N. 1240	713
Lachmin Kuar v. Debi Prasad, 20 A. 435; A. W. N. (1898) 101	725
Labar Puri v. Puran Nath, 29 Ind. Cas. 724; 37 A. 298; 19 C. W. N. 718; 21 C. L. J. 499; 17 Bom. L. R. 475; 18 M. L. T. 39; 29 M. L. J. 75; 2 L. W. 569; (1915) M. W. N. 526; 42 I. A. 115	887
Lakhi Narain Jagdes v. Kritibas Das, 19 Ind. Cas. 971; 18 C. L. J. 133	51
Lakho Bibi v. Salamat Ali, 20 A. 337; A. W. N. (1898) 59	768
Lakhoomal v. Joomromal, 1 S. L. R. 71	868
Lakhya Dasya v. Umakanto, 2 Ind. Cas. 318; 14 C. W. N. 256	431
Lakshman Mayaram v. Jamnabai, 6 B. 225 at p. 243	725
Lakshmi Bibi Kujrani v. Atal Behari Haldar, 21 Ind. Cas. 117; 40 C. 524	734
Lakshmi Doss v. Roop Lal, 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4	489
Lakshmana Chetti v. Chinnathambi Chetti, 24 M. 326	519
Lakshmandas Raghunathdas v. Jugalkishore, 22 B. 216	385
Lal Achal Ram v. Raja Kazim Husain Khan, 9 C. W. N. 477; 27 A. 271; 1 O. C. 155; 15 M. L. J. 197; 32 I. A. 113	956

L—concl'd.

	Page.
Lal Bahadur v. Kauhaya Lal, 29 A. 244 at pp. 254, 255; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 229; 9 Bom. L. R. 597 (P. C.)	729
Lal Mahomed Sarkar v. Jagir Sheikh Mallik, 2 Ind. Cas. 654; 13 C. W. N. 913	913
Lalit Mohan Ghose v. Gopal Chank Coal Co., Ltd., 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55	616
Lalji Panday v. Barhamdeo Panday, 13 Ind. Cas. 29; 16 C. W. N. 89	528
Lalji Sahoy v. Odoya Sunderi Mitra, 14 C. 757	408
Lalla Kanhoo Lal v. Musammat Manki Bibi, 1 C. W. N. 601	172
Land Mortgage Bank of India v. Moti, 1 A. 69; A. W. N. (1885) 3	576
Lea, <i>In re</i> , Lea v. Cooke, (1887) 34 Ch. D. 528; 55 L. J. Ch. 67; 56 L. T. 482; 35 W. R. 572	168
Leelanund Singh v. Musammat Lakhputtee Thakoorain, 22 W. R. 231	535
LeGeyt v. Harvey, 1 B. 501	758
Lever v. Goodwin, (1887) 36 Ch. D. 1 at pp. 3, 7; 57 L. T. 583; 26 W. R. 177	533
Lister v. Perryman, (1870) 39 L. J. Ex. 177; 4 H. L. 521; 23 L. T. 269; 19 W. R. 9	151
Lloyd v. Grace, Smith & Co., 1912 A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547	599
Lloyd v. Roberts, (1858) 12 Moore, P. C. 158; 14 M. R. 871	688
Lock v. Pearce, (1893) 2 Ch. 271; 62 L. J. Ch. 582; 2 R. 403; 68 L. T. 569; 41 W. R. 369	537
Lodge v. National Union Investment Company Limited, (1907) 1 Ch. 300 at p. 307; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187	493
Loffus v. Maw, (1862) 3 Giff. 592 at p. 594; 1 Jur. (N. s.) 607; 6 L. T. 346; 10 W. R. 513; 66 E. R. 544; 32 L. J. Ch. 49; 133 R. R. 193	923
Logadapatti Chinnayya v. Kotla Ramanna, 19 Ind. Cas. 579; 38 M. 203; (1913) M. W. N. 387; 3 M. L. T. 421; 25 M. L. J. 228	265
Loke Nath Singh v. Gaju Singh, 31 Ind. Cas. 426; 22 C. L. J. 33; 20 C. W. N. 178	791
Lokenath Bidyadhar Mohapatra v. Jahania Bibi, 12 Ind. Cas. 305; 14 C. L. J. 572	229, 841
London and South Western Railway Company, v. Gomin, 1882 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 20 W. R. 620	484
Long v. Bishop of Cape Town, (1863) 1 Moo. P. C. (N. s.) 411; 2 N. II 465; 15 E. R. 756; 9 Jur. (N. s.) 805; 8 L. T. 738; 11 W. R. 900; 138 R. R. 553	561
Lord v. Lord, (1867) 2 Ch. App. 782 at p. 789; 36 L. J. Ch. 533 at p. 538	158
Lowe v. Adams, (1901) 1 Ch. 598; 70 L. J. Ch. 783; 50 W. R. 37; 85 L. T. 195; 17 T. L. R. 763	475
Luchmun Chunder Geer Gossain v. Kalli Churn Singh, 19 W. R. 292	440
Lukhi Narain Jagadeb v. Jodu Nath Deo, 21 C. 504; 21 I. A. 39	541
Lutf Ali Khan v. Asgur Reza, 17 C. 455	639
Lysaght v. Edwards, 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778	70

M

	Page.
Ma E v. Maung San Da, 3 Bur. L. R. 8; 1 Chan. Toon, 140	162
Machaima v. Usman Beari, 17 M. L. J. 78	431
Mackay v. Commercial Bank of New Brunswick, (1874) 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 11 W. R. 473	600
Macmillan v. Suresh Ohunder Deb, 17 C. 951	358
Madan Lal v. Reoti Singh, 4 A. L. J. 249; A. W. N. (1907) 108	173
Madan Mohan Chakrawarty v. Sasbi Bhusan Mukherji, 31 Ind. Cas. 549; 19 C. W. N. 1211 at p. 1214	455
Madar Saheb v. Sannabawa, 21 B. 195	839
Maddison v. Alderson, (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 203; 31 W. R. 820; 47 J. P. 821	923
Madhavi v. Keln, 15 M. 264	929
Madras Building Company v. Rowlandson, 13 M. 383	123
Madugula Latchiah v. Mukkalanga, 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350	491
Magniram v. Mehdi Hassein Khan, 31 C. 95; 8 C. W. N. 20.	124, 929
Magu Brahma v. Bholi Das, 20 Ind. Cas. 195; 19 C. L. J. 352; 18 C. W. N. 657	908
Mahabeer Singh v. Dhujoo Singh, 20 W. R. 172	572
Mahabir Prasad v. Basant Singh, 12 Ind. Cas. 347; 14 O. C. 299	758
Mahadu Ganu v. Bayaji Sidu, 19 B. 239	18
Mahamad Haji Zakeria v. Ahmadbhai Habibhai, 25 B. 327; 3 Bom. L. R. 368	782
Mahammadunissa Begum v. J. C. Bachelor, 29 B. 428; 7 Bom. L. R. 477	606
Mahapanda Roy v. Sarat Moni Debi, 10 Ind. Cas. 374; 14 C. L. J. 585	818
Maharaja of Bobbili v. Venkataramanjulu Naidu, 25 Ind. Cas. 585; 27 M. L. J. 409; 16 M. L. T. 181	797
Maharaja Jagatjit Singh Bahadur v. Suraj Baksh Singh, 8 O. C. 145 at p. 148	769
Maharaja Kesho Prasad Singh v. Baijnath Saran Pande, Selected Decision No. 14 of 1913	706
Maharaja Manindra Chandra Nandi v. Kashi Chandra Bakshi, 15 Ind. Cas. 458; 15 C. L. J. 507	465
Maharajah of Venkatagiri v. Velikanti Rami Reddi, 34 Ind. Cas. 607	732
Maharana Futtehsangji Jaswantsangji v. Dessai Kullianraji Hekoomutraji, 21 W. R. 178	452
Mahomed Mehdi Faya Tharia Topan v. Sakina-bai, 17 Ind. Cas. 629; 37 B. 393; 14 Bom. L. R. 908	477
Mahomed Musa v. Aghore Kumar Ganguli, 28 Ind. Cas. 930; (1915) M. W. N. 621; 17 Bom. L. R. 420; 21 C. L. J. 231; 13 A. L. J. 224; 42 C. 801; 42 I. A. 1; 28 M. L. J. 548; 19 C. W. N. 250	299, 922
Mahomed Muzaffar Hoosein v. Kishori Mohun Roy, 22 I. A. 129; 20 C. 909	440
Mahomed Umar v. Chimansing, 25 Ind. Cas. 935; 8 S. L. R. 91	928
Mahomed Wahiduddin v. Hakimian, 25 C. 757 at p. 767; 2 C. W. N. 529	196
Mainland v. Upjohn, (1889) 41 Ch. D. 126; 58 L. J. Ch. 361; 60 L. T. 614; 37 W. R. 411	701

M—contd.

	Page.
Makhada Dasse v. Nundo Lal Haldar, 5 C. W. N. 297; 28 C. 278 at p. 288	279
Malayandi Goundan v. Subbaraya Vanavaraya Goundan, 8 Ind. Cas. 854; 21 M. L. T. 521; 9 M. L. T. 163; (1911) 1 M. W. N. 50	623
Malkarjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.)	190, 289, 428
Manasaram Paria v. Nagendra Nath Sahu Roy, 16 Ind. Cas. 235; 16 C. L. J. 557	830
Mancharam v. Pranshankar, 6 B. 298	911
Manekji Framji v. Rustomji Naserwanji Mistry, 14 B. 269	941
Mangal Das v. Jewan Ram, 23 B. 673	452
Mangal Sen v. Rup Chand 13 A. 324; A. W. N. (1891) 86	114
Mangat Ram v. Devi Chand, 20 P. R. 1906; 69 P. L. R. 1906	586
Manikyamala Bose v. Nand Kumar Bose, 33 C. 1306; 4 C. L. J. 357; 11 C. W. N. 12	894
Manilal v. Kavasji, 9 Ind. Cas. 124; 4 S. L. R. 250	891
Manilal Rewadat v. Bai Rewa, 17 B. 758	18
Manindra Chandra Nandy v. Jamahir Kumari, 32 C. 642; 9 C. W. N. 670	181
Manji Karimbhai v. Hoorbai, 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044	123
Manjuri Bibi v. Akkel Mahmud, 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889	28
Manly v. Patterson, 7 C. 339; 9 C. L. R. 166	639
Manmohandas Ramji v. N. C. Macleod, 26 B. 765; 4 Bom. L. R. 154	603
Manohar Lal v. Jadunath Singh, 33 I. A. 128; 4 C. L. J. 8; 1 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710 (P. C.)	214
Mansab Ali v. Gulab Chand, A. W. N. (1887) 292	174
Mansab Ali v. Nihal Chand, 15 A. 359; A. W. N. (1893) 113	637
Mansingh v. Rampiare, 8 Ind. Cas. 1184; 6 N. L. R. 185	462
Mapleback, <i>In re</i> , Caldecott, <i>Ex parte</i> , 4 Ch. D. 150; 46 L. J. Bk. 14; 35 L. T. 503; 25 W. R. 103; 13 Cox, C. C. 374	404
Maqsood-ul-Nissa v. Kaniz Zohra, 135 P. R. 1908; 194 P. W. R. 1908	583
Mariamnissa Bibi v. Joynab Bibi, 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149	584
Marimuthu v. Saminatha Pillai, 21 M. 366	431
Marogowdha v. Srinivasa kangachar, 12 Ind. Cas. 90; 35 M. 594; 21 M. L. J. 843; (1911) 2 M. W. N. 141; 10 M. L. T. 192; 12 C. L. J. 482	973
Marquis of Abergavenny v. Bishop of Llandaff, (1888) 20 Q. B. D. 460; 57 L. J. Q. B. 233; 58 L. T. 812; 36 W. R. 859	60
Martha Pool v. Secretary of State for India, 68 P. R. 1886	543
Martin & Co. v. Fakir Chand Sahu, 7 Ind. Cas. 241; 12 C. L. J. 14; 14 C. W. N. 888	132
Masilamania Pillai v. Thiruvengadam Pillai, 31 M. 385	157

M—contd.

	Page.
Mata Din v. Ahmad Ali, 13 Ind. Cas. 976; 16 C. W. N. 338; 11 M. L. T. 145; 1912 M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213. 21 M. L. J. 6. 9 I. A. 49	85
Mata Din Kasodhan v. Kazim Husain, 13 A. 432	477
Mathura Das v. Raja Narindar Bahadur, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88	918
Mauladan v. Rughunandan Pershad Singh, 27 C. 7	107
Maung Bwin v. Ma Hlaing, 3 L. B. R. 100	154
Maunsell v. Hedges, (1854) 4 H. L. C. 1039; 10 E. R. 769; 94 R. R. 532	922
McEacharn v. Colton, (1902) A. C. 104. 71 L. J. P. C. 20	839
McGowan v. Dyer, 1873 8 Q. ■ 141 at p. 145; 21 W. R. 560	600
McIntire v. Pryor, (1898) 173 U. S. 38; 43 Law. Ed. 606	601
Meenatchi Achi v. Ananthanarayana Ayyar, 26 M. 224; 12 M. L. J. 380	373
Meghan Dube v. Pran Singh, 30 A. 63; 5 A. L. J. 14; A. W. N. (1908) 10	299
Mehdi Abbas v. Muhammad Fakhr-ud-Din, 11 O. C. 217	387
Mehdi Husain v. Sughra Begam, 25 A. 206; A. W. N. (1903) 15	823
Meherally v. Sakerkhanonbai, 7 Bom. L. R. 602	471
Merali Visram v. Sheriff Devji, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017	847
Merriman v. Williams, 1882; 7 A. C. 484; 51 L. J. P. C. 95; 47 L. T. 51	561
Meser Mullick v. Hafiz-ud-din Mullick, 9 Ind. Cas. 965; 13 C. L. J. 316	451
Metropolitan Railway Company v. Defries, (1876-77) 2 Q. B. D. 87; 36 L. T. 494; 25 W. R. 841	8
Miajan v. Minnat Ali, 24 C. 521	76
Michell v. Wilson, (1877) 25 W. R. 380	640
Midnapore Zemindary Company, Limited v. Nitya Kali Dasi, 24 Ind. Cas. 243	584
Milan Khan v. Sagai Bepari, 23 C. 317	815
Milburn v. Wilson, (1901) 31 Can. Sup. Court 481	601
Miller v. Babu Madho Das, 19 A. 76 at p. 92; 23 I. A. 106; 7 Sar. P. C. J. 73	534, 573
Mills v. Green, 159 U. S. Sup. Court 651; 40 Law. Ed. 293	412
Minakshi Naidu v. Subramanya Sastri, 14 I. A. 160; 1 M. 26 5 Sar. P. C. J. 34; 10 Ind. Jur. 293	637
Mir Eusuff Ali Haji v. Panchanan Chatterjee, 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 659	51
Mir Haidar v. Muhammad Ali, 10 Ind. Cas. 855; 14 P. R. 1911; 88 P. L. R. 1911; 44 P. W. R. 1911	137
Mir Sarwarjan v. Fakhruddin Mahomed, 13 Ind. Cas. 331; 31 C. 232 at p. 236; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156 (P. C.)	209

M—contd.

	Page.
Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury, 22 Ind. Cas. 685; 19 C. W. N. 287	791
Mrs. Stewart v. Bank of Upper India Ltd., Simla, 34 Ind. Cas. 937	933
Mohabharat Shaha v. Abdul Hamid Khan, 1 C. L. J. 73	703
Mohabir Prosad Singh v. Adhikari Kunwar, 21 C. 473	639
Mohammad Abdul Karim Khan v. Nawaz Singh, 8 Ind. Cas. 377; 13 O. C. 303	280
Mohan v. Tukaram, 21 B. 63	196
Mohandas v. Krishnabai, 5 B. 597	110
Mohansing Chawan v. Henry Conder, 7 B. 473	132
Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi, 16 C. 472; 16 I. A. 22; 5 Sar. P. C. J. 321	842
Mohini Mohan Patra v. Ram Narain Patra, 12 Ind. Cas. 780; 14 C. L. J. 445	789
Mohunt Deo Surun Poory v. Moonshee Mahomed Ismail, 24 W. R. 300	452
Monessur Doss v. Beer Protap Sahee, 15 W. R. 188	383
Monindra Chandra Nandy v. Troyluckho Nath Burat, 2 C. W. N. 750	117
Moniram Kolita v. Keri Kolutani, 7 I. A. 115; at p. 153; 5 C. 776 at p. 788; 6 C. L. R. 322; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome, L. R. 198	426
Mookhesur v. Ramphul, 5 N.-W. P. H. C. R. 70	36
Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, 11 M. L. A. 551; 5 W. R. 3 (P. C.); 2 Suth. P. C. J. 59; 20 E. R. 203; 2 Sar. P. C. J. 259	539
Moore v. Culverhouse, 27 Beav. 639; 29 L. J. Ch. 419; 6 Jur. (N. S.) 115; 1 L. T. 386; 54 E. R. 254; 122 R. R. 570	854
Morrison v. Verschoye, 6 C. W. N. 429	601
Morufal Huq v. Surendra Nath Roy, 15 Ind. Cas. 893; 16 C. W. N. 1002	265
Moses v. Macferlan, (1760) 2 Burr. 1005; Buller 126; 1 Black. 219; 97 E. R. 676	493
Motilal v. Govindram, 30 B. 83 at p. 87; 7 Bom. L. R. 325	601
Mottai Reddy v. Thanappa Reddy, 26 Ind. Cas. 181; 37 M. 385	403
Moulton v. Cornish, 138 N. York, 133; 20 L. R. Annotated 370	509
Mowla Buksh v. Kishen Pertab Sahi, 24 W. R. 150; 1 C. 102	639
Moxon v. Payne, 8 Ch. App. 881; 43 L. J. Ch. 240	38
Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry, 4 M. L. A. 431; 7 W. R. 73 (P. C.); 1 Suth. P. C. J. 216; 1 Sar. P. C. J. 378; 18 E. R. 764	817
Muhammad Anwar-ul-Haq v. Habibul Rahman, 74 P. R. 1902	137
Muhammad Din v. Sadar Din, 67 P. R. 1901	937
Muhammad Husain v. Sultan Ali, 54 P. R. 1903	137
Muhammad Husain Saib v. Abdul Kareem, 29 Ind. Cas. 237; 17 M. L. T. 424	757

M—contd.

	Page.
Muhammad Ishaq v. Maqim-ud-din, 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913 ...	334
Muhammad Jafar v. Muhammad Ibrahim, 24 M. 243 ...	552
Muhammad Kamil v. Imtiaz Fatima, 4 Ind. Cas. 457; 31 A. 557 at p. 570 (P. C.); 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 36 I. A. 210 ...	220
Muhammad Karimullah Khan v. Jhaman Singh, 18 Ind. Cas. 734; 11 A. L. J. 277 at p. 279 ...	755
Muhammad Mumtaz Ahmad v. Zubaida Jan, 16 I. A. 205; 11 A. 460; 5 Sar. P. C. J. 433 ...	817
Muhammad Musaliar v. Kunji Chek Musaliar, 11 M. 322; 2 Weir, 117 ...	651
Muhammad Usan Rowthan v. Abdulla, 24 M. 171 ...	513
Muhammad Zahur v. Cheda Lal, 14 A. 141; A. W. N. (1892) 3 ...	221
Mukta Nath Roy Chowdhuri v. Jitendra Nath Roy Chowdhuri, 27 Ind. Cas. 677; 22 C. L. J. 262; 19 C. W. N. 1295 ...	850
Mukund Harshet v. Haridas Khemji, 17 B. 23 ...	919
Mul Chand v. Sadhu Singh, 59 P. R. 1893 ...	721
Mulji Virji v. Bangabashi Saha, 9 C. W. N. 502 ...	639
Mulla Veetil Seethi v. Achuthan Nair, 9 Ind. Cas. 513; 21 M. L. J. 213 (F. B.); 9 M. L. T. 431; (1911) 1 M. W. N. 165 ...	507
Mullins v. Smith, 1890) 1 Dr. & Sm. 204; 1 W. R. 739; 62 E. R. 356; 127 R. R. 83 ...	158
Mulraj Khatan v. Vishwanath Prabhuram Vadya, 17 Ind. Cas. 627; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 37 B. 198; 40 I. A. 24 ...	70
Mulluck Chand Das v. Satish Chandra Das, 3 Ind. Cas. 206; 11 C. L. J. 56; 14 C. W. N. 335 ...	47
Muncherji Bamanji Panthaki v. Dorabji Jehaugir Randiva, 19 B. 775 ...	343
Mungul Pershad Dicit v. Grija Kant Lahiri, 8 C. 51; 11 C. L. R. 113; 8 I. A. 113; 4 Sar. P. C. J. 249 ...	146
Munsob Bibee v. Ali Minh, 7 W. R. 258 ...	815
Muruga Chetty v. Rajasami, 14 Ind. Cas. 823; 22 M. L. J. 284; 19 2) M. W. N. 362; 1 M. L. T. 280 ...	640
Murugesu Chetti v. Chinnathambi Goundan, 24 M. 421 at p. 423 ...	510, 731
Musahar Sahu v. Hakim Lal, 32 Ind. Cas. 343; 3 L. W. 20; 20 C. W. N. 393; 14 A. L. J. 193; (1916) M. W. N. 198; 9 M. L. T. 20; 24 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 52; 30 M. L. J. 116 ...	781
Musammam Amirrunesse v. Baboo Behary all, 25 W. R. 529 ...	649
Musammam Anundmoyee Chowdhurayan v. Sheeb Chunder Roy; 9 M. I. A. 287 at pp. 287, 30; 2 W. R. 9; 1 South. P. C. 485; 1 Sar. P. C. J. 854; 19 E. R. 750 ...	242
Musammam Bhoban Moyee Debia v. Ram Kishore Acharj Chowdhury, 10 M. I. A. 79 at pp. 80, 81; 3 v. R. (P. C.) 15; 1 South. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 973 ...	893
Musammam Brij Coomareo v. Ramrick Dass, 5 C. W. N. 781 ...	637
Musammam Bulli Kunwar v. Musammam Bhagirathi, 9 C. W. N. 619; 15 M. L. J. 267 ...	817

M—concl.

	Page.
Musammam Chander v. Murat Singh, 7 C. P. L. R. 153 ...	681
Musammam Dal Koer v. Musammam Panbas Koer, 8 C. W. N. 658 ...	682
Musammam Hoymobutty Dossee v. Sreckishen Nundee, 14 W. R. 58 ...	815
Musammam Kollany Kooer v. Luchmee Pereshad, 24 W. R. 395 ...	379
Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry, 6 M. I. A. 27; 8 Moo. P. C. 90; 1 Sar. P. C. J. 489; 19 E. R. 11; 14 E. R. 35; 97 R. R. 38 ...	440
Musammam Parmeshri v. Vasdco, 35 P. R. 1885 ...	478
Musammam Thukrain Sookraj Koowar v. Government, 14 M. I. A. 112; 2 Sar. P. C. J. 705; 20 E. R. 728 ...	410
Muthiah Chettiar v. Bawa Sahib, 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969 ...	830
Muthukaruppan Chettiar v. Muthuraman Chettiar, 26 Ind. Cas. 282; (1914) M. W. N. 899; 1 L. W. 1012 ...	697
Muthukaruppan Samban v. Muthu Samban, 25 Ind. Cas. 772; 38 M. 1158; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497 ...	921
Muthukumaraswami Pillai v. Emperor, 14 Ind. Cas. 896; 13 Cr. L. J. 352; (1912) M. W. N. 549; 12 M. L. T. 1; 35 M. 397 at p. 490 ...	308
Muthuraman Chettiar v. Sundra Kumara Ettappa Sami, 9 M. L. J. 113 at p. 115 ...	382
Muttyjan v. Ahmad Ally, 8 C. 370; 10 C. L. R. 346 ...	129
Mylapore Iyaswami Vyapoory Moodliar v. Yeokay, 14 C. 801; 14 I. A. 168; 11 Jur. 327; 5 Sar. P. C. J. 50 ...	445

N

Nabadwipendra Mookerjee v. Madhu Sudan Mondal, 16 Ind. Cas. 741; 18 C. W. N. 473 ...	445
Nabia v. Musammam Fatto, 5 Ind. Cas. 232; P. R. 910; 4 P. W. R. 1910; 156 P. L. R. 1910 ...	937
Nadamuni, Narayana Iyengar v. Veerabhadra Pillai, 8 Ind. Cas. 429; 31 M. 417; (1910) M. W. N. 16; 9 M. L. T. 12; 21 M. L. T. 928 ...	759
Nadir Chand Shaba v. Wood, 25 C. 194; 12 C. W. N. 450 ...	131
Naganada Davay v. Bappu Chettiar, 27 M. 424 at p. 42; 4 M. L. J. 69 ...	753
Nagindas Bhugwandas v. Bachoo Hukissendas, 2 Ind. Cas. 43; 19 G. M. W. N. 258; 23 C. L. J. 95 (P. C.); 20 M. L. J. 193; 20 C. W. N. 702; 4 A. L. J. 185; 3 L. W. 259; 19 M. L. J. 93; 18 Bom. L. R. 172 ...	11
Naginlal Chudilal v. Official Assignee, 17 Ind. Cas. 876; 7 B. 24; 14 Bom. L. R. 1146 ...	536
Nain Singh v. Mahmood Ali, Selected Decision No. 4 of 1910 ...	149
Najm-un-nissa v. Rajaib Ali Khan, 22 A. 343; A. N. (1900) 102 ...	211
Nalini Behari Roy v. Fulmani Dasi, 13 Ind. Cas. 487; 15 C. L. J. 383 at p. 391; 16 C. W. N. 411 ...	79
Namasivayam Pillai v. Nellayappa Pillai, 18 M. ...	492

N—contd.

	Page.
Nambelumal Chetty v. Pasunarty Kaunia Chetty, 28 Ind. Cas. 959	767
Nanack Chand v. Teluckdye Koer, 5 C. 265; 4 C. L. R. 358	513
Nanammal v. Collector of Trichinopoly, 5 Ind. Cas. 879; 20 M. L. J. 97	382
Nandi Reddy v. Thimmakka, 22 Ind. Cas. 250; 14 M. L. T. 477	903
Nanjaya Audali v. Shamuga Mudali, 22 Ind. Cas. 555; 26 M. L. J. 576; 15 M. L. T. 186; (1914) M. W. N. 756; 38 M. 684	798
Nandlal Thakersey v. Bank of Bombay, 4 Ind. Cas. 652; 11 Bom. L. R. 926	752
Nandlal Thakersey v. Bank of Bombay, 5 Ind. Cas. 457; 12 Bom. L. R. 316	752
Narain Das v. Manohar Lal, 21 P. R. 1893 (F. B.)	194
Naraini Kuar v. Chandi Din, 9 A. 467; A. W. N. (1887) 118	297
Narasimhal v. Balaramachari, 1 M. H. C. R. 420	20
Narasimha Nayanevaru v. Ramalingama Rao, 10 M. L. J. 104	772
Narayan v. Jaswant Singh, 1 N. L. R. 147	473
Narayan Coomari Debi v. Shajani Kanta Chatterjee, 22 C. 14	602
Narayana Kotban v. Kalianasundaram Pillai, 19 M. 219	430
Narayana Pattar v. Viharaghavan Patter, 23 M. 184	783
Narendra Nath Sircar v. Kamalbasini Dasi, 23 L. A. 18; 23 C. 513	894
Narmadabai v. Bhavanishankar, 26 B. 410; 4 Bom. L. R. 72	960
Narotam Dass v. Sheo Pargash Singh, 11 L. A. 82; 10 C. 740; 8 Ind. Jur. 275; 4 Sar. P. C. J. 522; Rabque & Jackson's P. C. No. 78	901
Narpat Rai v. Devi Das, 126 P. R. 1907; 50 P. L. R. 1908; 88 P. W. R. 1907	196
Narpat Rai v. Devi Das, 9 Ind. Cas. 385; 1 P. L. R. 1911; 12 P. W. R. 1911	196
Natesan Chetti v. Velgu Nachiar, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 51; 20 M. L. J. 20	447
Nathu Mal, <i>In the matter of the petition of</i> , 24 A. 35; A. W. N. (1890) 74	231
National Exchange Company of Glasgow v. Drew, (1855) 2 Macquenn, H. L. 103	610
Nawab Jaffree Begum v. Mahomed Zuhoor Ahsun Khan, 2 N. W. P. H. C. R. 409	387
Nawab Shah Ara Begum v. Nanthi Begum, 11 C. W. N. 1 C. 9 A. 29; 17 M. L. J. 32; 5 C. L. J. 4; 9 Bom. L. R. 80; 1 M. L. T. 429 (P. C.)	817
Nazhat-ud-daula Abbas Husain Khan v. Dilband Begum, 21 Ind. Cas. 510; 18 O. C. 225	304
Neate v. Duke of Marlborough, (1838) 3 Myl. & Car. 407 at p. 42; 40 E. R. 983; 2 Jur. 76; 45 R. R. 304	780
Neale v. Gordon Lennex, (1902) A. C. 465; 71 L. J. Q. B. 538; 66 J. P. 757; 87 L. T. 341; 18 T. L. R. 791; 51 W. R. 140	396
Nethercal Colliery Co. v. Bourne, (1888) 20 Q. B. D. 601, on appeal 14 A. C. 228; 59 L. J. Q. B. 66; 61 L. T. 125; 51 J. P. 81	67
Nerrupal Singh v. Kalyan Das, 28 A. 400; A. W. N. (1906) 69; 3 A. L. J. 136	839

N—contd.

	Page.
Neve v. Pennel, Hunt v. Neve, 2 H. & M. 170; 33 L. J. Ch. 19; 1 L. T. 285; 11 W. R. 986; 71 E. R. 427	354
Newman v. Newman, (1815) 4 M. & S. 66; 105 E. R. 759; 1 Stark. 101; 16 R. R. 380	67
Newton v. Clarke, (1839) 2 Curt. 820	683
Nicholson v. Smith, 1 Stark. 128	577
Nihal v. Lakhna, 6 P. R. 1693 Rev.	524
Nil Madhab Parhi v. Haran Prosad Parhi, 20 Ind. Cas. 325; 19 C. L. J. 146; 17 O. W. N. 1161	106
Nil Madhab Sikdar v. Narattam Sikdar, 17 C. 826	885
Nilakandhen Nambudripad v. Padmanabha Revi Varma, 18 M. 1; 4 M. L. J. 233; 21 I. A. 128; 6 Sar. P. C. J. 478	68
Nilkanta Chaki v. Ghatoo Sheikh, 1 C. W. N. 867	913
Nirmal Chunder Bandopadhyay v. Saratmoni Debya, 25 C. 91; 2 C. W. N. 642	850
Nobin Chandra Soot v. Nawab Ali Sarkar, 1 C. W. N. 343	486
Nobin Chunder Pooshalee v. Bungo Chunder Chatterjee, 25 W. R. 363	815
Nobin Chunder Roy Chowdhury v. Radha Pearce Debia, 6 W. R. 17	229
Nobin Kriehna Bose v. Man Mohun Bose, 7 O. 573; 9 C. L. R. 182	341
Nooris v. Marshall, (1621) 5 Madd. 475; 56 E. R. 977	860
Norendra Nath Pahari v. Bhupendra Narain Roy, 23 C. 374 at p. 385	86
Nubo Kishore Doss v. Joy Doorga Dossee, 22 W. R. 189	687
Nujebar Rahman v. Muktashed Husain, 15 Ind. Cas. 259; 40 C. 113; 10 C. W. N. 854	403
Nunda Lal Mukherjee v. Kymuddin Sardar, 9 O. W. N. 886	465

O

Offord v. Davies, (1862) 12 C. B. (N. S.) 748; 31 L. J. C. P. 319; 9 Jur. (N. S.) 22; 6 L. T. 579; 10 W. R. 758; 14 E. R. 1336; 133 R. R. 491	521
Oliver v. Hinton, (1899) 2 Ch. 264; 68 L. J. Ch. 683; 48 W. R. 3; 81 L. T. 212; 15 T. L. R. 450	122
O'Mahoney v. Burdett (1874) 7 H. L. 398; 31 L. T. 705; 23 W. R. 361	894
Oriental Finance Corporation Ltd. v. Mercantile Credit and Finance Corporation Ltd., 2 Bom. H. C. R. 267	640

P

Pa. Wa. v. O. A. R. Valliappa Chetty, 14 Bur. L. R. 211	942
Padmakumari Debi Chowdhurani v. Court of Wards, 8 C. 302; 8 I. A. 229; 4 Sar. P. C. J. 285; 6 Ind. Jur. 143	12, 406
Padmanabhaya v. Ranga, 6 Ind. Cas. 447; 34 M. 161; 8 M. L. T. 110; 20 M. L. J. 930; (1910) M. W. N. 462	517, 840
Pai Beng Teng v. Ko Maung, 2 L. B. R. 261	169

P—contd.

	Page.
Painter, <i>In re</i> , Painter, <i>Ex parte</i> , (1895) 1 Q. B. D. 85; 64 L. J. Q. B. 2; 71 L. T. 581; 1 Manson 490; 15 R. 16; 43 W. R. 144	793
Palani v. Selambara, 9 M. 267	920
Palani Chetty v. Rathina Chetty, 24 Ind. Cas. 597; 26 M. L. J. 208; (1914) M. W. N. 352; 15 Cr. L. J. 609	331
Palani Palagan, <i>In the matter of</i> , 26 M. 55; 1 Weir, 166	656
Palaniappa v. Lakshmanan, 16 M. 429 at p. 434	383
Palmer v. Bramley, (1895) 2 Q. B. 405; 65 L. J. Q. B. 42; 14 R. 643; 73 L. T. 329	421
Palmer v. Johnson, 1883) 13 Q. B. D. 351; 53 L. J. Q. B. 548; 51 L. T. 211; 33 W. R. 36	147
Pamu Sanyasi v. Zamindar of Jayapur, 25 M. 540	481
Pandit Badri Prasad v. Bhim Sen, Selected Decision No 2 of 1892	155
Pandurang Vasudeo v. Anant Lakshman, 5 Bom. L. R. 956	816
Panna Lal v. Soman, 89 P. R. 1902 (F. B.); 120 P. L. R. 1902	195
Paquine v. Snary, (1909) 1 K. B. 688; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212	382
Park v. Lawton, (1911) 1 K. B. 538; 80 L. J. K. B. 396; 104 L. T. 184; 75 J. P. 163; 18 Manson, 151; 27 T. L. R. 192	963
Parmeshri v. Vittappa Shanbaga, 26 M. 157; 12 M. L. J. 189	839
Parmanand Mier v. Sahib Ali, 11 A. 438; A. W. N. (1889) 155	208
Paramen Chetty v. Sundararaja Naick, 26 M. 499	250
Parameshraya v. Seshagiri Appa, 22 M. 364	788
Partap Chand v. Saiyida Bibi, 11 A. 442; A. W. N. (1901) 187	774
Parvatibayamma v. Ramakrishna Rau, 18 M. 145; 5 M. L. J. 44	888
Parvatishankar Durgashankar v. Bai Naval, 17 B. 733	493
Pasumarti Payidanna v. Ganti Lakshminarasamma, 29 Ind. Cas. 314; 11 M. L. J. 5-5; 38 M. 1076	430
Patel Vendraan Jekisan v. Patel Manilal Ohnilal, 15 B. 565	880
Patinharkuru Vallabhan (Lattan Rajah Avergal v. Rama Varma, 24 Ind. Cas. 519; 28 M. L. J. 669	881
Pattabhiramier v. Venatarow Naicken, 13 M. L. A. 560; 15 W. R. 35 (P. C.); 7 B. L. R. 136; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660	476
Paul v. Nurse, (1828) 8 B. & C. 486; 2 M. & Ry. 525; 7 L. J. (n. s.) K. B. 12; 103 E. R. 112; 32 R. R. 456	819
Pauliem Valoo Chetty v. Pauliem Sooryah Chetty, 1 M. 252; 4 L. A. 109; 1 Ind. Jur. 323; 3 Suth. P. C. J. 387; 3 Sar. P. C. J. 698	722
Peacock v. Purcell, (1863) 32 L. J. C. P. 266; 14 O. B. (N. s.) 728; 10 Jur. (N. s.) 178; 8 L. T. 636; 11 W. R. 834; 2 N. R. 282; 14 E. R. 630; 185 R. R. 875	421
Pearson v. Dublin Corporation, (1907) A. C. 351; 77 L. J. P. O. 1	600

P contd.

	Page.
Peary Lal v. Rance Mani Dasse, 10 C. W. N. 695; 3 C. L. J. 502; 33 C. 917	20
Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose, 6 C. W. N. 794	181
Peesapati Sitaramanujachari v. Kanduri Vellammama, 30 Ind. Cas. 822; 18 M. L. T. 542; 2 L. W. 858	552
Pennell v. City of London Brewery Company, (1900) 1 Ch. 496; 69 L. J. Ch. 244; 48 W. R. 264; 2 L. T. 53; 16 T. L. R. 152	537
Pergash Koer v. Mahabir Prashad Narain Singh, 11 C. 584	477
Peria Aiyambalam v. Shunmugasundaram, 22 Ind. Cas. 615; 38 M. 904; 15 M. L. T. 112; 26 M. L. J. 140; (1914) M. W. N. 417; 1 L. W. 119	945
Peria Krishnasami Naik v. Aiyappa Naik, 24 Ind. Cas. 924; 1 L. W. 376	540
Periannan Chetty v. South Indian Railway Company, 22 M. 137	184
Pershad Singh v. Ram Pertab Roy, 22 C. 77	499, 538
Pestenji Muncherji Mody v. Queen Insurance Company, 25 B. 332; 2 Bom. L. R. 939; 4 C. W. N. 781	151
Peveret, <i>In the goods of</i> , 1902) P. D. 205; 71 L. J. P. 114; 87 L. T. 143	686
Philadelphia and Reading Railroad Company v. Derby, (1852) 14 Howard, 468; 14 Law. Ed. 502	601
Phul Chand v. Chand Mal, A. W. N. (1908) 105; 5 A. L. J. 49; 3 A. 252	387
Phul Kumari v. Ghanshyam Misra, 35 C. 20; 7 C. L. J. 36 (P. C.); 12 C. W. N. 169; 0 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 5 L. A. 22; 14 Bur. L. R. 41	783
Piggott v. Middlesex County Council, (1909) 1 Ch. 134 at p. 147; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 431; 6 L. G. R. 1177	537
Pillay v. Robinson, 20 Q. B. D. 85; 57 L. J. Q. B. 54; 58 L. T. 110; 36 W. R. 269	140
Pilu v. Babaji, 4 Ind. Cas. 584; 34 B. 105; 11 Bom. L. R. 1291	598
Pirag v. Sital Pershad, 22 Ind. Cas. 965; 36 A. 155; 12 A. L. J. 136	443
Pirbhu Narain Singh v. Amir Singh, 23 A. 369; A. W. N. (1907) 83	51
Ponnusami Mudali v. Mandi Suddara Mudali, 27 M. 255; 14 M. L. J. 256	196
Ponnuswamy Padayachi v. Karupudayan, 24 Ind. Cas. 217; 38 M. 84; 26 M. L. J. 285; 15 M. L. T. 299; 1 L. W. 218	806
Poole v. Middleton, (1881) 7 Jur. (N. s.) 1262; 4 L. T. 634; 9 W. R. 758	463
Potter v. Sanders, (1846) 6 Hare, 1; 67 E. R. 1055; 77 R. R. 1	480
Pragdas Sagurmall v. Girdhardas Mathuradas, 26 B. 76; 3 Bom. L. R. 431	221
Pragji Kalan v. Govind Gopal, 11 B. 534	553
Pramada Nath Roy v. Ramani Kanta Roy, 35 C. 331; 12 C. W. N. 249 (P. C.); 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43; 35 L. A. 73	140
Pran Nath Roy v. Mohesh Chandra Moitra, 24 C. 546	265
Prayag Kapri v. Shyam Lal, 31 C. 139	610

P—concl'd.

	Page.
Premji Trikumdas, <i>In re</i> , 17 B. 514	287
Price v. Powell, (1858) 3 H. & N. 341 at p. 350; 117 R. R. 719	711
Printing and Numerical Registering Company v. Sampson, (1875) 19 Eq. 462; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463	180
Priyanath Majumdar v. Mahendra Kumar Mitra, 10 Ind. Cas. 376; 14 C. L. J. 578; 16 C. W. N. 317	164
Promoda Nath Roy v. Asir-ud-din Mandal, 11 Ind. Cas. 262; 15 C. W. N. 896	93
Prosonna Coomar Singha v. Ram Coomar Ghose, 16 C. 640	474
Protap Chandra Das v. Biseswar Pramanick, 9 C. W. N. 416	152
Protap Chunder Mukerji v. Empress, 11 C. L. R. 25	815
Puchha Lal v. Kunj Behari, Lal, 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445	485, 490
Puramathau Somayajipad v. Sankara Menon, 23 M. 82	553
Pyari Mohan Boso v. Kedarnath Roy, 26 C. 409 (F. B.); 3 C. W. N. 271	139

Q

Queen v. Tyler, (1891) 2 Q. B. 588; 60 L. T. 662; 61 L. J. M. C. 38	964
Queen-Empress v. Babu Lal, 6 A. 509 at p. 533; 2 Bom. L. R. 1095	998
_____ v. Hussein Haji, 25 B. 422; 2 Bom. L. R. 1095	979
_____ v. Krishnabhat, 10 B. 319	968
_____ v. Mehrban Singh, 6 A. 626	242
_____ v. Mona Puna, 16 B. 661	979
_____ v. Pirya Gopal, 9 B. 100	336
_____ v. Ramasami, 12 M. 148	317
_____ v. Surendra Nath Sarkar, 28 C. 397; 5 C. W. N. 574	968
_____ v. Tukaram, 1 Bom. L. R. 817	974
_____ v. Viran, 9 M. 224; 2 Weir 125	308

R

R. v. Burns, (1886) 16 Cox. C. C. 355	975
R. v. Topping, (1825) Mo. & Yo. 544; 29 R. R. 839	838
Rabbidge, <i>Ex parte</i> Pooley, <i>In re</i> (1878) 8 Ch. D. 267; 38 L. T. 683; 26 W. R. 646	441
Radha Madhab Paikara v. Kalpataru Roy, 16 Ind. Cas. 811; 17 C. L. J. 209	494
Radha Mohun Mandal v. Jadoomonee Dossee, 23 W. R. 863	445
Radha Prosad Mulick v. Ranimoni Dass, 35 I. A. 118; 35 C. 896; 12 C. W. N. 729; 8 C. L. J. 48; 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23	894
Radha Prosad Wasti v. Esuf, 7 C. 414; 9 C. L. R. 76	886
Ragava v. Rajaratnam, 14 M. 57	385

R—contd.

	Page.
Raghojirao Saheb v. Lakshmanrao Saheb, 16 Ind. Cas. 230; 16 C. W. N. 1058; 23 M. L. J. 383; 12 M. L. T. 472; (1912) M. W. N. 114; 14 Bom. L. R. 1226; 17 C. L. J. 17; 39 I. A. 202; 38 B. 639 at p. 659 (P. C.)	805
Raghub Prusti v. Bhobni Sahoo, 8 C. W. N. 216	826
Raghubar Doss v. Sadhu Churn Doss, 4 C. 453; 3 C. L. R. 534; 2 Shome L. R. 113	20
Raghubar Dyal Shu v. Bhikya Lal Misser, 12 C. 69	189
Raghubar Das v. Sundar Das, 24 Ind. Cas. 304; 42 C. 72 (P. C.); 18 C. W. N. 1058; 1 L. W. 587; 27 M. L. J. 50; 6 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 84; 2 C. L. J. 555; 13 A. L. J. 154	831
Rahimatbai v. Hirbai, 3 B. 34	887
Rahmatullah v. Shamsuddin, 21 Ind. Cas. 609; 11 A. L. J. 877	704
Rahmun v. Hashim, 7 Ind. Cas. 717; 73 P. R. 1910; 163 P. W. R. 19 C; 144 P. L. R. 1910	209
Rai Charan Mandal v. Biswanath Mandal, 26 Ind. Cas. 410; 20 C. L. J. 107	873
Raj Kumar Roy v. Hara Krishna, 10 Ind. Cas. 355; 15 C. L. J. 217	896
Raj Narain Das v. Shama Nando Das Chowdhry, 26 C. 845; 4 C. W. N. 162	776
Raj Narain Das v. Shamananda Das Chowdhry, 33 C. 1862	776
Raj Narain Ghosh v. Abdur Rahim, 5 C. W. N. 454	370
Raja v. Subbaraya, 7 M. 253	20
Raja Baikunto Nath Day Bahadur v. Uday Chand Maiti, 2 C. L. J. 311 at p. 316	341
Raja Har Narain Singh v. Chaudrain Bhagwant Kuar, 13 A. 800 (P. C.); 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283	178
Raja of Karvetnagar v. Lodd Govind Doss Krishna Doss, 29 M. 56; 16 M. L. J. 49; 1 M. L. T. 405; 5 Cr. L. J. 91	380
Raja Kishendatt Ram v. Raja Muntaz Ali Khan, 5 C. 198 at p. 29; 5 C. L. R. 213; 6 I. A. 45; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1	629
Raja Nur Khan v. Muszmmat Darab Khatun, 25 P. R. 1889	209
Raja Ram v. Itraj Kunwar, 24 Ind. Cas. 157; 17 C. 94	233
Rajah Rajeswara Dorai v. Arunachellam Chettiar, 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321	489
Rajah of Ramnad v. Arunachellam Chettiar, 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321	782
Rajah of Venkatagiri v. Isakapalli Subbiah, 26 M. 410	190
Rajah of Venkatagiri Jayampn v. Ayapa Reddy, 21 Ind. Cas. 52; 8 M. 738; 25 M. L. J. 578; 14 M. L. T. 405; (1912) M. W. N. 919	608, 731
Rajah Sahib Perilad Sein v. Maharaja Rajender Kishore Sing, 12 M. L. A. 292 at p. 33; 12 W. R. 6 P. C.; 2 B. L. R. 11; 2 Suth. P. C. J. 225 at p. 239; 2 Sar. P. C. J. 430; 20 E. R. 349	628

R—contd.

	Page.
Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty, 1 M. 235; 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. O. J. 687; 3 Suth. P. O. J. 332	887
Rajani Kanta Biswas v. Ekkari Das, 7 C. L. J. 78; 11 O. W. N. 811; 34 C. 689	498
Rajani Kumar Dass v. Gaur Kishore Shaha, 35 C. 1051; 7 C. L. J. 586; 12 O. W. N. 761	779
Rajnarain Bose v. Universal Life Assurance, Company, 7 C. 594; 10 O. L. R. 561	678
Rajnarain Mitter v. Ekadasi Bag, 27 C. 479; 4 O. W. N. 494	410
Ralla v. Budha, 50 P. R. 1893 (F. B.)	937
Ram Baran Rai v. Kamla Prashad, 6 Ind. Cas. 69; 32 A. 594; 7 A. L. J. 802	297
Ram Chand v. Muhammad Khan, 135 P. R. 1888	524
Ram Chandra v. Narayan Mahadev, 11 B. L. R. 216	929
Ram Charan Das v. Gaya Prasad, 30 A. 422 at p. 437; 5 A. L. J. 875 (F. B.); A. W. N. (1908) 175; 4 M. L. T. 49	206
Ram Coomar Coondoo v. Chunder Contoo Mookerjee, 2 O. 233; 4 I. A. 23	528
Ram Coomar Koondoo v. John, 11 B. L. R. 46 (P. O.); 18 W. R. 166; 1 A. Sup. Vol. 40	440
Ram Das v. Sanwana Ram, 10 P. R. 1900; P. L. R. 1900, p. 352	920
Ram Dayal v. Narsingh Bahadur Singh, 4 Oudh and Agra Law Reporter 569	280
Ram Din v. Kalka Prasad, 7 A. 502 (P. C.); 12 I. A. 12; Sar. P. O. J. 619	705
Ram Gopal v. Piari Lal, 21 A. 441; A. W. N. (1899) 63	869
Ram Gopal Bysack v. Nuruddin, 20 C. 443	452
Ram Jiyawan v. Mohammad Abdul Hussain Khan, 23 Ind. Cas. 231	304
Ram Lal v. Gulam Husain, 29 A. 579; A. W. N. (1907) 181; 4 A. L. J. 671	752
Ram Pershad Koeri v. Jawahir Roy, 12 O. W. N. 899 at p. 904; 7 C. L. J. 72	838
Ram Ranjan Chakravarti v. India Narain Das, 33 O. 890; 10 O. W. N. 262	51
Ram Ranjan Roy v. Emperor, 27 Ind. Cas. 554; 19 O. W. N. 28; 42 C. 422; 6 Cr. L. J. 170	988
Ram Ratan Sahu v. Mohant Sahu, 6 O. L. J. 74; 11 O. W. N. 732	412
Ram Saran v. Mahomed Latif, 3 O. W. N. 62	76
Ram Sarup v. Ram Dei, 29 A. 239; 4 A. L. J. 168; A. W. N. (1907) 3; 3 M. L. T. 59	692
Ram Sundar Koiri v. Jogi Khatik, Selected Decision No. 1 of 1908	84
Ram Taran Goswami v. Rameswar Malia, 11 C. L. J. 719; 11 O. W. N. 1078	289
Ram Tuhul Singh v. Biseswar Lal Sahoo, 2 I. A. 131; 23 W. R. 205; 15 B. L. R. 208 (P. C.)	343
Ram Udar Singh v. William Cox, 21 Ind. Cas. 564; 19 O. W. N. 263	914
Rama Aiyar v. Venkatachella Padayachi, 30 M. 311; 2 M. L. T. 84; 17 M. L. J. 123; 5 Cr. L. J. 288	324
Ramachandra Mardaraja Deo v. Dakko Podhano, 31 Ind. Cas. 852	732
Ramadin v. Mathura Singh, 10 A. 407; A. W. N. (1888) 79; 3 Ind. Jur. 232	597
Ramalingam Pillai v. Vythilingam Pillai, 20 I. A. 150; 16 M. 490 (P. C.); 6 Sar. P. O. J. 351; 17 Ind. Jur. 578	64

R—contd.

	Page.
Raman v. Vairavan, 7 M. 392; 8 Ind. Jur. 186	419
Ramanadhan Chetty v. Murugappa Chetty, 27 M. 192	911
Raminand v. Nakched, 8 O. C. 5	387
Ramarathan Chetty v. Murugappa Chetty, 27 M. 192 at p. 191; 13 M. L. J. 241	69, 553
Raminathan Chetty v. Subramaniam Chetty, 28 Ind. Cas. 638; 28 M. L. J. 372; 17 M. L. T. 266	348
Ramanugra Narain v. Mahasundar Kunwar, 12 B. L. R. 433; 3 Sar. P. O. J. 277; 3 Supp. Vol. 149	440
Ramasami v. Bagirathi, 6 M. 180	830
Ramasami v. Papayya, 6 M. 466; 3 M. L. J. 205	379
Ramaswami Ayyar v. Vythinatha Ayyar, 26 M. 760; 13 M. L. J. 448	458
Rameshar Chaudbey v. Mata Bhikh, 5 A. 341; A. W. N. 893 48	752
Rameswar Koer v. Mahomed Mehdi Hossein Khan, 26 C. 39; 25 I. A. 171; 2 O. W. N. 633	610
Ramhari Sahu v. Madan Mohan Mitter, 23 C. 339	639
Ramji Das v. Mokandi Lal, 02 P. R. 1892	257
Ramkishore Kedarnath v. Jainarayan Ramrachpal, 20 Ind. Cas. 959; 4 C. 966; 25 M. L. J. 512; (1913) M. W. N. 661; 5 Bom. L. R. 867; 14 M. L. T. 163; 17 O. W. N. 1189; 18 O. L. J. 237; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213	796
Ramkrishna Seetaram v. Balasahib, 1 O. P. L. 158	696
Ramkrishnapuri v. Sitaram, Second Appeal No. 132 of 1905	
Ramlal Thakursidas v. Lakhmi Chand Muniram, 1 Bom. H. C. R. Appendix li	717
Rampal Singh v. Ram Prasad Singh, 27 A. 37; 1 C. L. J. 46; 2 A. L. J. 237 (P. C.); 32 I. A. 17	583
Ranee Annapurni Nachiar v. Swaminathan Chetty, 6 Ind. Cas. 433; 34 M. 7 & M. L. T. 104; 1910 M. W. N. 505; 20 M. L. J. 785	383
Rang Lal v. Annu Lal, 22 Ind. Cas. 349; 36 A. 21; 11 A. L. J. 938	365
Ranganayakamma v. Alwar Setti, 13 M. 214	579
Rangasami Naikan v. Annamalai Mudali, 31 M. 7; 3 M. L. T. 87; 17 M. L. J. 499	123
Rangayya Appa Rou v. Ratnam, 20 M. 392	355
Rangayya Chettier v. Parthasarathi Nicker, 20 M. 120	508
Rangilbhai Kalyandas v. Vinayak Vishnu, 11 B. 663	781
Rangoon Botataung Company Ltd v. Collector of Rangoon, 16 Ind. Cas. 188; 39 I. A. 197; 40 C. 21; 16 O. W. N. 911; 16 O. L. J. 245; (1912) M. W. N. 781; 12 M. L. T. 195; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150	637
Raniganj Coal Association Limited v. Judoonath Ghose, 19 C. 439	754
Ranjit Singh v. Ilahi Bakhsh, 5 A. 520; A. W. N. (1883) 151	868
Rash Behari Bosu v. Hara Moni Debya, 15 C. 555	217
Rash Mohini Dasi v. Umesh Chunder Biswas, 25 I. A. 109; 25 C. 824; 2 C. W. N. 321	817

R—contd.

	Page.
Rashid-un-nissa v. Muhammad Ismail Khan, 3 Ind. Cas. 864; 36 I. A. 168; 31 A. 572; 13 C. W. N. 182 (P. C.); 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279	430
Ratnam v. Govindarajulu, 2 M. 339	741
Ratnam Ayyar v. Krishna Doss Vital Doss, 21 M. 494; ■ M. L. J. 75	233
Ravula Parti Chellamanna v. Rama Row, 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265	447
Rawbone's Trust, <i>In re</i> , (1857) 3 K. & J. 476; 112 R. R. 243; 69 E. R. 1197; 26 L. J. Ch. 583; 3 Jur. (N. S.) 837	440
Rayner v. Preston, 14 Ch. D. 237; affirmed in 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 45 J. P. 829; 29 W. R. 546	70
Reese River Silver Mining Company v. Atwell, (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601	779
Reg. v. Catholic Life and Fire Assurance and Annuity Institution, (1853) 48 L. T. 675; 47 J. P. 503	964
Rex v. Chancellor, Masters and Scholars of the University of Cambridge, (1723) 1 Str. 557; 8 Mod. 148; 93 E. R. 698	61
Reg. v. Demers, (1900) A. C. 103; 81 L. T. 795; 69 L. J. P. C. 5	522
Reg. v. Duffield, (1855) 5 Cox C. C. 404	649
Reg. v. Esdaile, (1858) 1 F. & F. 23	650
Reg. v. Jeans, (1844) 1 Car. & K. 539	973
Reg. v. Manchester, Sheffield and Lincolnshire Railway Company, 1854 4 El. & Bl. 88; 1 Jur. (N. S.) 419; ■ W. R. 591; 119 E. R. 35; 99 R. R. 362	65
Reg. v. Sullivan, (1868) 11 Cox C. C. 44	975
Rewa Mahon v. Ram Kishan Singh, 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746	303
Reynolds v. Witte, (1879) 13 S. C. 5; 36 Am. Rep. 678	601
Rhedoy Krishna Ghose v. Koylash Chunder Bose, 13 W. R. 3 F. B.; 4 B. L. R. 82	303
Right d. Fisher v. Cuthell, (1804) 5 East 491; 7 R. R. 752; 2 Marsh 83; ■ Esp. 149; 102 E. R. 1158	226
Roberts v. Davey, 4 B. & Adolp 664; 1 N. & M. 443; 2 L. J. K. B. 141; 110 E. R. 606; 38 R. R. 348	836
Robinson, <i>In re</i> , (1884) 27 Ch. D. 160; 53 L. J. Ch. 986; 33 W. R. 17	382
Roe v. Galliers, (1787) 2 T. R. 133; 1 R. R. 415; 100 E. R. 72	888
Roban Singh v. Bhao Lal, 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699	670
Romesh Chunder Mukerji v. Rajani Kant Mukerji, 21 C. 1	87
Romesh Chandra Banerjee v. Emperor, 3 Ind. Cas. 985; 41 C. 35 at p. 357; 18 C. W. N. 418; 15 Cr. L. J. 335	1002
Roop Lal v. Lakshmi Doss, 29 M. 1 at p. 12	491
Ruben v. Great Fingall Consolidated Ltd., (1906) A. C. 439 at p. 465; 75 L. J. K. ■ 843; 95 L. T. 214; 22 T. L. R. 712; 13 Manson 248	599

R—concl'd.

	Page.
Rugboo Bibee v. Noor Jehan Begum, 12 W. R. 459 4 B. L. R. A. O. J. 10	639
Run Bahadur Singh v. Luchko Koer, 11 C. 801; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202	165
Rungama v. Atchanna, 4 M. I. A. 1; 7 W. R. 57 (P. C.); 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 603	817
S	
Sadar-ud-din v. Ekram-ud-din, 20 Ind. Cas. 670; 18 C. W. N. 22; 19 C. L. J. 225	595
Sadashiv Moreshwar Ghate v. Hari Moreshwar Ghate, 11 B. H. C. B. 190	677
Sadashiv Rayaji v. Maruti Vithal, 14 B. 455	848
Sadhu Krishna Ayyar v. Kuppan Ayyangar, 30 M. 54; 6 M. L. J. 479; 1 M. L. T. 268	493
Safurabai v. Abdollahbai, 4 Ind. Cas. 273; 11 Bom. L. R. 1164; 10 Or. L. J. 539	970
Sagaji v. Namdev, 2 ■ II 525; 1 Bom. L. R. 5	106
Sahadeb Dholi v. Ram Rudra Halder, 10 C. W. ■ 820	125
Sahib Rai v. Chait Ram, 28 Ind. Cas. 427; 30 P. W. R. 1915; 96 P. L. II 1915	251
Sainal Ranchod v. Dullabh Dvarka, 10 B. II. C. R. 360	595
Sajawal v. Sodagar Singh, 18 Ind. Cas. 792; ■ P. II 1913 Rev.; 81 P. L. R. 1913; 3 P. W. R. 1913 Rev.	210
Sajid Ali v. Ibad Ali, 23 C. 1; 2 ■ I. A. 171	817
Sakina Bibi v. Amirau, 10 A. 472; A. W. N. (1888) 177	870
Samandan Karkat Edathil Rayarappan Nambiar v. Malikandi Aketh Mayan, 23 Ind. Cas. 251; 26 M. L. J. 267	831
Samarendra Chandra Deb v. Birendra Kishore Deb, 35 C. 777; 8 C. L. J. 1, 12 C. W. N. 777; 4 M. L. T. 27	65
Saminathan Chetty v. Palaniappa Chetty, ■ Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617 (P. C.); 83 L. J. P. C. 131; 17 New Law Reports 56; 1914 A. C. 618	421
Sandback Charity Trustees v. North Staffordshire Railway Company, (1877) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 59; 26 W. R. 229	687
Sankaralinge Nadan v. Rajeswara Dorai, 31 M. 236; 12 C. W. N. 946; 4 M. L. J. 01; 8 C. L. J. 230; 10 Bom. L. R. 781 (P. C.); 35 I. A. 176	567
Sankarama Aiyer v. Padmanabha Aiyar, 17 Ind. Cas. 425; ■ M. 25; 23 M. L. J. 373; (1912) M. W. N. 686	114
Sanwal Das v. Gur Parshad, 4 Ind. Cas. 179; 147 P. L. R. 189; 90 P. R. 1909; 59 P. W. R. 1909	874
Sanwal Kunwar v. Murli, 16 Ind. Cas. 339; 10 A. L. J. 52	149
Sappabadi Chetty v. Maung In, P. J. L. B. 481	126
Sarat Chunder Dey v. Gopal Chunder Laha, 20 C. 296 at p. 313; 19 I. A. 203	678
Sarbesh Chandra v. Hari Dayal Singh, ■ Ind. Cas. 23; 11 C. L. J. 846; 4 C. W. N. 451	896
Sarju Prasad v. Mahadeo Pande, 29 Ind. Cas. 996; 13 A. L. 639; 37 A. 450	118

S—contd.

	Page.
Saroda Prosad Mullick v Luchmeeput Singh Doogur, 14 M. I. A. 529; 17 W. R. 259; 10 B. L. R. 214; 1 Suth. P. O. J. 560; 3 Sar. P. O. J. 77; 20 E. R. 833	303
Saroda Prosad Roy Chaudhuri v. Kailash Bashini Guha, 18 Ind. Cas. 117; 17 C. W. N. 128	980
Satara Begam v. Syed Faiz Ali Khan, 9 Ind. Cas. 994; 13 C. L. J. 677	517
Satish Chandra Guha v. Chunder Kant Pyne, 3 C. W. N. 278	189
Satish Chandra Roy v. Emperor, 11 C. W. N. 79; 4 Cr. L. J. 433	313
Saturjit Pertap Bahadoor Sahi v. Dulhin Gulab Koer, 24 C. 469	928
Sayad Abdul Huk v. Gulam Jilani, 20 B. 677	188
Seale v. Brown, 1 A. 710	129
Senger v. Hukma Kessa, 24 B. 458; 2 Bom. L. R. 403	752
Seaward v. Drew, (1898) 67 L. J. Q. B. 322; 78 L. T. 19; 14 T. L. R. 200	226
Secretary of State v. Bai Rajbai, 30 Ind. Cas. 303; 42 I. A. 229; 19 C. W. N. 1087; 13 A. L. J. 952; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 780; 39 B. 625; 23 C. L. J. 1	804
Secretary of State v. Chinnapragada Bhanuamurti, 17 Ind. Cas. 873; 24 M. L. J. 538	806
Secretary of State v. Dip Chand Poddar, 24 C. 306	131
Secretary of State v. Gajanan Krishna Rao, 10 Ind. Cas. 689; 15 B. 362 at p. 365; 13 Bom. L. R. 273	537
Secretary of State for India v. India General Steam Navigation and Railway Company, Limited, 4 Ind. Cas. 448; 16 C. 967; 10 C. L. J. 281 (P. C.); 11 Bom. L. R. 1197; 14 C. W. N. 134	817
Secretary of State v. Kalekhan, 16 Ind. Cas. 947; 37 M. 113; (1912) M. W. N. 786; 23 M. L. J. 181; 12 M. L. T. 224	536
Secretary of State v. Kirtibas Bhupati Harichandan Mahapatra, 26 Ind. Cas. 676; 42 C. 710; 1 M. L. J. 457; 17 M. L. T. 1; 2 L. W. 11; 17 Bom. L. R. 32; 19 C. W. N. 65; 21 C. L. J. 31	628
Secretary of State v. Mathura Bhai, 14 B. 213	29
Secretary of State for India v. Subaya Karantha, 31 Ind. Cas. 590; (1915) M. W. N. 962; 2 L. W. 1175; 18 M. L. T. 504	295
Seetamma v. Venkataramanayya, 21 Ind. Cas. 367; 14 M. L. T. 31; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 108	9
Seetharam Naidu v. Balakrishna Naidu, 22 Ind. Cas. 68; 26 M. L. J. 604; 15 M. L. T. 78	623
Selappaswamy v. Manikkaswamy, 11 Ind. Cas. 326; (1911) 1 M. W. N. 369	65
Serjeant v. Nash, Field & Co., (1913) 2 K. B. 84; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510	840
Serle, <i>In re</i> Gregory v. Serle, (1898) 1 Ch. 652; 67 L. J. Ch. 344; 78 L. T. 84; 46 W. R. 440	517
Seahagiri Rao v. Tangatnuri Jaganadham, 32 Ind. Cas. 191; 19 M. L. T. 98	429

S—contd.

	Page.
Seton v. Lafone, (1887) 19 Q. B. D. 68 at pp. 70, 71; 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749	681
Seumal Nihalchand v. Mulomal Rahumal, 28 Ind. Cas. 6; 1 S. L. R. 260	196
Shahzadi Begam v. Secretary of State, 34 C. 1059 (P. C.); 2 M. L. T. 439; 9 Bom. L. R. 1192; 6 C. L. J. 678; 34 I. A. 194	534
Shaikh Ewaz v. Mokuna Bibi, 1 A. 132	205, 315
Shaikh Khoda Bux v. Shaikh Taj-ud-din, 8 C. W. N. 359	451
Sham Sundar Lal v. Achhan Kunwar, 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 47	379
Shama Bibi v. Chairman of Baranagore Municipality, 6 Ind. Cas. 675; 12 C. L. J. 410	151
Shama Charn Kundu v. Khetromoni Dasi, 27 C. 521; 27 I. A. 10; 4 C. W. N. 501	817
Shamu Patter v. Abdul Kadir Rowthan, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.)	371, 393, 850
Shan Maun Mall v. Madras Building Company, 15 M. 264; 2 M. L. J. 9	123
Shankar Das v. Ram Das, P. L. R. 1900, p. 131	920
Shankar Lal v. Zorawar Singh, 116 P. R. 1907	955
Sharat Chunder Ghose v. Kartik Chunder Mitter, 9 C. 810; 12 C. L. R. 453	396
Shears v. Goddard, (1898) 1 Q. B. 40; 65 L. J. Q. B. 344; 74 L. T. 128; 44 W. R. 402; 3 Manson 24	441
Sheikh Akbar v. Sheikh Khan, 7 C. 256; 8 C. L. R. 528	431
Sheik Euayutoollah v. Sheik Elaheebuksh, W. R. (1864) Act X, Rulings, 42	466
Sheo Din v. Bhawani Bakhsh, 9 Ind. Cas. 752; 14 O. C. 62	51
Sheo Prasad v. Behari Lal, 25 A. 79; A. W. N. (1902) 203	51
Sheo Prasad v. Lalit Kuar, 18 A. 403; A. W. N. (1896) 132	208
Sheo Singh v. Jeoni, 19 A. 524; A. W. N. (1897) 141	682
Sheopher Singh v. Deo Narain Singh, 17 Ind. Cas. 675; 10 A. L. J. 413	703
Sher Muhammad v. Emperor, 25 P. R. 1901; 3 Punjab Cr. R. 2506	936
Shetabdee Biswas v. Molamdee Mundul, 25 W. R. 30	815
Shib Kristo Daw and Company v. Satish Chandra Dutt, 18 Ind. Cas. 69; 39 C. 822	178
Shibu Halidar v. Gupi Sundhari Dasya, 24 C. 449	452
Shields v. Schiff, 124 W. S. 357 at p. 358	509
Shivabasava v. Sangappa, 8 C. W. N. 835; 29 B. 1; 1 A. L. J. 67; 6 Bom. L. R. 770	445, 541
Shivji Ram v. Hem Raj, 67 P. R. 1800	192
Shoma Mehta v. Rajani Biswas, 1 C. W. N. 55	528
Shookmoy Chandra Das v. Monoharri Dassi, 11 C. 684; 12 I. A. 103; 4 Sar. P. C. J. 639; 9 Ind. Jur. 234	378
Shridhar Balkrishna v. Babaji Mula, 28 Ind. Cas. 134; 38 B. 708; 16 Bom. L. R. 586	404

S—contd.

	Page.
Shunmugaraya Mudaliar v. Manika Mudaliar, ■ Ind. Cas. 799; 36 I. A. 185; 12 M. 400; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304	815
Shunshanisa v. Emperor, 2 L. B. R. 244; 1 Cr. L. J. 742	322
Shyama Churn Ghosh v. Mahomed Ali, 3 Ind. Cas. 466; 13 C. W. N. 835; 10 C. L. J. 30	528
Shyama Sundari Dasya v. Mahomed Zari, 3 Ind. Cas. 693; 9 L. J. 91	547
Shyamanand Das v. Raj Narain Das, 4 C. L. J. 568	703
Sibendrapada Banerjee v. Secretary of State, 34 C. 207; 5 C. L. J. 90	193
Sibo Sundari Debi v. Hemangini Debi, 4 C. W. N. 204	658
Sikher Chund v. Dulputty Singh, 5 C. 363; 5 Ind. Jur. 20; 5 C. L. R. 374	185
Silu Peda Yelligadu v. Raja Raru Venkata Kumara Mahipati Surya Rao, 3 Ind. Cas. 542; 29 M. L. J. 693; 2 L. W. 1122; 18 M. L. T. 494; (1916) M. W. N. 109	792
Simla Bank v. Narpat Rai, 88 P. R. 1487	551
Singaravelu Pillai v. Santhana Krishna Mudaliar, 31 Ind. Cas. 9; 1915 M. W. N. 643	757
Singer Manufacturing Company v. Loog, (1860) 18 Ch. D. 395 at p. 412	533
Singheeram Poddar v. Bhagbat Chander, 6 Ind. Cas. 632; 11 C. L. J. 543	495
Sir Jehangir v. Hope Mills Ltd., 9 Bom. L. R. 1380	363
Sitapershad v. Thakur Dass, 5 C. L. R. 73	64
Sivachidambara Mudeley v. Kamakshi Ammal, 3 Ind. Cas. 433; 19 M. L. J. 498; 33 M. 71; 6 M. L. T. 239	52
Sivarama Pattar Kariakar v. Edathil Madhathil V. Krishna Iyer, 23 Ind. Cas. 23; 15 M. L. T. 233; 26 M. L. J. 307	772
Slobodinsky, <i>Ex parte</i> , Moore, <i>In re</i> , (1903) 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 19 T. L. R. 616; 52 W. R. 156; 10 Manson 31	431
Small Cause Court Reference No. 23 of 1877, (1877) P. J. 133	268
Smith v. Bromley, 2 Dougl. 696n; 99 E. R. 44	402
Smith v. Chadwich, 1884 9 App. Cas. 187 at p. 194; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687; 58 J. P. 644	816
Smith v. Great Western Railway Co., (1877) 3 A. C. 165; 47 L. J. Ch. 97; 37 L. T. 616; 26 W. R. 120	840
Smith v. Hurst, (1855) 10 Hare 30; 68 E. R. 826; 22 L. J. Ch. 89; 17 Jur. 20; 20 L. T. (o. s.) 303; 90 R. R. 263	750
Smith v. Monteith, 1844 13 M. & W. 427; 2 D. & L. 358; 14 L. J. Ex. 22; 9 Jur. 310; 153 E. R. 178; 67 R. R. 654	404
Soinu Pillai v. Municipal Council of Mayavaram, 28 M. 520	754
Sonbai v. Ahmelbhai Habibhai, 9 Bom. H. C. R. 398	628
Soni Ram v. Kanhaiya Lal, 19 Ind. Cas. 291; 40 I. A. 74; 25 M. L. J. 131; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 459; 35 A. 227 (P. C.)	477

S—contd.

	Page.
Soobah Pirthee Lal Jha v. Soobah Doorgah Lal Jha, 7 W. R. 73	768
Sottomayer v. De Barros, (1877) 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 45; 6 W. R. 455	162
Sonmia Narayana v. Alagiriswamy Iyenger, 14 Ind. Cas. 580; 11 M. L. T. 429; (1912) M. W. N. 54	421
Soundararajam v. Arunachalam Chetty, 33 Ind. Cas. 858; 11 L. W. 1247 and 1266; 18 M. L. T. 552 and 563; (1916) 1 M. W. N. 31; 39 M. 136 and 54; 29 M. L. 1793 and 816	796
South American and Mexican Company, <i>In re</i> , Bank of England, <i>Ex parte</i> , (189) 1 Ch. D. 37; 64 L. J. Ch. D. 189; 12 R. L. 71 L. T. 594; 43 W. R. 131	60
South Eastern Railway Company v. Associated Portland Cement Manufacturers, 19 O) 1 Ch. D. 12; 79 L. J. Ch. 150; 10 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61	484
Southampton Steamboat Co. v. Rawlins, (1863) 34 L. J. Ch. 287; 11 Jur. (N. S.) 230; 13 W. R. 512	640
Sreemutty Soorjeemoney Dossee v. Denobundoo Mullik, 9 M. L. A. 123; 4 W. R. 114 (P. C.); 1 Sar. P. C. J. 837; 19 E. R. 688	893
Sreemutty Tripoora Soonduree v. Juggur Nath, Dutt, 24 W. R. 321	486
Sreenath Bunde Chowdhry v. Mohesh Chunder Bundo padhya, 1 C. L. R. 453	410
Sri Gopal v. Firthi Singh, 24 A. 429 (P. C.) 29 I. A. 118; 6 C. W. N. 889; 11 Bom. L. R. 827	930
Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State, 21 Ind. Cas. 871; 38 M. 620; 26 M. L. J. 39; 14 M. L. T. 514; (1913) M. W. N. 959	628
Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row, 29 M. 437 at p. 452; 16 M. L. J. 178	426
Sri Sethuramaswamy Iyer v. Sri Meruswamy Iyer, 4 Ind. Cas. 76; 34 M. 470; 6 M. L. T. 319; 20 M. L. J. 108	911
Srimati Moharane Dasya v. Harendra Lal Roy Chowdry, C. W. N. 458	181
Srinath Das v. Khetter Mohan Singh, 16 I. A. 85; 6 C. 693; 13 Ind. Jur. 132; 5 Sar. P. C. J. 315	477
Srinath Roy v. Dinabandhu San, 25 Ind. Cas. 467; 42 C. 469; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 722; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901 (P. C.); 4 I. A. 221	229
Srinivasa Aiyangar v. Radhakrishna Pillai, 22 Ind. Cas. 54; 38 M. 667 14 M. L. T. 547; 19(14) M. W. N. 81; 21 M. L. J. 47	476
Subbayya v. Saminadayyar, 18 M. 496; 5 M. L. J. 63	873
Subbiah Pillai v. Kailasam Pillai, 26 Ind. Cas. 19; 1 L. W. 905	373
Subbravati Ramiah v. Gundala Ramanna, 1 Ind. Cas. 1050; 33 M. 260 at p. 262; 19 M. L. J. 732; 7 M. L. T. 259	8
Subjan v. Sariatulla, 3 B. L. R. 413; 12 W. R. 329	601

S—conold.

Page.

Subramania Iyer v. Vengappa Reddi, 4 Ind. Cas. 1083; 33 M. 232; 19 M. L. J. 750	481
Subramania Iyer v. Venkataramier, 31 Ind. Cas. 4	374, 824
Subramanian Chettiar v. Muthuswami Aiyangar, 17 M. L. J. 481	859
Sujan Singh v. Hira Singh, 12 A. 399; A. W. N. (1890) 125	625
Sumbhoohunder v. Naraini, 3 Knapp, 55; 12 E. R. 568	20
Sundar v. Parbati, 12 A. 51 at p. 57; 16 I. A. 186; 5 Sar. P. C. J. 448	692
Sundar Koer v. Rai Sham Krishen, 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 204; 2 M. L. T. 75; 34 I. A. 9	610
Sunder Singh v. Collector of Shahjahanpur, 11 Ind. Cas. 514; 8 A. L. J. 539; 33 A. 553	27
Suppan Acharry v. Vannia Konar, 24 Ind. Cas. 467; 27 M. L. J. 110	566
Suppu Nayakan v. Perumal Chetty, 34 Ind. Cas. 372; 30 M. L. J. 486; (1916) 1 M. W. N. 301; 19 M. L. T. 364	823
Saraj Prosad v. Golab Chand, C. 517; 5 C. W. N. 640	289
Surannanna Devappa Hegde v. Secretary of State for India, 24 B. 435; 2 Bom. L. R. 261	536
Surendra Narain Singh v. Bhai Lal Thakur, 22 C. 752; 2 C. W. N. 169	452
Surendra Nath Roy v. Krishna Sakhi Dasi, 9 Ind. Cas. 110; 15 C. W. N. 239; 13 C. L. J. 228	836
Surendro Keshub Roy v. Doorgasoondery Dossee, 19 C. 513; 19 I. A. 108	678
Surjokant Nundi v. Mohesh Chunder Dutt, 9 C. 70; 7 Ind. Jur. 195	20
Swire v. Francis, (1877) 3 A. C. 106; 47 L. J. P. C. 18; 37 L. T. 554	600
Synge v. Synge, (1894) 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 42 W. R. 309; 9 R. 265; 58 J. P. 396	922
Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad, 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; Sar. P. C. J. 656; 20 E. R. 701	381

T

Tafazul Husain v. Than Singh, 6 Ind. Cas. 426; 32 A. 567; 7 A. L. J. 715	869
Talboonissa Bibee v. Koomar Sham Kishore Roy, 15 W. R. 228	815
Tallapragada Suryanaraina Row v. Tallapragada Sarabaya, Ind. Cas. 173; 21 M. L. J. 263; 9 M. L. T. 251; (1911) 1 M. W. N. 151	742
Tamaya v. Timapa Ganpaya, 7 B. 262	839
Tara Chand Biswas v. Radha Jeebun Mustofee, 24 W. R. 148	639
Tara Mohun v. Kripa Moyee Debia, 9 W. R. 433	20
Tara Soonduree Debee v. Oojul Monee Dossee, 14 W. R. 111	440
Tara Sundari Debi v. Sarada Charan, 7 Ind. Cas. 80; 12 C. L. J. 146	362

T—contd.

Page.

Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya, 12 C. 608	625
Tata Charlu v. Konadala Ramachandra Reddi, 7 M. 152	393
Tayammaul v. Sashachalla Naicker, 10 M. I. A. 429 at p. 436; 2 Sar. P. C. J. 139; 19 E. R. 1034	816
Taylor v. London and County Banking Company, (1901) Ch. 231 at p. 254; 84 L. T. 397; 49 W. R. 451; 70 L. J. Ch. 477; 17 T. L. R. 413	860
Taylor, <i>In re</i> , Taylor, <i>Ex parte</i> , (1901) 1 K. B. 744; 70 L. J. K. B. 531; 49 W. R. 510; 84 L. T. 426; 8 Manson, 220	793
Teencowroe v. Dinonath, 3 W. R. 24	12
Tejendro Narain Singh v. Bakai Singh, 22 C. 658 at p. 663	498
Tek Chand v. Musammat Gopal Devi, 13 Ind. Cas. 482; 46 P. R. 1912; 127 P. L. R. 1912; 180 P. W. R. 1912.	677
Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, 28 C. 751; 5 C. W. N. 673	470
Tekoit Krishna Prasad Singh v. Moti Chand, 19 Ind. Cas. 296; 17 C. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 Bom. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 140; 40 C. 635; 40 I. A. 140	86
Tepu Khan v. Rajani Mohun Das, 25 C. 522 (F. B.); 2 C. W. N. 501	165
Thackersey Dewraj v. Hurbhum Nursey, 8 B. 432	553
Thacoor Prosad v. Baluck Ram, 12 C. L. R. 64	101
Thandavan v. Valliamma, 15 M. 336 at p. 341; 2 M. L. J. 130	543
Thomas Barclay v. Syed Hossein Ali Khan, 6 C. L. J. 601	78, 338, 379
Thumbalabed Hampanna v. Parisi Gangamma, 27 Ind. Cas. 911; 16 Cr. L. J. 239	330
Thumbusawmy Moodelly v. Hossain Rowthen, 2 I. A. 241; 1 M. 1; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531	476
Tincowry Dey v. Fakir Chand Dey, 30 C. 218; 7 C. W. N. 180	221
Tirbeni Pershad v. Ram Narain, 20 Ind. Cas. 951; 11 A. L. J. 713	623
Tirumalachariar v. Andal Animal, 30 M. 406; 17 M. L. J. 285; 2 M. L. T. 357	111
Toodgood v. Spyring, (1834) 1 C. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 347; 149 E. R. 1044; 40 R. R. 523	328
Toolsee Money Dasse v. Sudevi Dasse, 26 C. 361; 3 C. W. N. 347	638
Topandas v. Manager, Encumbered Estates, 10 Ind. Cas. 210; S. L. R. 47	869
Tottempudi Venkatararatnam v. Tottempudi Sehamma, 27 M. 228	889
Tottenham Local Board v. Law Conservancy, (1913) 1 Ir. R. 48; 2 T. R. 410	413
Trimnell, <i>In re</i> , (1865) 11 Jur. (N. S.) 348	688
Troughton v. Gitley, (1766) Ambler 629; at p. 630; 27 E. R. 408	440
Troylokya Nath Bose v. Jyoti Prokash Nandi, 8 C. W. N. 251; 30 C. 761	70

T—concl.

V—concl.

	Page.
Tucker v. Hernaman, (1853) 4 DeG. M. & G. 395; 102 R. R. 186; 22 L. J. Ch. 791; 17 Jur. 723; 1 Sm. & G. 394; 43 E. R. 561	440
Tukaram Anant Joshi v. Vithal Joshi, 13 B. 656	428
Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. 1; 8 M. L. T. 453; (1910) M. W. N. 656; 21 M. L. J. 1	638
Tulk v. Moxbay, (1848) 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 13 Jur. 89; 41 E. R. 1143; 78 R. R. 289; 12 L. T. (o. s.) 469	484
Tullis v. Jackson, (1892) 3 Ch. 441; 61 L. J. Ch. 655; 67 L. T. 340; 41 W. R. 11	179
Tulebhiram v. Babu Lal, 10 Ind. Cas. 908; 33 A. 654; 8 A. L. J. 733	793
Tulsidas Laxman v. Emperor, 3 Ind. Cas. 171; 11 Bom. L. R. 544; 10 Cr. L. J. 250	986
Turner v. Smith, (1901) 1 Ch. 213 at p. 219; 83 L. T. 704; 49 W. R. 186; 70 L. J. Ch. 144; 17 T. L. R. 143	860

U

U. Dhammaloka v. Emperor, 10 Ind. Cas. 789; 12 Cr. L. J. 248; 4 Bur. L. T. 84	975
Udit Upadhia v. Imam Bandi Bibi, 24 A. 402; A. W. N. (1902) 99	772
Udoy Kumari Ghatwalin v. Hari Ram Shaha, 28 C. 483	383
Uma Sundari Dasi v. Ramji Haldar, 7 C. 242; 9 C. L. R. 13	428
Uma Sunker v. Kalikomul, 6 C. 256 (F. B.); 7 C. L. R. 145	12
Umatul Batul v. Nanji Kuar, 6 C. L. J. 427; 11 C. W. N. 705	703
Umesh Chandra Khasnavis v. Golap Lal Mustafi, 31 C. 233; 7 C. W. N. 876	610
Umrao Singh v. Lachhman Singh, 10 Ind. Cas. 285; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 33 A. 344; 38 I. A. 104	923
Underhill v. Horwood, (1804) 10 Ves. 209; 32 E. R. 824	214
Union Steamship Company of New Zealand, Limited v. Melbourne Harbour Trust Commissioners, 9 A. C. 365; 53 L. J. P. C. 59; 50 L. T. 337; 1 Asp. M. C. 222	131
Unwin v. Leaper, 1 M. & G. 747; 1 Drink 3; 10 L. J. C. P. 41; 4 Jur. 1037; 56 R. R. 522	402
Upendra Chandra Singh v. Mohri Lal Marwari, 31 C. 745	705
Upooroop Tewary v. Lalla Bandhjeo Suhay, 6 C. 749; 8 C. L. R. 112; 4 Shome, L. R. 42	24
Uttum Chand v. Emperor, 15 Ind. Cas. 1007; 16 C. W. N. 551; 13 Cr. L. J. 591; 15 C. L. J. 401; 20 C. 344	206

V

Vadali Mamidigada v. Kotipalli Ramayya, 26 M. 334	681
Vadilal v. Fulchand, 30 B. 56; 7 Bom. L. R. 664	595
Vaidyanatha Sastrial v. Eggia Venkatarama Dikshitar, 30 M. 279; 17 M. L. J. 373	382

Vaithilinga Mudali v. Munigan, 15 Ind. Cas. 299; 37 M. 529; 23 M. L. J. 189; (1912) M. W. N. 1127	679
Vansittart, <i>Ex parte</i> , Brown, <i>In re</i> , (1893), 2 Q. B. 377; 62 L. J. Q. B. 279	441
Vappuluri Tatayya v. Garinalla Rama krishnamma, 6 Ind. Cas. 240; 34 M. 288; 8 M. L. T. 74; 20 M. L. J. 798; (1910) M. W. N. 222	279
Varadayya Chetty v. Munusami Chetti, 13 Ind. Cas. 232; 10 M. L. T. 514	385
Varden Seth Sam v. Luckpathy Royjee Lallah, 9 M. I. A. 303; Marsh, 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 766	941
Vasudev Raghunath v. Janardan Sadashiv, 29 Ind. Cas. 497; 17 Bom. L. R. 522; 11 B. 507	783
Velayutha Chetty v. Govindasami Naicken, 8 Ind. Cas. 364; 34 M. 513; (1910) M. W. N. 637; 9 M. L. T. 108	108
Velchand Ohhaganlal Shah v. Lieut. Liston, 25 Ind. Cas. 371; 38 B. 638; 16 Bom. L. R. 517	847
Venkata v. Kannam, 5 M. 184 at p. 186	509
Venkata Kumara Mahipati Surya Rao v. Sreerama Charyulu, 12 Ind. Cas. 430; (1911) 2 M. W. N. 307	355
Venkatagiri Aiyar v. Sadagopachariar, 10 Ind. Cas. 83; 14 Ind. Cas. 449; 22 M. L. J. 129	507
Venkatanarasammah v. Ramiah, 2 M. 108	507
Venkataramana Bhatta v. Gundaraya, 31 M. 408; 4 M. L. T. 221	335
Venkatarangayya v. Poranki Appalarazu, 8 Ind. Cas. 546; 20 M. L. J. 728; 11 M. L. T. 429	631
Venkatanarayana Pillay v. Subbammal, 29 Ind. Cas. 298; 38 M. 408; 17 M. L. T. 435; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 69 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 29 M. L. J. 851; 42 I. A. 125	385
Venkateswara Iyan v. Shekhari Varma, 8 I. A. 142; 3 M. 384	817
Venkayya v. Narasamma, 11 M. 204	929
Vidyapurna Tirtha Swami v. Vidyandhi Tirtha Swami, 27 M. 435; 14 M. L. J. 105	61, 894
Vidyasagar v. Ratipal, 25 Ind. Cas. 752; 17 O. C. 347; 1 O. L. J. 433	350
Virjivandas v. Mahomed Ali Khan, 5 B. 208 at p. 221	495
Virupakshappa v. Shidappa, 26 B. 109 at p. 116; 3 Bom. L. R. 565	214, 678
Vishnu v. Krishnan, 7 M. 3	678
Visvanathan Chetty v. Ramanathan Chetty, 24 M. 646	373
Vyankatraya v. Shivrambhat, 7 B. 256	373
Vyse v. Brown, (1884) 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151	782

W

Wadling v. Oliphant, (1875) 1 Q. B. D. 145; 45 L. J. Q. B. 173; 33 L. T. (N. S.) 837, 24 W. R. 246	440
Wahed Ali v. Emperor, 32 C. 1090; 3 Cr. L. J. 120	968
Walayat Husain v. Ram Lal, 25 Ind. Cas. 643; 12 A. L. J. 1113	373, 823

W—contd.

	Page.
Walford, <i>In re</i> , Kenyon v. Walford, (1912) 1 Ch. D. 219 at p. 225; 81 L. J. Ch. D. 828 ...	158
Wali Muhammad v. Bahawal Baksh, 21 Ind. Cas. 925; 28 P. R. 1914; 14 P. L. R. 1914; 20 P. W. R. 1914 ...	194
Walker v. Linom, (1907) 2 Oh. D. 104; 76 L. J. Ch. 500; 97 L. T. ...	122
Wallace v. Small, M. & M. 446 ...	574
Walsh v. Lonsdale, (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109 ...	474, 329
Waring v. M'Caldin, 7 Ir. R. O. L. 288 ...	329
Washington Gaslight Company v. Lansden, (1898) 172 U. S. 534; 43 Law. Ed 543 ...	601
Wasi Inam v. Poonit Singh, 20 C. 696 ...	626
Watson and Company v. Ram Chund Dutt, 18 C. 10; 17 I. A. 110 ...	840
Watts v. Driscoll, (1901) 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R. 101 ...	545
Watts v. Lawson, M. & M. 447n. ...	577
Wazir Mahton v. Lulit Sing, 7 C. 163 at p. 169; 8 C. L. R. 505 ...	848
Weatherall v. Geering, (1960) 12 Ves. Jun. 504; 8 R. R. 369; 88 E. R. 191 ...	839
Webb v. Macpherson, 31 C. 57 (P. O.); 5 Bom. L. R. 838; 8 C. W. N. 41, 13 M. L. J. 389; 30 I. A. 288 ...	941
Webster v. Bosanquet, (1912) A. C. 394; 106 L. T. 357; 28 T. L. R. 271; 81 L. J. P. O. 205 ...	612
Wegg Prosser v. Evans, (1895) 1 Q. B. 108; 64 L. J. Q. B. 1 ...	
West Hopetown Tea Company, Limited, <i>In the matter of</i> , 12 A. 192; A. W. N. (1890) 71 ...	839
Whetham v. Davey, (1885) 30 Ch. 574; 53 L. T. 501; 83 W. R. 925 ...	545
Wickenden v. Raysan, (1855) ■ DeG. M. & G. 210; 43 E. R. 1212; 25 L. J. Ch. 162; 4 W. R. 39; ■ L. T. (o. s.) 192; 106 R. R. 82 ...	509
Williams v. Earle, (1868) 3 Q. B. 739; 9 B. & S. 740; 87 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041 ...	839
Williams v. Hedly, (1807) ■ East, 378; 103 E. R. 388; 9 R. R. 473 ...	400
Williams v. Poole, 21 W. R. 252; 28 L. T. 292 ...	545
Williams v. Tyley, (1858) Johnson, 530; 123 R. R. 228; 5 Jur. (N. s.) 35; 7 W. R. 116; 70 E. R. 531 ...	711
Willis v. Gipps, (1846) 5 M. P. C. 379; ■ State Trials (N. s.) 311; 13 E. R. 379 ...	1
Winsor v. Queen, (1866) 1 Q. B. 390; 7 B. & S. 490; 35 L. J. M. C. 161; 12 Jur. (N. s.) 561; 14 L. T. 567; 14 W. R. 695; 10 Cox, C. C. 327 ...	980

W—conold.

	Page.
Wise v. Sunduloonissa Chowdhranee, 20 E. R. 68; 11 M. I. A. 177 at p. 181; 7 W. R. 13 (P. O.); 1 Suth. P. C. J. 667; ■ Sar. P. C. J. 249 ...	815
Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company, (1873) 16 Eq. 433; 43 L. J. Ch. 131 ...	70
Wood v. Earl of Durham, 21 Q. B. D. ■ at p. 508; 57 L. J. Q. B. 547; 59 L. T. 142; 37 W. R. 222 ...	242
Wood v. Griffith, 1 Jacob & Walker, 36 at p. 37; 37 E. R. 16; 1 Swans. ■ ...	70
Wood v. Leadbitter, (1845) 13 M. & W. 833 at p. 845; 67 R. R. 831; 14 L. J. Ex. 161; 9 Jur. 187; 153 E. R. 351 ...	473
Wooma Dace v. Gokulanand Das, 5 I. A. 40; 3 C. 587; 2 C. L. R. 51 ...	18
Woomatara Debea v. Unnopoorina Dasse, 11 B. L. R. 158; 18 W. R. 163 ...	458
Womesh Chunder Goopto v. Raj Narain Roy, 10 W. R. 15 ...	217
Wotherspoon v. Currie, (1872) 5 H. L. 508 at p. 514; ■ L. J. Ch. 130; 27 L. T. 393 ...	533
Wright v. Sanderson, Sanderson, <i>In re</i> , (1884) 9 P. D. 149; 53 L. J. P. 49; 10 L. T. 769; 32 W. R. 560; 48 J. P. 180 ...	688
Wright v. Zetland Marquess, (1908) 1 K. B. 63; 77 L. J. K. B. 152; 97 L. T. 867; 24 T. L. R. 48 ...	65
Y	
Yarnold v. Moorhouse, (1830) 1 Rus. ■ My. 364; 89 E. R. 141; 32 R. R. 223 ...	838
Yemunabai v. Balshet, 5 Bom. L. R. 584 ...	816
Young v. Richard, (1889) 2 Curt. 371 ...	688
Yusuf Sahib v. Durgi, 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 368 ...	929
Z	
Zaharia v. Debi, 7 Ind. Cas. 156; 33 A. 51 (F. B.); 7 A. L. J. 861 ...	584
Zain-ul-abdin Khan v. Muhammad Asgar Ali Khan, 10 A. 166; 15 I. A. 13; 5 Sar. P. C. J. 129 ...	304, 763
Zemindar of Chellapalli v. Rajalapati Somayya, 27 Ind. Cas. 77; 27 M. L. J. 718; 16 M. L. T. 576; (1915) M. W. N. 1; 2 L. W. 117; 39 M. 341 ...	804
Zimble v. Abrahams, (1908) 1 K. B. 577; 72 L. J. K. B. 103; 51 W. R. 343; ■ L. T. 46; 19 T. L. R. 189 ...	492

Title

Author

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GENERAL INDEX

VOLUME XXXIV—1916.

—:—:—

ABATEMENT of SUIT—Decree, appeal in 372

——Public Trust—Suit by two worshippers—
Death of one plaintiff, if causes suit to abate 384

ABDUCTION. See PENAL CODE, s. 366.

ACCOUNT. See VENDOR AND PURCHASER.

——Mutual dealings—Oral settlement of accounts
——Cause of action.

In cases of mutual dealings even an oral settle-
ment of accounts may give rise to a substantive
—— of action. *M. AIYASAMI CHETTY v. CHINNIA*
NAINAR, 3 L. W. 333 431

ACKNOWLEDGMENT. See LIMITATION ACT, s. 19.

—— of receipt of insured parcel, whether 'valu-
able security'. Despatch of registered insured
packets with blank sheets to a creditor—Creation
of evidence in discharge of debt—Offence—Cheat-
ing—Attempt to cheat 992

ACTS—GENERAL.

- ACT 1858—XXXV. See LUNACY ACT.
—— 1860—XXI. See SOCIETIES REGISTRATION ACT.
—— 1860—XLV. See PENAL CODE.
—— 1861—V. See POLICE ACT.
—— 1865—X. See SUCCESSION ACT.
—— 1870—VII. See COURT FEES ACT.
—— 1872—I. See EVIDENCE ACT.
—— 1872—IX. See CONTRACT ACT.
—— 1877—I.—See SPECIFIC RELIEF ACT.
—— 1877—III.—See REGISTRATION ACT.
—— 1877—XV. See LIMITATION ACT.
—— 1878—I. See OPIUM ACT.
—— 1878—XI. See ARMS ACT.
—— 1879—XVIII. See LEGAL PRACTITIONERS ACT.
—— 1881—V. See PROBATE AND ADMINISTRATION
ACT.
—— 1881—XXVI. See NEGOTIABLE INSTRUMENTS
ACT.
—— 1882—II. See TRUSTS ACT.
—— 1882—IV. See TRANSFER OF PROPERTY ACT.
—— 1882—V. See EASEMENTS ACT.
—— 1882—VI. See COMPANIES ACT.
—— 1882—XIV. See CIVIL PROCEDURE CODE.
—— 1884—II. See INCOME TAX ACT.
—— 1887—IX. See PROVINCIAL SMALL CAUSE COURTS
ACT.
—— 1889—VII. See SUCCESSION CERTIFICATE ACT
—— 1890—VIII. See GUARDIANS AND WARDS ACT.
—— 1890—IX. See RAILWAYS ACT.
—— 1893—IV. See PARTITION ACT.
—— 1894—I. See LAND ACQUISITION ACT.

ACTS—GENERAL—concl'd.

- ACT 1897—X. See GENERAL CLAUSES ACT.
—— 1898—V. See CRIMINAL PROCEDURE CODE.
—— 1899—II. See STAMP ACT.
—— 1904—VIII. See UNIVERSITIES ACT.
—— 1907—III. See PROVINCIAL INSOLVENCY ACT.
—— 1908—V. See CIVIL PROCEDURE CODE.
—— 1908—IX. See LIMITATION ACT.
—— 1908—XVI. See REGISTRATION ACT.
—— 1909—III. See PRESIDENCY TOWNS INSOLVENCY
ACT.

ACTS—(LOCAL)—BENGAL.

- ACT 1857—II. See CALCUTTA UNIVERSITY ACT.
—— 1859—XI. See BENGAL LAND REVENUE SALES
ACT.
—— 1879—IX. See BENGAL COURT OF WARDS ACT.
—— 1880—IX. See BENGAL CESS ACT.
—— 1884—III. See BENGAL MUNICIPAL ACT.
—— 1885—VIII. See BENGAL TENANCY ACT.
—— 1887—XII. See BENGAL, N.-W. P. AND ASSAM
CIVIL COURTS ACT.
—— 1903—I. See BENGAL VALIDATING ACT.
—— 1908—VI. See CHOTA NAGPUR TENANCY ACT.
—— 1911—V. See CALCUTTA IMPROVEMENT ACT.

ACTS—(LOCAL)—BOMBAY.

- ACT 1863—VI. See BOMBAY PUBLIC CONVEYANCES
ACT.
—— 1879—V. See BOMBAY LAND REVENUE CODE.
—— 1879—XVII. See DEKKHAN AGRICULTURISTS'
RELIEF ACT.
—— 1888—VI. See GUJARAT TALUQDARS' ACT.
—— 1901—III. See BOMBAY DISTRICT MUNICIPAL
ACT.

ACTS—(LOCAL)—CENTRAL PROVINCES.

- ACT 1898—XI. See CENTRAL PROVINCES TENANCY
ACT.
—— 1904—II. See CENTRAL PROVINCES COURTS
ACT.

ACTS—(LOCAL)—MADRAS.

- ACT 1886—I. See MADRAS ABKARI ACT.
—— 1889—I. See MADRAS VILLAGE COURTS ACT.
—— 1889—III. See MADRAS TOWN NUISANCES ACT.
—— 1904—III. See MADRAS CITY MUNICIPAL ACT.
—— 1908—1. See MADRAS ESTATES LAND ACT.

ACTS—(LOCAL)—PUNJAB.

- ACT 1887—XVI. See PUNJAB TENANCY ACT.
 — 1887—XVII. See PUNJAB LAND REVENUE ACT.
 — 1900—I. See PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT.
 — 1911—III. See PUNJAB MUNICIPAL ACT.
 — 1914—I. See PUNJAB EXCISE ACT.
 — 1914—III. See PUNJAB COURTS ACT.

ACTS—(LOCAL)—U. P.

- ACT 1876—XVIII. See OUDH LAWS ACT.
 — 1886—XXII. See OUDH RENT ACT.
 — 1900—I. See U. P. MUNICIPALITIES ACT.
 — 1901—II. See AGRA TENANCY ACT.
 — 1901—III. See U. P. LAND REVENUE ACT.
 — 1903—II. See BUNDELKHAND ALIENATION OF LAND ACT.

ORDINANCE.

- ORD. 1914—III. See FOREIGNERS ORDINANCE.

REGULATION.

- REG. 1900—VII. See ADEN SETTLEMENT REGULATION.

STATUTES.

- 24 & 25 Vic. C. 104. See CHARTER ACT.
 53 & 54 Vic. C. 39 (1890). See PARTNERSHIP ACT.

ADEN SETTLEMENT REGULATION (VII of 1900)
 — Rules for assessment and collection of taxes - Provision regarding finality of rateable value - Rule—
 Ultra vires.

It is doubtful if rule 12 of the rules for assessment and collection of taxes made under the Aden Settlement Regulation (VII of 1900) makes the decision of the Judge of the Resident's Court in a rating appeal final, and assuming that it does make the decision final it would amount to the creation of a jurisdiction which the Legislature withheld, and thus would be *ultra vires*. **B ABDULLABHAI LALJI v. EXECUTIVE COMMITTEE, ADEN**, 18 Bom. L. R. 296 141

ADJUDICATION directing abatement of suit on account of plaintiff's death, whether decree—
 Appeal 822

ADOPTION. See BUDDHIST LAW; HINDU LAW.

ADVERSE POSSESSION—Land acquired by being included in land held from before—Encroachment—
 Rights acquired, nature of.

Where a person in possession of a certain land acquires by adverse possession some other land adjoining it, he gets the same rights in respect of the land thus acquired as he has in respect of the land already in his possession from before. **O SHER NARAIN SINGH v. BISAI SINGH**, 3 O. L. J. 170 416

—, nature of 471
 — Prescriptive title, acquisition of 898

— Right to redeem, it can be adversely possessed—
 — Equity of redemption, nature of.

A person cannot be said to be in "adverse possession" of the right to redeem immoveable property,

ADVERSE POSSESSION—concl'd.

where the right to possession and actual possession is all the time in the hands of the mortgagee. The fact that he succeeds in getting his ~~name~~ recorded in the Revenue papers does not confer a title on him.

Semble.—A person cannot be said to be in "adverse possession" against the owner while the former is neither in actual possession nor in constructive possession by receipt of the rents and profits.

The equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee. **A KUNWAR SEN v. DARBARI LAL** 171

— Trust property—Acts of ownership while office of trustee vacant—Appointment of trustee—
 Suit for possession—Limitation 945

— against widow—Confiscation of proprietary rights in Oudh, effect of 257

AGRA TENANCY ACT (II of 1901), Ss. 3, 12—
 Restriction on leases, applicability of—Stipulation contrary to—Proviso to s. 12, how far valid—
 Contract Act (IX of 1872), s. 23.

The restrictions on leases and agreements relating to tenancy, contained in section 3 of the Agra Tenancy Act, apply only to tenants and do not take away or limit any right of a landholder.

Where, therefore, a lease contained a definite stipulation that it was not to interfere with the accrual of occupancy rights either in the past or in the future, i. e., the zamindar practically agreed that the proviso to section 12 should not apply:

Held, (1) that the stipulation was valid and could have effect as making the proviso inapplicable in the case;

(2) that the stipulation could not be said to defeat the provisions of the Agra Tenancy Act and as such unlawful under section 23 of the Contract Act. **U P B R HARDEO v. SHER SINGH** 148

— S. 12 148

— S. 14—Agreement to exchange holding—Landholder, whether can give possession of new holding before old one has been vacated—Tenant cultivating both holdings, whether loses his right of exchange.

A tenant must be admitted to possession of a new holding within a year of loss of possession of the old one to claim a right of exchange; but there is nothing to prevent the landholder from giving possession of the new holding, before the old holding has been actually vacated: nor would the tenant thereby be deprived of his right of exchange on the new holding.

Where, therefore, there was an agreement between the landlord and his tenant to the effect that the tenant should exchange one holding for another and the tenant cultivated both the holdings for one year:

Held, that section 14 of the Tenancy Act did not operate to destroy the tenant's right of exchange. **U P B R MOHAMMAD HUSAIN KHAN v. SIS RAM** 186

— Ss. 41, 97—Agreement to enhance rent—
 Attestation—Verbal agreement, if valid.

An agreement enhancing the rent of a tenant under section 41 of the Agra Tenancy Act must be contained in a written document and attested under section 97 of the Act, if not registered under the

AGRA TENANCY ACT—contd.

provisions of the Registration Act, but must not be a verbal attested agreement. **A MUHAMMAD YUNUS ALI KHAN v. KAIAN SINGH** 369

— S. 41 (a), (b)—*United Provinces Land Revenue Act (III of 1901), s. 36 - Rent fixed by Collector—Enhancement of rent by agreement, validity of.*

Where on the 26th of April the Collector fixed the rent of an ex-proprietary tenant under section 36 of the Land Revenue Act at Rs. 50 and on the 10th of July of the same year the defendants executed an agreement undertaking to pay Rs. 72-6-0 as rent:

Held, that the agreement was valid.

The right of free contract cannot be disregarded by Courts of law without an express statutory prohibition.

Where the rent has not abated or been enhanced within ten years it is open to the parties to adopt the alternative provisions, either by a registered agreement or by an application under section 41 (b) of the Agra Tenancy Act. **A BHAIROO PRASAD v. SAMARPURI** 441

— Ss. 47, 97—*Non-occupancy tenant paying above Rs. 100 rent—Enhancement of rent - Registered agreement, necessity of.*

In a suit for the ejectment of a non-occupancy tenant a compromise was arrived at between the zemindar and the tenant, under which the zemindar dropped the ejectment proceedings allowing the tenant to acquire occupancy rights and the tenant agreed to pay a rent of Rs. 200 instead of Rs. 180 per annum. The compromise was endorsed on a paper bearing a general stamp of Re. 0-8-0 and filed in the Court of the Assistant Collector but not registered. The suit was dismissed but the terms of the compromise were not embodied in the decree. In a suit for rent:

Held, that under section 47 of the Tenancy Act the original rent of Rs. 180 could be enhanced only by registered agreement between the parties and that section 97 of the Act did not apply to the circumstances of the case. **A DAT PRASAD SINGH v. GOPAL RAM**, 14 A. L. J. 57 234

— S. 58 84

— S. 97 234, 369

— Ss. 150, 156—*Suit for assessment of rent—Grove, when liable to assessment—General custom—Burden of proof.*

A 'grove', i. e., land covered with trees, does not fall within the definition of the term 'land' as used in the Agra Tenancy Act.

There is no general custom that grove land should pay rent, and unless such a custom is established no rent can be assessed upon it.

The burden of proving such a custom is upon the landholder alleging it.

Where, however, grove land is subsequently brought under cultivation it becomes "land" within the definition of the Tenancy Act, and is liable to assessment of rent. **U P B R MAULA BAKHSI v. KALKA SINGH** 155

— S. 156 155

— S. 158—"Successor", meaning of—*Hindu Law—Joint family—Survivor, if successor—Decision of*

AGRA TENANCY ACT—conold.

Revenue Court—Appeal to District Judge, maintainability of—Court, duty of.

A survivor in a Hindu joint family is a "successor" within the meaning of the word in section 158 of the Agra Tenancy Act.

An appeal against the decision of a Revenue Court deciding the question of successor under section 158 of the Agra Tenancy Act lies to the District Judge.

Semle.—It is the duty of a Court of Law, specially in a matter which is after all more a matter of settlement and revenue than strict law in the sense of determination of the rights of litigants or redress of wrongs, to take a broad and liberal view, if it is possible. **A DAYALPURI v. NARAYAN DUTT**, 14 A. L. J. 878 26

— S. 164—*Jurisdiction—Suit for profits in respect of rents of shops and houses, market dues and ground rents—Suit cognizable by Civil Court only.*

A claim for the plaintiff's share of the rents of shops and houses, market dues and ground rents in connection with a market realized by the defendant, a *lambardar*, is not cognizable by the Revenue Court under the provisions of section 164 of the Agra Tenancy Act, inasmuch as the jurisdiction of the Revenue Court is excluded unless the profits claimed are strictly in respect of revenue-paying lands. **A DIGBIJAI SINGH v. HIRA DEVI**, 14 A. L. J. 419; 38 A. 322 276

— S. 202 162

ALIENATION, Administrator's powers of—Sanction of Court, strict compliance with terms of 128

— , decree restraining, effect of 353

— by Hindu father—Son's right to impeach only when purpose illegal or immoral—Inadequacy of consideration, whether ground for setting aside alienation—Manager, powers of 89

AMENDMENT OF PLAINT. See PLAINT.

— Application made at late stage 934

— at late stage—Court, power of 397

— Suit framed upon title—Plaintiff, whether can amend plaint by asking for specific performance 446

ANNUAL REGISTERS, correction of, application for—Possession, main factor to be considered—Taluka, disputes regarding, referred to arbitration—Award given effect to by private partition—Entry, wrong in annual registers—U. P. Land Revenue Act (III of 1901), s. 138.

In an application for a correction of the annual registers prescribed by section 32, U. P. Land Revenue Act, possession is, in view of section 40 of the Act, the main factor to be considered.

The disputes between the members of a *talukdar's* family regarding the *taluka* were referred to arbitration, and an award was made, by which the villages in the *taluka* were separately allotted to each of them while one of them was to remain the *talukdar*. To give effect to the terms of the award, it was followed by a private partition and the different members of the family remained ever since in separate possession of the villages. But the name of the member who was the *talukdar* continued all along to be wrongly recorded in the

ANNUAL REGISTERS—concl'd.

annual registers, prescribed by section 32 of the U. P. Land Revenue Act, ■ the sole owner, ■ well as the *talukdar*, of his own share and those of the remaining members. These members subsequently applied for ■ correction of the annual registers stating that the *talukdar's* name should continue to be recorded as *talukdar* and *lambardar* of each village and the entire *taluka*, but that they should be recorded as co-sharers in possession:

Held, that section 138 of the U. P. Land Revenue Act was no bar to the granting of the application and to corrections being made accordingly, unless and until the award itself was set aside by a competent Court as invalid. **UPBR RAMZAN ALI KHAN v. MUHAMMAD QAYUM KHAN**, 3 O. L. J. 247 749

APOSTACY. See HINDU LAW.

APPEAL (CIVIL). See ARBITRATION; CIVIL PROCEDURE CODE, O. XLIII, R. 1.

- Abatement—Decree — Revision, where appeal permitted 372
- Appellate Court — Amendment of slips, mistakes, omissions — Jurisdiction 79
- Appellate Court, functions of—Decision on facts—Reversal 807
- Appellate Court, right of, to entertain matters happening after suit—Jurisdiction, objection to—'Place of suing'—Civil Procedure Code (Act V of 1908), s. 21 411
- Appellate Court, power of, to differ from opinion of Trial Judge 707
- Application under Order XXIII, r. 3, of Civil Procedure Code, 1908—Decree, refusal to draw up 186
- Appointment of guardian of property on furnishing security—Confirmation of order after security is furnished—Appeal against latter order, whether lies—Madras High Court Rules under section 50, Guardians and Wards Act—Muffasil Courts, practice of 432
- Arbitration—Award, 'recorded' by Court 105
- , bar to, under s. 153, Bengal Tenancy Act, whether can be evaded by joining claim for money with claim for rent—Civil Procedure Code (Act V of 1908), s. 102—Error of law—Revision 697
- to Board of Revenue—Appeal not maintainable—Revision, appeal treated as 689
- cognizable by different Courts—Pecuniary jurisdiction—Decision of Divisional Judge in appeal from decree in one suit, whether *res judicata* in appeal to Chief Court from the simultaneous decision in another suit where parties identical—Provision in bar of suit—Interpretation 581
- Decision of Revenue Court—Question of successor—Appeal to District Judge, maintainability of 25
- Decree prepared after judgment—Judgment deferring preparation of decree till payment of penalty—Decree, appeal from—Limitation, starting point for 867
- District Collector wrongly entertaining appeal—Board of Revenue, powers of 460
- *Ex parte* decree, appeal from—Remand for further evidence—Appellate Court, powers of 493

APPEAL—cont'd.

- (CIVIL)—Interlocutory orders 301
- against ■ interlocutory order—Receiver, power of, to make inquiry 777
- Judgment of reversal, what should contain
- Discussion of evidence—*Jotedar*, meaning of 185
- under Letters Patent, extension of time for 584
- Limitation—Amendment of decree, whether extends time for appealing—Limitation Act (IX of 1908), s. 5.
- A party who prefers an appeal from a decree after its amendment beyond the period of limitation from the date of the decree but within it from the date of the amendment, is to be limited to his grounds of appeal which refer to the amendment, unless he is entitled to an extension of time under section 5 of the Limitation Act.
- The rule laid down in *Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji*, 3 C. L. J. 188, for extending the time for appeal from ■ decree on its amendment approved. **C SATIKANTH BANERJEE v. RAM CHANDRA CHATTERJEE** 556
- Limitation, computation of time for—Copyists rules—Time requisite for obtaining copies—Requisition for appearance to take steps to secure copies—Default, deduction of day of 458
- Limitation, new point of—No bar from date of confirmation under Article 138—Estoppel for inconsistent positions, rule of, applicability of 817
- Non-appealing parties, right of, to be heard in support of appeal 714
- , non-joinder of some of defendants in—Relinquishment of claim—Maintainability of appeal—Right to proportionate relief 138
- Order refusing to remove Receiver, if appealable—Receivers appointed to act jointly—Retirement of one, effect of.
- An order refusing an application for the removal of a Receiver is not appealable.
- Where two persons are appointed Receivers by the Court, one for the mortgagors and the other for the mortgagees, by the retirement of one of them the order appointing the Receivers does not come to an end. **C EASTERN MORTGAGE AGENCY CO. LD. v. PREMANANDA SAHA**, 23 C. L. J. 217 789
- Order refusing to restore suit dismissed for default by Judge on Original Side—Legal advisers, mistake or laches of—Party, whether should be penalized for—Appeal, if maintainable—Order, if judgment—Letters Patent, cl. 15 634
- Plea raised for first time in final Court of Appeal, when can be entertained—Suit, circumstances after institution of, when to be taken into consideration by Court 869
- presented after time—'Sufficient cause'—Review of judgment, deduction of time occupied in—Practice 44
- Suit for possession by partition—Decree specifying mode of partition—Proper fee 587
- (CRIMINAL)—Acquittal—Grounds for interference in appeal 306

APPEAL—contd.

- (CRIMINAL)—Appellate Court, finding of
 - Not common gaming house—Re-trial, propriety of order for—Criminal Procedure (Act V of 1898), s. 423 (1) 305
- Assistant Sessions Judge, judgment of—Sentence under each of two sections, Penal Code, 4 years, sentences to run concurrently—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 408.
 - Where Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years under each of two sections of the Penal Code, the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court. **C LAKHIMI RAM GAGOI v. EMPEROR**, 23 C. L. J. 515; 17 Cr. L. J. 266 586
- Change in language, effect of—Orders of attachment and imprisonment, how to be passed—Injunction dissolved after disobedience—Effect of dissolution—Object of order of attachment or imprisonment explained 588
- Infringement of order under s. 3, Foreigners Ordinance, 1914—Procedure for trial of offender—Appeal, right of—Criminal Procedure Code (Act V of 1898), ss. 5, 418 641
- Order granting or refusing sanction—Jurisdiction of Appellate Court—Remand 334
- Sanction to prosecute—Sanction granted or refused by Small Cause Court—Appeal to District Judge—'Where no appeal lies', meaning of, in s. 195 (7) (c) Cr. P. C. 320
- , SECOND—Action for slander—Death of party—Second appeal, whether abates 249
- Application by Receiver to set aside sale—Order refusing application 829
- Burden of proof, wrong view of—Remand 294
- Change of defence—Foreclosure by consent of parties, plea of, whether can be urged 745
- Conversion of suit into one for specific performance, whether permissible 482
- Custom, point of, overlooked or neglected by lower Court—Appeal, whether competent without certificate 904
- Document admitted in first appeal—Objection in second appeal, if allowed.
 - The plaintiff sued for possession and to set aside an agreement which, she said, had been brought about by fraud and undue influence. The document was admitted without objection on her part in the first Court.
 - Held, that under the circumstances it was quite too late for the plaintiff-appellant to raise in second appeal questions as to the admissibility of the document which was received in evidence by the Court below. **A KIRPIA v. HARDEO** 57
- Money-decrees against same judgment-debtor in two suits by two separate creditors—Judgment-debtor's property sold in execution of one decree—Subsequent attachment of same property in other decree—Objection—Purchaser, whether legal representative of judgment-debtor 759
- Question of law, whether can be raised for the first time 450
- Question whether parties follow Muhammadan Law or custom, one of fact—Appeal, whether maintainable.

APPEAL—concl'd.

The question whether the parties to a case follow Muhammadan Law or custom is a question of fact and cannot be agitated in second appeal. **P ILAHI BAKSH v. RAHIM BAKSH**, 106 P. W. R. 1916 219

— SECOND—Revenue Court—Copy of first Court's judgment not filed, effect of—Dismissal of appeal, illegal—Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII, r. 1—Oudh Rent Act (XXII of 1886), s. 135.

Where a second appeal is preferred to a Revenue Court under the provisions of the Oudh Rent Act, and the memorandum of appeal is not accompanied by a copy of the first Court's judgment, or, if so accompanied, the copy is incomplete as only containing reference to the main judgment, the appeal ought not, in view of Order XLI, rule 1, and Order XLII, rule 1, Civil Procedure Code, and section 135 of the Rent Act, to be dismissed on the ground that the appellant has failed to file the copy of the first Court's judgment or main judgment, as the case may be, within the time allowed to him for that purpose, inasmuch as he is not required by law to file such a copy. **UPBR MUHAMMAD ABUL HASAN KHAN v. RAJ KUMARI**, 3 O. L. J. 209 705

— Revision petition converted into second appeal—Appeal barred at time of alteration—Insertion of wrong section of law, effect of—*Ex parte* fraudulent decree, suit to set aside, whether lies 264

— Right to graze cattle on village waste, how defined—"Agricultural cattle," meaning of—Suit for recovery of grazing dues, nature of 695

— Civil Procedure Code (Act V of 1908), s. 100—Substantial error or defect in procedure—Rejection of Commissioner's report without directing further enquiry.

In an appeal the Appellate Court rejected the report of the Commissioner for local investigation, which was acted upon by the Primary Court, and instead of directing a further investigation decided the appeal on other materials on the record. The case was one which could not be decided without an investigation on the spot:

Held, that the decision of the Appellate Court was open to second appeal under section 100, Civil Procedure Code, as it involved "a substantial error or defect in the procedure provided by the Code... which may possibly have produced error or defect in the decision upon the merits." **C TIRTHABASI SINGH ROY v. BEPIN KRISHNA ROY** 30

— Taking up big original suits after 5-30 P.M.—Practice 547

APPROVER, evidence of—Corroboration in material particulars 332

ARBITRATION—Award—Execution, award to be capable of—Intervention of Court, award made without—Uncertain award, setting aside of—Court, power of—Parties to arbitration, option of.

An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties;

ARBITRATION—concl.

in other words, it ought not to be infructuous and incapable of execution.

Where an award, made without the intervention of, and then filed in, Court, is uncertain and does not specify either the amount or the land awarded or does not give directions sufficient to enable it to be ascertained or identified, it is liable to be set aside on account of uncertainty. The Court has no power to remit such an award to the re-consideration of the arbitrator, but it is nevertheless open to the parties to go back to him and ask him to make a complete award, treating the arbitration as still pending. **O LAL JAGROOP SINGH v. BANKTAISHWAR RAWAN BAHADURPAL SINGH, 3 O. L. J. 137** **355**

— Award filed after time fixed therefor, whether nullity—Agreement not to raise any objection to award, how far binding **177**

— Award given effect to by private partition—Entry, wrong in annual registers—U. P. Land Revenue Act (III of 1901), s. 138 **749**

— Award, questions affecting validity of—Forum for decision—Appeal—Revision—Irregularities in procedure, rectification of, by High Court—Judgment on award before expiry of time allowed for objections—Jurisdiction—Pleader, power of, to apply for reference—Minor, benefit to, consideration of, before decree on award **845**

— Award 'recorded' by Court—Appeal—Agreement to abide by decision of majority—Refusal of minority to sign award—Award, validity of **105**

— Award, submission of, before due date, effect of **250**

— Court, whether can refer insolvency proceedings to arbitrator **549**

— Decree on award—Decree at variance with award as to payment of costs—Jurisdiction of Court—Amendment of decree—Remedy of party **787**

— Reference to arbitration—Application for adjournment praying for records to be sent to arbitrators, whether falls under Sch. II, s. 1, Civil Procedure Code, 1908 **741**

— Rejection of award for misconduct—Appeal—Revision—Parties agreeing not to object to award, effect of—Estoppel—Contract Act (IX of 1872), s. 28—Court Fees Act (VII of 1870), Sch. II, Art. 17 (*vi*)—Punjab Land Revenue Act (XVII of 1887), s. 158—Prayer for setting aside award, valuation of **192**

ARMS ACT (XI of 1878), Ss. 19, 20—Evidence indicating offence under s. 20—Commitment to Sessions—Magistrate's duty to order.

If in the trial of a case under the Indian Arms Act, the evidence recorded indicates an offence under section 20 of the Act, the Magistrate ought to commit the case to the Sessions, leaving it to the latter Court to determine whether the evidence is to be believed. **C NISHI KANTA LAHIRI v. EMPEROR, 20 C. W. N. 732; 17 CR. L. J. 202** **314**

— Ss. 19, 20, 29—Offences under ss. 19 and 20, whether distinct—Sanction under s. 29, whether

ARMS ACT—concl.

necessary when act punishable under first part of s. 20—Criminal Procedure Code (Act V of 1898), s. 537—Want of sanction under s. 29, Arms Act, whether curable—Procedure.

The offences created by and punishable under the first part of section 20 of the Arms Act are distinct from offences created by and punishable under section 19 of the Act. Therefore, District Magistrate's sanction, under section 29 of the Act, is unnecessary before instituting proceedings in respect of an act punishable under the first part of section 20 and mentioned in clause (f) of section 19.

The absence of sanction required under section 29 of the Arms Act is a defect fatal to any proceedings held without such sanction, inasmuch as the defect is not curable under section 537 of the Criminal Procedure Code.

Per Parlett, J.—Proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without previous sanction under section 29. If, however, in such a case a Magistrate finds that the intention to conceal the possession is not made out, he should discharge the accused under section 20. Proceedings under section 19 (f) may then be instituted, if and when the necessary sanction thereto is given under section 29. **L B NGA PO CHEIN v. EMPEROR, 17 CR. L. J. 209** **321**

— S. 20

314, 321

— S. 29

321

ATTACHMENT. See EXECUTION.

— , before judgment—Sale after attachment in pursuance of contract entered into before attachment, effect of **953**

ATTESTATION. See TRANSFER OF PROPERTY ACT, s. 59.

AWARD. See ARBITRATION.

BAILMENT. See CONTRACT ACT, s. 160.

BENAMIDAR, if can give notice under Bengal Tenancy Act **215**

BENGAL CESS ACT (IX B.C. of 1880), S. 47—Levy of cess, procedure for—Analogy to procedure for realization of rent—Contract between parties, effect of—Waiver of claim to interest on rent for a term, whether affects liability for interest on cess—'In the same manner and under the same penalties, etc.,' meaning of.

Section 47 of the Bengal Cess Act lays down that the procedure for levy of cess shall follow that prescribed for realization of arrears of rent.

The provisions of the section are not restricted or controlled by any special contract existing between landlord and tenant as to payment of interest on arrears of rent. Hence, the waiver of a claim by the landlord to demand interest on arrears of rent for a term in virtue of a contract with the tenant will not absolve liability for interest on the cess for that particular period at the rate mentioned in section 47.

The expression 'in the same manner and under the same penalties as if the same were arrears of rent due to him' in section 47 of the Act has reference

BENGAL CESS ACT—concl'd.

only to the procedure to be adopted and the consequences to follow in the recovery of rent, that is to say, the remedy would be by suit and the penalties would possibly be the sale of the holding or damages at 25 per cent. under section 68 of the Bengal Tenancy Act. **C RADHICA MOHAN ROY v. MANMOTHA NATH MITTER**, 23 C. L. J. 603 111

BENGAL COURT OF WARDS ACT (IX B. C. of 1879), Ss. 13A, 51, 55—*Management by Court of Wards under s. 13A—Execution sale of ward's property—Ward's right to set aside sale unrepresented by Manager—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—'Suit' in ss. 51, 55 of Act IX of 1879, meaning of—Release of estate pending appeal, whether empowers continuance of original application.* The word 'suit' in sections 51 and 55 of the Court of Wards Act (IX B. C. of 1879) covers miscellaneous proceedings

A judgment-debtor whose estate is under the management of the Court of Wards under section 13A of the Court of Wards Act cannot apply to set aside an execution sale of his properties except through the Manager of the Court. The Court's failure to institute the necessary proceedings will not give the ward a right to apply in his own name.

The judgment-debtor cannot continue the original application even if the estate is released during the pendency of the appeal. **C UMAKUNTA SEN v. HIRA LAL ROY** 86

— S. 18—*Court of Wards, power of, to give acknowledgment of debt and to execute promissory notes—Limitation Act (IX of 1908), s. 19—Acknowledgment of debt given by Court of Wards, validity of.*

A Court of Wards has power to give an acknowledgment under section 19 of the Limitation Act so as to give a fresh start for the computation of limitation.

Semble.—It may be doubted whether a Court of Wards has under the terms of section 18 of the Court of Wards Act power to direct the execution of a promissory note.

But a promissory note executed under its direction may in any event be used as an acknowledgment of a pre-existing debt. **C RASHBEHARY LAL MANDAR v. ANAND RAM**, 43 C. 211 205

— Ss. 51, 55 86

BENGAL LAND REVENUE SALES ACT (XI B. C. of 1859), s. 14—*Arrears incorrectly shown in Collector's books as due on separate account—Sale of whole estate—Requisition to co-sharers to purchase share as bids did not reach amount due—Re-sale on co-sharers' failure to purchase—Closing accounts of whole estate—No arrears due on date of sale for kist of period for which sale held—Irregularity—Sale inoperative—Mahalwar Register, copy of entries in, if admissible in evidence.*

A revenue-paying estate was put up for sale under section 14 of the Bengal Land Revenue Sales Act for arrears due on a separated share, which was entered in a separate account in the Collector's books. The sale was ostensibly held for arrears of the March kist, but the bids not having reached the amount due, the Collector intimated to the co-sharers that they were at liberty to purchase the share within June 17, 1904, by paying the arrears due under section

BENGAL LAND REVENUE SALES ACT—concl'd.

14 of Act XI of 1859. The co-sharers not having purchased the share, the Collector again put up the whole estate for sale on 19th September 1904 as for the March kist. Meantime, payments were made, in consequence whereof the March kist was not in arrear though an arrear of Rs. 2 and odd was due for the June kist:

Held, by the Judicial Committee affirming the judgment of the High Court,

(1) that the sale of the entire estate under section 14 of the Bengal Land Revenue Sales Act was void;

(2) that the Collector was bound to close the separate accounts on 17th June 1904, and as on that date there was no arrear in respect of the March kist, a sale as for the March kist was *ultra vires*.

Copies of entries in a *Mahalwar* Register kept under section 4 of Act VII of 1876 are admissible in evidence. The mere fact that it bears the signature of the Superintendent of Survey on a corner does not make it a document kept by that officer. **P C MUTSADDI MIAN v. MAHOMED IDRIS**, 19 C. W. N. 764 283

BENGAL MUNICIPAL ACT (III B. C. of 1884), Ss. 175, 176, 178, 179, *non-compliance with provisions of—Conviction under s. 218, legality of.*

The conviction of, and sentence passed upon, an accused under section 218 of the Bengal Municipal Act cannot be sustained, where the essential preliminary steps in compliance with the provisions of all the sections 175, 176, 178 and 179 of the Act had not been observed before an application was made to the Magistrate under section 202 of the Act for his criminal prosecution. **C NABIN CHANDRA AICH v. NOAKHALI MUNICIPALITY**, 23 C. L. J. 598; 17 Cr. L. J. 265 985

— Ss. 176, 178, 179 985

BENGAL, N.-W. P. AND ASSAM CIVIL COURTS ACT (XII of 1887), S. 37 210

BENGAL TENANCY ACT (VIII B. C. of 1885), S. 5—*Tenancy, character of, as shown by lease, if conclusive against sub-tenant—Renewal of lease, option of—Terms undefined, unenforceability of.*

Per N. R. Chatterjea, J.—Where it is shown by a lease unambiguous in its terms that the land was originally acquired by the tenant as a *raiyati*-holding, the character of the tenancy is not altered by the mere fact of the lessee subsequently letting out the land to others and the land may, as between the lessor and the lessee, be taken to have been acquired for the purpose as stated in the lease itself.

But it is open to a sub-lessee, who was no party to the contract of lease, to show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease.

The fact that the terms of a lease and the papers of the landlord show that the tenancy was a *raiyati* one, is not conclusive against the sub-lessees, who are entitled to prove from surrounding circumstances and other relevant facts that the interest of the lessee in relation to them was that of a tenure-holder.

The word "*jote*" does not necessarily mean the interest of a cultivator.

An option to the tenants of renewal on the expiry of a lease according to the terms on

BENGAL TENANCY ACT—contd.

which the lessors will wish to lease out in future, is not enforceable, the terms being undefined and depending upon the will of the lessors.

Per *Richardson, J.*—*Quere.*—Whether a mere statement in a lease that the land is let out to the tenant for the purpose of being cultivated by himself or his servants, is conclusive even as against the landlord to show that the tenant is a *raiyat*, whatever the area of the land may be or whatever may be done under the lease? **C RAJANI KANTA MUKHERJEE v. YUSUF ALI** 92

— S. 12—*Bengal Validating Act (I B. C. of 1903), effect of—Permanent tenure, transfer of, whether affected by non-payment of landlord's fee—Absence of notice to landlord—Rent-decree against transferor—Non-joinder of purchaser—Decree, whether binding on purchaser.*

Under the Validating Act (I B. C. of 1903) a transfer of the whole or a portion of a permanent tenure may be complete upon registration, although the landlord's fee is not paid and no notice of the transfer is given to him.

But if such a transferee allows the transferor (the original tenure-holder) to represent him to the landlord, he cannot take exception to the sale of his interest in execution of a decree for arrears of rent in a suit brought by the landlord against the original tenure-holder without making the transferee a party thereto. **C ALI MAHAMUD v. AFTABUDDIN BHUYA, 20 C. W. N. 335** 251

— as amended by Bengal Act I of 1907, s. 22 —
Landlord and tenant—Landlord's purchase of occupancy holding—Co-sharer landlords—Purchasing landlord, when can preserve non-occupancy rights.

The purchase by a landlord of an occupancy holding prior to 1908 is governed by the Bengal Tenancy Act VIII of 1885.

If the purchase was made by a co-sharer landlord on behalf of the other sharers, the whole tenancy is merged and the purchasing landlord cannot be heard to say that the non-occupancy right still subsists. In the case, however, of a purchase by a co-sharer landlord individually, the non-occupancy right can be kept alive by the purchaser. **PAT RAJA RAM SAHU v. JHANTI GOPE** 75

— S. 29 783

— S. 29—*Agreement to pay produce rent and on default enhanced money rent—Illegality.*

Where the money rent of an occupancy holding is altered, by a fresh agreement to a produce rent with a proviso that the rent exigible on default is to be in excess of the original rent, the agreement violates section 29 of the Bengal Tenancy Act and is unenforceable.

The defendant, an occupancy *raiyat* who had been occupying his holding at a money rent of Rs. 3-4-0, undertook, by a fresh *kabuliyat*, to pay a fixed produce rent of 12 *batwas* of paddy (priced at a *batwa* per rupee) and in default Rs. 12:

Held, that it was in effect a case of prohibited enhancement of rent under section 29 of the Bengal Tenancy Act and that the plaintiff was only entitled to rent at the original rate. **C TARAP ALI v. KALIPADA BANDOPADHYA, 23 C. L. J. 635** 97

BENGAL TENANCY ACT—contd.

— S. 29, CL. (6), proviso (1)—*Enhancement of rent by contract—Contract to enhance more than 2 annas in the rupee, if partially valid—Division of a tenancy by contract, when has effect of creating new tenancies.*

Proviso (1) to section 29 of the Bengal Tenancy Act does not control clause (6) of the section and continuous realisation of rent at an illegal enhanced rate will not entitle the landlord to realise rent at that rate.

A contract providing for an enhancement exceeding 2 annas in the rupee in contravention of section 29 of the Bengal Tenancy Act is wholly void and cannot be operative to the extent of the enhancement of 2 annas.

A mere division of a tenancy in pursuance of a contract between the landlord and the tenant has not the effect of creating new tenancies unless that was the intention of the parties. **C NAFAR CHANDRA PAL v. RAHMAN SHEIKH** 45

— S. 30 (c) 783

— Ss. 49, 85—*Notice—Under-raiyat getting transfer of non-transferable holding, whether can be ejected by landlord without notice.*

Where the sub-lease to an under-*raiyat* granted by the *raiyat* of a non-transferable occupancy holding is not valid against his landlord under section 85 of the Bengal Tenancy Act, the landlord can eject the under-*raiyat* without any notice under section 49 of the Act on the *raiyat* transferring the holding to the under-*raiyat*. **C JADAB SARDAR v. GOBINDA CHANDRA** 912

— S. 52—*Landlord and tenant—Diluvion—Claim for reduction of rent—Lease, construction of.*

A tenant is entitled to claim abatement of rent under section 52 of the Bengal Tenancy Act for partial diluviation of his lands, save where he expressly waives the privilege in his *kabuliyat*.

If, for no fault of the tenant, all the lands of his *jote* are washed away, he cannot, on general principles, be held liable to pay rent to the landlord, unless he is precluded by the terms of his *kabuliyat* from pleading non-liability on that ground.

In a suit for recovery of rent, therefore, the tenant is entitled to claim exemption from rent for total diluviation of his lands.

The above rule is also applicable to tenants who hold over, even if they did not surrender the *jote* or avoid the tenancy when the lands were washed away.

Where in a *kabuliyat* the lessees stipulated "Cultivation or non-cultivation, profit or loss in respect of the *jote* will be ours and we shall not be competent to make any objection to the rent settled":

Held, that the lessees were not precluded by the terms of the *kabuliyat* from pleading non-liability to pay rent if all the lands of the *jote* were washed away. **C RAJENDRA KUMAR ROY v. MAHARAJA MANINDRA CHANDRA NANDY, 24 C. L. J. 162** 464

— Ss. 56, 58 (3), (5)—*Landlord's refusal to grant rent receipts—Summary enquiry by Collector on tenant's application, whether prosecution of landlord—Discharge without award of compensation—Claim for compensation in Civil Court—Malice, reasonable and probable cause, whether questions of law—Decree for rent—Bar of proceedings under s. 58—Res judicata—Civil Procedure Code (Act V of 1908), s. 11.*

BENGAL TENANCY ACT--contd.

A summary inquiry by ■ Collector under section 58 (3) of the Bengal Tenancy Act on the application of a tenant is in the nature of ■ prosecution of the landlord for an offence within the meaning of that term in the Indian Penal Code.

The discharge of ■ landlord under section 58 (5) without an award of compensation does not bar the landlord's right to recover the same by proceedings in a Civil Court, the cause of action being referable to tort.

Malice and absence of reasonable and probable cause follow ■ an inference of law from the finding that ■ complaint under section 58 (3) of the Bengal Tenancy Act is false. These are questions not for the Jury, but for decision by the Judge as questions of law.

The existence of a decree against a tenant for rent, in respect of which receipts are claimed under section 56, operates ■ *res judicata* of the fact of its payment in subsequent proceedings held under section ■ (3) of the Act. **PAT NAIK PANDEY v. BIDYA**, 1 P. L. J. 149

—— S. ■ (3), (5)

—— S. 65

—— S. 65—*Non-transferable holding—Assignment of proprietary right—Sale in execution of rent-decrees by assignee and assignor—Delivery to purchaser at assignee's sale before institution of assignor's suit, effect of.*

The plaintiff and his co-sharers leased their proprietary right in a holding to the Cawnpore Factory. The latter brought ■ suit to recover arrears of rent due from the tenant after the lease and obtained a decree. In execution of the decree they purchased the holding. Subsequently plaintiff brought a suit to recover arrears of rent due to him and the other co-sharers prior to the lease and he obtained ■ decree in execution whereof he purchased the same holding:

Held, that, the interest of the tenant having been extinguished and eliminated in the course of the execution of the decree obtained by the Cawnpore Factory, there was no subject-matter in existence on which the plaintiff's decree could operate to effectually vest in the plaintiff any interest whatsoever. **PAT NAG NARAIN v. JUNG BAHADUR SAHAI**

—— S. 65

—— Ss. 93 to 95—*Proceedings for appointment of common manager—Interim appointment of Receiver—Order to be based on evidence—Verified petition of party, whether sufficient—Civil Procedure Code (Act V of 1908), O. XL, r. 1.*

A Court can, pending the final appointment of a common manager under section 95 of the Bengal Tenancy Act, make an *interim* appointment of a Receiver if it appears to be just and convenient.

The order should be based on evidence establishing the necessity for the Receiver's appointment under Order XL, rule 1, Civil Procedure Code. The mere verified petition of a party filed in support of application for the appointment of a common manager, which does not set forth the sources of the petitioner's knowledge or belief, cannot be made the basis of the Court's order. **C ASAD ALI v. MOHAMAD HUSAIN**

BENGAL TENANCY ACT--contd.

—— Ss. 94, 95

—— S. 103—*Record of Rights, entry in, as to occupancy rights of tenant—Presumption—Burden of proof.*

An entry in the Record of Rights showing a person to be an occupancy tenant creates ■ presumption in favour of such person, and the onus is on the landlord to establish the contrary **PAT BISESWAR SINGH v. PARBHOO NATH PATHUK**

—— S. 103—*Record of Rights, entry in—Presumption as to correctness, when arises.*

It is not until the Record of Rights is finally published that a presumption of correctness arises. Such presumption, however, is not conclusive, but is rebuttable. **PAT IMRIT MAHATON v. BAHADUR SINGH**

—— Ss. 103B, 104, 104J, 105, 112, 113—*Enhancement of rent—3. 113, scope and operation of.*

Section 113 of the Bengal Tenancy Act applies to rents which have been finally settled under the provisions of one or other of the sections 104, 104J, 105 or 112 of Chapter X of the Act but it does not apply to rents otherwise settled.

The provisions of section 113 are not applicable to a mere entry of an existing rent in the Record of Rights.

There is really no inconsistency between section 103B and section 113 of the Bengal Tenancy Act and the effect of the plain language of section 113 is not in any way controlled or cut down by anything in section 103B.

The operation of section 113 is not limited to cases where there was no dispute between the landlord and the tenant as to the correctness of rents settled. **C MEYAJAN BUIAN v. JOYMALA**

—— Ss. 104, 104J, 105, 112, 113

—— S. 153—*"Amount claimed", meaning of—Appeal, bar to, under s. 153, whether can be evaded by joining claim for money with claim for rent—Civil Procedure Code (Act V of 1908), s. 102—Error of law—Revision.*

The expression "amount claimed in the suit", which occurs in clause (a) of section 153, Bengal Tenancy Act, must be read with the words "in any suit instituted by a landlord for the recovery of rent" and has plainly reference to rent for the recovery whereof the suit has been instituted.

The bar to an appeal provided in section 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent.

Where there would have been no second appeal, if two different suits had been instituted for the recovery of rent and the recovery of damages for breach of a contract, by reason of section 153, Bengal Tenancy Act, and section 102, Civil Procedure Code, the bar provided by these two sections could not be evaded by amalgamating the two claims in one suit for rent.

An error of law committed by a Subordinate Court in deciding a case is not a ground for interference by the High Court in the exercise of its revisional jurisdiction. **C JAMDAR SINGH v. JAGAT KISHORE ACHARYA**, 23 C. L. J. 557

—— S. 153—*Decree for full rent overruling claim for abatement, if appealable—Abatement of rent,*

BENGAL TENANCY ACT—contd.

when lands let out are found subject to right of pasturage of others.

In a suit for rent when the Court, after considering the question whether the tenants are entitled to get an abatement of rent or are bound to pay the full rent, makes a decree for the full rent, the decree decides the question of the amount of rent, annually payable by the tenants, and as such an appeal against it is not barred under section 153 of the Bengal Tenancy Act.

Where, after lands have been let out at a certain rent, it is established that other persons have rights of pasturage over the lands, the tenants are entitled to get an abatement in respect of the land which may be required for the purpose of pasturage. **C DINA NATH DAS v. SARAT CHANDRA CHAKRABUTTY** 811

S. 153—Interlocutory orders—Appeal.

The term "order" as used in section 153 of the Bengal Tenancy Act is not limited to final orders but includes interlocutory orders such as orders of remand.

Therefore, in a suit for rent valued at less than Rs. 100 the order of the first Appellate Court remanding the suit for re-trial without deciding any of the special questions mentioned in section 153 is not appealable. **C SASHI BHUSAN HAZRAH v. DENO MOYEE DAS** 301

Ss. 155, 188, SCH. III, ART. 1—Transfer of Property Act (IV of 1882), ss 12, 111, 117—Landlord and tenant—Lease—Covenant against alienation, voluntary or involuntary—Forfeiture for breach and re-entry by lessor—Ejectment, suit for, of lessee's alienee—Alienee in possession under involuntary sale, whether tenant—Right to claim notice to quit under Transfer of Property Act or equitable provisions of section 155, Bengal Tenancy Act—Suit for ejectment by fractional landlord, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 142.

Under the terms of a permanent lease executed by defendants Nos. 2 and 3 to plaintiffs, the lessees undertook not to transfer their interest by sale, gift or mortgage and the lessors reserved the right to put an end to the lease and re-enter on breach of the covenant, or on a sale of the property in auction for the debts of the lessees. The lessees mortgaged their interest to 1st defendant. The 1st defendant sued defendants Nos. 2 and 3 on the mortgage, obtained a decree and in execution thereof brought the leasehold interest to sale and purchased it himself. Plaintiffs instituted the present suit to eject the 1st defendant. It was found that plaintiffs were entitled to a 12-annas share and the 8th defendant to a 4-annas share in the leased property:

Held, (1) that the covenant was enforceable, and the assignment was not *ad-invitum* as the execution sale was directly due to the voluntary acts of the lessees, viz., the execution of the mortgage and the omission to pay the mortgage-debt;

(2) that, in the absence of any act done by the landlords amounting to a recognition of the transfer, the 1st defendant was not a tenant entitled to claim the procedure laid down in section 155 of the Bengal Tenancy Act or to a notice to quit under the provisions of the Transfer of Property Act, and that he occupied no better position than that of a trespasser;

BENGAL TENANCY ACT—contd.

(3) that the suit was governed by Article 142 of Schedule I of the Limitation Act and not by Article 1 of Schedule III of the Bengal Tenancy Act, which applies only to actions for ejectment of tenants;

(4) that plaintiffs were entitled to a decree for *khas* possession of the 12-annas share jointly with the 8th defendant, the rule that all sharers should unite in a suit to determine a lease not applying to a suit to eject a trespasser.

Per Mookerjee, J.—A lease in perpetuity is forfeitable for breach of covenant notwithstanding that it is permanent.

A covenant for forfeiture of a lease upon an involuntary sale is enforceable both under the English and the Indian Law, though section 12 of the Transfer of Property Act expressly mentions the case of forfeiture for bankruptcy and does not specifically refer to cases of forfeiture for involuntary sales.

An involuntary alienation may, in one sense, be attributed to a remote act of a party quite as much as a voluntary alienation, but a covenant for forfeiture by voluntary alienation does not include, by implication, a covenant for forfeiture for involuntary alienation.

Where there is a covenant in a lease against alienation by the tenant but no right of re-entry reserved in the landlord, the lease is not forfeited by breach of the covenant and the remedy of the landlord is either by way of injunction against an apprehended breach or by recovery of damages for the breach already committed. But where the lease reserves a right of re-entry, the landlord is not limited to the reliefs by injunction or damages but may at his choice treat the lease as forfeited and exercise his right of re-entry.

Where section 111 of the Transfer of Property Act does not apply, it is not necessary for a landlord prior to the institution of a suit for ejectment of the tenant to manifest his intention to avail himself of the forfeiture as the forfeiture is complete as soon as the breach occurs; so the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined.

When a lease is forfeited, an under-lease or any other interest created by the lessee is extinguished; but if the lessee surrenders the lease, the estate of the under-lessee or of the person who claims under him is not prejudiced. **C DWARKA NATH ROY v. MATHURA NATH ROY**, 24 C. L. J. 40 833

S. 155—Landlord and tenant—Misuse of land by tenant—Breach of covenant—Notice demanding unconditional surrender—Ejectment, suit for.

The object of a notice to quit given under section 155 of the Bengal Tenancy Act is to give the tenant an opportunity of remedying the breach (if it is capable of being remedied); so that on remedying the breach and on payment of a reasonable compensation he may avoid ejectment.

A notice, therefore, requiring the tenant to remedy the breach, to pay compensation for misuse or breach of contract and to surrender the land is not legally valid to support an action for ejectment. **C KALI CHANDRA v. KALI KUMAR MAJUMDAR** 537

S. 155 (b)

BENGAL TENANCY ACT—contd.

— Ss. 160, 161, 167—Wasat taluk, purchase of, by zemindar—Sale of taluk, application for, wasat taluk not entered in—Suit for possession—Estoppel—Evidence Act (I of 1872), s. 13—Record, admissibility of—Burden of proof—Benamidar, if can give notice under Bengal Tenancy Act.

The plaintiff, who was the *zemindar*, purchased in 1884 an under-tenure called *wasat taluk* which formed a part of the superior tenure. In 1889 he put up for sale the tenure in execution of a rent-decree but omitted to mention his own *wasat taluk* in the application for execution. The defendant purchased the tenure at the auction sale. The plaintiff sued for declaration of title and recovery of possession of the *wasat taluk*. The defendant pleaded *inter alia* that the plaintiff was estopped inasmuch as he failed to mention the *wasat taluk* in his application for execution. The plaintiff relied upon the records of an execution proceeding held in 1858:

Held, (1) that the statements in the application for execution were not sufficiently precise to prevent the plaintiff from saying that he had a protected interest in the *wasat taluk*;

(2) that the records of the execution proceeding were admissible as ancient recorded documents if the plaintiff could show that there had been a possession in accordance with the recitals in those documents;

(3) that the onus was on the plaintiff to show that the *wasat taluk* was a protected interest within the meaning of the Bengal Tenancy Act.

Held (per *Banerjee, J.*), that the records of the execution proceedings were admissible also under section 13 of the Evidence Act

Per *Maclean, C. J.*—A *benamidar* is the proper person to give the notice under section 167 of the Bengal Tenancy Act if the sale certificate were made out in his name. **C** JOGESH CHUNDER PATITUNDA v. ROHINI KUMAR ROY CHOWDHURY, 21 C. L. J. 65

215

— Ss. 161, 167 215
— Ss. 170, 171—Rent-decree against tenant—Order for sale—Deposit by fictitious mortgagee—Claim for recovery of deposited amount from judgment-debtor, sustainability of—'Lawfully paid' in s. 70 of Contract Act, meaning of 341

— S. 171 341

— Ss. 178, 179 497

— S. 185, provisions of, if applicable to lease of lands for building shop—Occupancy right in site of shop held by raiyat.

A *raiya*t who acquired lands under a lease for building a shop, in which he has resided and from where he has carried on his agricultural operations in another village and in respect of holdings under the same landlord, can claim the protection of section 182 of the Bengal Tenancy Act in respect of the lands **C** BHIKARIRAM BHAGAT v. MAHARAJA BAHADUR SINGH, 43 C. 195

152

— S. 188 833

— Sch. III, Art. 1 833

— Sch. III, Art. 6—Decree for arrears of rent after cessation of landlord's interest, execution of—Limitation,

BENGAL TENANCY ACT—concl'd.

The special law of limitation prescribed by the Bengal Tenancy Act for the execution of rent-decrees does not apply to a decree in a suit for arrears of rent brought by a landlord after he has parted with his interest as landlord. The decree-holder in such a case is entitled to execute his decree under the general law of limitation. **C** SATIS RANJAN DAS NASARADDI PATWARI 145

BENGAL VALIDATING ACT (I B. C. of 1903)

251

BOMBAY DISTRICT MUNICIPAL ACT (Bom. Act III of 1901), S. 160 (3)—Revision, incompetent.

An application for revision does not lie from the decision of a District Court under clause ■ of section 160 of the Bombay District Municipalities Act. **B**

MUNICIPALITY OF BELGAUM v. RUDRAPPA SUBRAO SUTAR, 18 Bom. L. R. 340

21

BOMBAY LAND REVENUE CODE (Bom. Act V of 1879), S. 111 198

— Ss. 150, 154, 111—Gujarat Talukdars' Act (Bom. Act VI of 1888), s. 33—Talukdari village—Talukdar minor—Guardianship of Collector—Arrears of assessment—Mamlatdar attaching moveables of khatedar—Suit for damages by khatedar for wrongful attachment—Mamlatdar not liable—Income-Tax Act (II of 1884)—Seizure of account-books, wrongful—Liability to damages.

A minor *talukdar* was placed under the guardianship of the Collector and in consequence of this guardianship the Talukdari Settlement Officer and under him the *mamlatdar* had the revenue management of the *talukdari* village. The *mamlatdar* attached ornaments of a certain *khatedar* in the village on account of unpaid assessment of previous years. The account-books of the *khatedar* were also removed for the purposes of income-tax. The *khatedar* sued the *mamlatdar* for damages for wrongful attachment of ornaments and seizure of account-books:

Held, (1) that the *mamlatdar* as a subordinate of the Collector had both under sections 150 and 154 of the Land Revenue Code and section 111 of the said Code as modified by section 33 of Bombay Act VI of 1888 power to attach the ornaments, or at least he and his superiors supposed that he had the power;

(2) that, supposing that the *mamlatdar* and his superiors made a mistake as to the law, the mistake, if any, was a *bona fide* mistake and it was made in pursuance of the provisions of the law;

(3) that attainment of majority by the *talukdar* before the occurrence of attachment did not affect the question, as the *de facto* management of the Government Officers continued uninterruptedly, notwithstanding the event of the *talukdar* attaining majority, and in fact at his own request and with his consent;

(4) that the seizure of account-books was unauthorized and wrongful, and for this act of his the *mamlatdar* was liable to pay damages, which under the circumstances of the case must be nominal. **B** DALUCHAND FULCHAND GANDHI v. GULABBHAI KANTHADJI, 18 Bom. L. R. 323

198

BOMBAY PUBLIC CONVEYANCES ACT (Bom. Act VI of 1863), S. 34 (A)—"All vehicles kept in readiness for hiring on demand", meaning of—Government Notification extending provisions of the Act to such

BOMBAY PUBLIC CONVEYANCES ACT—conold.

vehicles, legality of—High Court, power of, to report erroneous conviction to Government where remedy by appeal or revision barred by Statute.

Bombay Government Notification No. 955 of 1885, applying the provisions of the Bombay Public Conveyance Act (Bombay Act VI of 1863) to "all vehicles kept in readiness for hiring on demand," is not inconsistent with the provisions of section 34 (a) of the Act and is, therefore, not *ultra vires*. The words 'on demand' seem to have been intended to imply that there is no solicitation for employment and are, therefore, equivalent to 'not ordinarily used for the purpose of plying for hire'. The words 'in readiness' seem to be a mere surplusage and do not limit the application of the Act to any particular class of vehicles.

The words "all vehicles kept in readiness for hiring on demand" include vehicles let on monthly hire and kept in the stables of the hirer.

The owner of such a vehicle would be guilty of an offence under section 2 of the Act if he let the vehicle on hire without a license; but the driver of such a vehicle could not be convicted under section 3 of the Act for plying for hire, as the contract for hiring is between the owner and the hirer.

Where the High Court cannot interfere with an erroneous conviction owing to the rights of appeal and revision being barred by Statute, it may report the conviction to the Local Government with its recommendation. **S** *JIWANJI & CO., v. EMPEROR*, 9 S. L. R. 205; 17 CR. L. J. 231 **647**

BUDDHIST LAW, Chinese—Custom—Widow—Maintenance, right to, whether lost by refusal to live in family house—'Family house,' meaning of—Adoption, power of making—Consent of husband's nearest male relatives—Letters of Administration, grant of, to Administrator-General without his application or that of party—Illegality.

The expression 'family house', according to the ideas prevalent among Chinese Buddhists, means a house which has belonged to the paternal ancestors of a person or one which a man has started for his family and their male descendants, and in which the family has lived together continuously descending from father to son.

In the absence of a guide as to the prevalent custom among Chinese Buddhists in China, any rule that deprives a widow of her right to maintenance for her refusal to live in the family house should not be enforced, when the other members of the family have made themselves objectionable to her or rendered it impossible for her to live with them.

A Chinese Buddhist widow has power to adopt a son to her husband with the consent of her husband's nearest male relatives.

Letters of Administration should not be issued to the Administrator-General except on the application of that officer or of any of the parties concerned. **L B** *MA PWA v. YU LWAI* **99**

—**Marriage—Marriage between Chinese Buddhist and Burmese Buddhist—Law applicable—Custom in derogation of law, when valid—Evidence—Breach of promise of marriage—Damages, measure of—Substantial damages, award of—Contract Act (IX of 1872), s. 74.**

BUDDHIST LAW—conold.

Per Parlett, J. (Fox, C. J., dubitante).—A marriage between a Chinese Buddhist (male) and a Burmese Buddhist (female) in which none of the preliminaries of Chinese Customary Law has been observed, such negotiations between the parties' parents and their consent, is invalid.

The evidence of a few of such marriages in Burma, wherein the Chinese ceremonies were treated as optional and not essential, though it shows that public opinion in regard to such unions was lenient and uncritical, falls short of proving a legal and binding custom.

Per Fox, C. J.—Where one of the parties to a marriage is subject to one Customary Law and the other to another Customary Law, there is *prima facie* no strong reason why the Customary Law of the should be applied and the Customary Law of the woman entirely disregarded, at any rate up to and at the time of marriage. Where there is a divergence between the personal laws applicable to the parties, the proper principles to act on are that the *lex loci contractus quoad solemnitates* determines the validity of a marriage, and the *lex domicilii* the question of the capacity of the parties to marry.

Per Parlett, J.—In awarding compensation for the breach of a promise to marry, it is open to the Court under section 74 of the Contract Act to award such compensation, not exceeding the amount named in the agreement of the parties, as appears to it to be reasonable.

Per Fox, C. J.—It is doubtful whether the party aggrieved should not be given the full amount named in the agreement.

Per Parlett, J.—In assessing damages for the breach of a promise of marriage, it is not the defendant's position alone that will justify a reduction of damages. Where the defendant has treated the plaintiff in a shameful and hard-hearted manner, cohabited with plaintiff under promise of marriage and committed a breach of faith by marrying another person, the Court should award substantial damages. **L B** *MAUNG SEIN KYI v. MA E* **159**

BUNDHELKHAND ALIENATION OF LAND ACT (II OF 1903), S. 17 **280**

BURDEN OF PROOF. See WILL.

Bank, deposit of money in—Proof of payment—Fraud	126
Custom	126
Debt by Hindu manager—Duty of lender	742
—, failure to discharge—Inherent power	165
—Fraud and irregularity in conduct of sale, plea of	911
General custom—Grove, when liable to assessment	155
Gift—Absolute estate	596
Illicit possession of opium by servant when in company of master—Proof, necessity of	306
Mortgage of joint ancestral property—Sons, suit against—Legal necessity, want of, pleaded—Proof, nature of—Mortgagee, what to prove—Immoral purpose of debt also pleaded—Sale of mortgaged property sought—	

BURDEN OF PROOF—concl'd.

Simple money decree, prayer in appeal for, whether can be allowed **757**

Record of Rights, entry in, as to occupancy rights of tenant—Presumption, rebutting of **506**

Sale—Non-payment of consideration—Vendee's right to possession—Intention of parties **106**

Wasat taluk—Protected interest **215**

—, wrong view of—Appeal—Remand **294**

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS, VOL. I, R. 122, NOTES 6, 8, 9—Commissioner's remuneration fixed by Trial Court—Jurisdiction of District Judge to set aside—Civil Procedure Code (Act V of 1908), O. XXVI, r. 15.

The powers given to a District Judge under the Calcutta High Court General Rules and Circular Orders, Volume I, do not authorise him to set aside any orders made by a Subordinate Court in respect of the remuneration of a Commissioner for local investigation in a pending suit. These powers are given to the District Judge for maintaining a particular standard of efficiency among Pleader Commissioners who undertake commissions. **C** PEARI MOHAN KUNDU v. MOHINI KANTA SAHA CHOUDHURY **855**

CALCUTTA IMPROVEMENT ACT (V B. C. OF 1911), S. 71—Land Acquisition Act (I of 1894), s. 53—Special Tribunal, power of, to call for records of other Courts.

The power to call for records from another Court is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal which has been constituted a Court under the Land Acquisition Act, I of 1894, to hear cases from the orders of the Calcutta Improvement Trust. **C** NARESH CHANDRA BOSE v. HIRA LAL BOSE, 20 C. W. N. 360; 43 C. 239 **263**

CALCUTTA UNIVERSITY ACT (II OF 1857) 637

CAUSE OF ACTION. See DECLARATION; MORTGAGE; PLEDGE.

— Declaratory suit—Irrigation right **9**

CAVEAT EMPTOR. See CONTRACT ACT, s. 20.

CENTRAL PROVINCES COURTS ACT (II OF 1894), S. 8 (1) (c), R. 26 458

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 41 (6)—Malguzar purchasing property from subsequent mortgagee in possession—Suit by prior mortgagee to recover mortgage-money, nature of—Charge on purchase-money—Limitation Act (IX of 1908), Sch. I, Art. 132—Pleadings—Omission in plaint to refer to technical point not misleading defendant—Defendant, whether can object to frame of plaint on appeal.

Plaintiff, first mortgagee of an absolute occupancy holding, sued defendants, the legal representatives of a subsequent mortgagee, for the recovery of Rs. 2,000 due to him by the tenant mortgagor. The holding was purchased by the malguzar, under the provisions of section 38, Central Provinces Tenancy Act, from the second mortgagee, who had foreclosed the mortgage and remained in possession. Plaintiff claimed a charge on the purchase-money:

CENTRAL PROVINCES TENANCY ACT—concl'd.

Held, (1) that the mortgage-debt was a charge on the purchase-money in exoneration of the land within the meaning of section 41 (6) of the Tenancy Act, 1898, and no new cause of action having arisen, the suit was governed by Article 132 of the Limitation Act;

(2) that the omission of the plaintiff to refer to the existence of such a charge in the plaint did not mislead the defendant as it stated all the facts fully, and he could not object to the frame of the plaint in appeal.

It is not the practice to construe *moffusil* pleadings strictly. **N** VISHWANATH v. SHANKERLAL, 12 N. L. R. 90 **704**

— S. 41 (8), scope of—Transfer by occupancy tenant without landlord's consent—Right of landlord to evict transferee.

Sub-section (8) of section 41 of the Central Provinces Tenancy Act pre-supposes the right of a landlord to bring a suit for ejectment against the transferee and makes a special provision for the protection of a tenant against both the landlord and the transferee.

Where, therefore, an occupancy tenant of certain fields mortgaged them to the defendant, and the proprietor of the *patti* in which the fields lay, sued to recover possession on the ground that the mortgage was without the landlord's consent:

Held, that the question of abandonment by the tenant did not arise, whether or not he was joined as a party, and that the landlord was entitled to evict the transferee in possession. **N** NAKULSAO v. RAMADHINSAO, 12 N. L. R. 86 **698**

CESS. See BENGAL CESS ACT, s. 47.

CHARGE. See TRANSFER OF PROPERTY ACT, s. 100.

CHARTER ACT (24 AND 25 VIC. C. 104), s. 15 372, 03

CHARTER PARTY. See CONTRACT.

CHEATING. See PENAL CODE, s. 420

CHOTA NAGPUR TENANCY ACT (VI B. C. OF 1908), S. 47—Sale of raiyati right in execution of mortgage decree, objection to, in execution—Duty of executing Court.

An objection to the sale of a *raiya* right in execution of a mortgage decree under section 47 of the Chota Nagpur Tenancy Act may be taken after the passing of the decree and it is the duty of the executing Court to determine the question. **PAT** JADHO MAHTO v. KALI PRASANN BHATTACHARJEE, 1 P. L. J. 33 **733**

— Ss. 81, 83, 87, 256—Decree obtained before operation of Act—Execution after operation of Act—Procedure—Mundari khuntkati tenant, right of—Jurisdiction—Settlement Officer, powers of.

Where a suit for arrears of rent was brought and a decree was obtained under Act X of 1859, and the execution of the decree was applied for after the Chota Nagpur Tenancy Act came into force:

Held, that the execution proceedings must be governed by the provisions of the Chota Nagpur Tenancy Act, as the suit having terminated with the decree, the application for execution, although an application in the suit, was a separate proceeding

CHOTA NAGPUR TENANCY ACT—concl'd.

A Settlement Officer has jurisdiction to record a tenant as *mundari khuntkatidar* in a settlement proceeding under the Chota Nagpur Tenancy Act on deciding a dispute under section 83 of the Act between the tenant who claimed to be a *mundari khuntkati* tenant and the landlord who said he was not, although there was no suit between the parties under section 87 which the Settlement Officer was called upon to decide. **C JOGENDRA NATH DEY v. GOUR SINGH MURA**, 20 C. W. N. 582 **385**

— Ss. 83, 87, 256 **385**

— Ss. 139, 184, 191 (2), 208 (2), 210—*Execution of rent decree—Arrest of judgment-debtor, effect of—Stay of proceedings for sale.*

A warrant for the arrest of a person against whom a decree for rent has been obtained under the Chota Nagpur Tenancy Act has the effect of only staying proceedings for sale of the tenure. Neither section 191 (2) which refers to persons arrested on decrees for money, nor section 139, which refers to suits for recovery of money from defaulting agents, has any application to the case **C MADAN MOHAN NATH SAHI DEO v. PRATAP UDAI NATH SAHI DEO**, 10 C. W. N. 111 **22**

— Ss. 184, 191 (2), 208 (2), 210 **22**

CIVIL PROCEDURE CODE (ACT XIV of 1882),

S. 210—*Civil Procedure Code (Act V of 1908),*

s. 48, O. XX, r. 11—*Order recording application under O. XX, r. 1 (2), effect of—Order postponing execution, whether order for amendment of decree—Execution—Limitation.*

An order postponing execution of a decree or ordering payment by instalments under section 210, Civil Procedure Code, 1882, or under Order XX, rule 11, of the Civil Procedure Code of 1908 is virtually an order amending the decree, and an application for execution made within 12 years of the date when the said order is to take effect is not barred under section 48, Civil Procedure Code, 1908.

On an application for postponement of a decree signed by all parties, the Court endorsed the expression 'recorded':

Held, that it was an order granting the application and amending the decree in the terms of the prayer. **M PERUMAL NAIKER v. DAVOOD ROWTHER** **393**

— S. 230 **27**

— Ss. 257, 310A—*Payment into Court of decretal amount by persons other than judgment-debtor, whether amounts to satisfaction of decree—Order as to rateable distribution, when justified—Sale proclamation mentioning larger amount than what is really due, effect of—Sale, whether valid.*

If the whole amount due under a decree is paid into Court, the decree becomes satisfied without any formal order of the Court recording satisfaction, but the payment must be made either by the judgment-debtor himself or on his behalf by a recognised agent or by a Pleader duly authorized.

Where, therefore, payment into Court of the decretal amount was made, not by the judgment-debtor, but by two other persons who paid not on behalf of the judgment-debtor but as persons whose immovable property had been sold in execution of a money-decree:

CIVIL PROCEDURE CODE—(1882)—concl'd.

Held, (1), that such payment did not have the effect of satisfying the decree in the eye of the law unless and until the decree-holder consented to receive the amount deposited in satisfaction of his decree;

(2) that as the depositors had no right to make such payment and were mere volunteers, the lower Court did not act without jurisdiction in treating it as money realised under section 295 of the old Code of Civil Procedure and in ordering its rateable distribution among the creditors.

Where a decree has not been wholly satisfied, the holding of a sale in execution of that decree mentioning in the sale proclamation an amount larger than the amount then really due under the decree, is only an irregularity and does not make the sale a nullity, i.e., a sale held without jurisdiction.

When the right, title and interest of a judgment-debtor have once been sold in execution, there is nothing left for a purchaser, in a subsequent auction sale to take. **M KASTHURI AYYANGAR v. ARUNACHELLAM CHETTIAR**, (1916) 1 M. W. N. 195 **350**

— S. 310A **350**

— S. 336 **407**

— S. 462 **213**

— S. 463—*Lunatic—No guardian ad litem appointed—Decree passed—Sale of lunatic's property in execution of such decree—Sale, validity of—Lunatic's right to resist purchaser's suit for possession—Lunacy Act (XXXI of 1858).*

The provisions of section 463 of the old Civil Procedure Code, 1882, apply to lunatics, whether adjudged or not under Act XXXV of 1858.

A lunatic stands in the same position as a minor. Therefore, a sale of a lunatic's properties in execution of a decree against him passed in a suit in which he was not properly represented by a guardian *ad litem* is a nullity, and the lunatic can resist an action for possession without seeking to set aside the sale. **M MOOTHETUTH KANARI v. HARI SHENOY**, 3 L. W. 301; 19 M. L. T. 245; (1916) 1 M. W. N. 273 **428**

CIVIL PROCEDURE CODE (ACT V of 1908), S. (2) **460**

— S. 2 (2), O. XXII, r. 9—*Adjudication directing abatement of suit on account of plaintiff's death, whether decree—Appeal.*

When a Court passes a purely formal order recognizing the abatement which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon any rights and cannot be treated as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under Order XXII, rule 9, it amounts to a decree and is appealable as such. **P NIRANJAN NATH v. AFZAL HUSSAIN**, 111 P. W. R. 1916 **822**

— Ss. 2 (2), 115, O. XXI, Rr. 3, 4—*Decree—Abatement—Appeal—Revision, where appeal permitted—Charter Act (24 & 25 Vic., c. 104), s. 15.*

An order declaring a suit to have abated is a decree from which an appeal lies.

CIVIL PROCEDURE CODE—(1908)—contd.

Although rules ■ and 4 of Order XXII, Civil Procedure Code, do not expressly state that the abatement of a suit has the same effect as the dismissal of a suit, that appears to be the meaning of the Legislature.

Under the present Code it is not necessary to make an order that the suit shall abate, inasmuch as it abates *ipso facto* if no application is made under rule 3 or rule 4 of Order XXII, Civil Procedure Code.

Upon ■ suit abating under rule 3 or rule 4 of Order XXII of the Code of Civil Procedure, a decree dismissing the suit must follow.

Per *Sadasiva Aiyar, J.*—Where there is an appeal to the District Court and a second appeal to the High Court, section 115, Civil Procedure Code, cannot apply.

The power under section 15 of the Charter Act can only be exercised in extraordinary cases and subject to the enactments of the Indian Legislature.

M SUPPU NAYAKAN v. PERUMAL CHETTY, 30 M. L. J. 486; (1916) 1 M. W. N. 301; 19 M. L. T. 364 **372**

— S. 3

255

— S. 9—*Suit to prohibit certain members of Roman Catholic persuasion from mixing with other members in the church, whether lies in Civil Court—Canon Law—Authority of Bishop, extent of—Caste distinction, if exists among Roman Catholics—Customary right, when valid—Suit by member of congregation against Bishop to continue a favour or indulgence, if lies—Interference of Civil Courts, when can be obtained.*

Where certain Roman Catholic Christians, forming a portion of the congregation attached to the Vadakkankulam Church in the Trichinopoly District and composed of Pillai and Mudaliar converts to Christianity, acting on behalf of themselves and other members of their community, based their suit upon agreement and caste custom, and sued the Roman Catholic Bishop of Trichinopoly, the parish priest of the place and certain Nadar converts, as representing their community, for mandatory injunction to erect certain walls for separating the northern and southern wings of that Church, for a declaration of the exclusive right of the plaintiffs' community to the ownership of and entrance into the southern wing of the church to the exclusion of the Nadar convert community and to perform service at the altar and join in the service of the congregation except on certain days, and also for an injunction to restrain the Nadar section of the congregation from entering the chancel and other *peetams* and the Bishop and the parish priest from allowing them to do so, and for ■ declaration of their sole right to conduct certain processions and have custody of the sacred images and the keys of the church and to ring the church bells:

Held, (1) that according to the tenets of the Christian faith and the Canon Law such a suit did not lie, as the basis of the suit, *viz.*, the theory of pollution and defilement by touch could not be recognised in the case of Christians;

(2) that the so-called agreement was only an order by the Bishop to the congregation and was in the nature of a license and was not binding upon the successors of the Bishop, as it was not

CIVIL PROCEDURE CODE—(1908)—contd.

competent to the Bishop, however, unfettered and absolute his right of control over his flock might be, to contract himself out of his rights perpetually so as to prevent his successors from exercising the same authority;

(3) that the suit as framed was not maintainable.

Per *Napier, J.*—*Quære*.—Whether the Courts have power to give declarations as between different classes of His Majesty's subjects on matters such as the existence of caste distinctions among Roman Catholic converts and whether any action can be founded on a disregard of such rights save as they arise out of trusts?

According to English Law, customary rights have one feature in common, namely, that however large the community enjoying them and however frequent the exercise of the right, they never amount to a continuous and complete deprivation of the owner of the soil of his natural exclusive right of user. Further, whether the customary right be ■ *profit a prendre* or a right of unprofitable user such as to hold ■ fair or play games in a particular close, the custom has always arisen in the close and has no other origin.

Where there is a recognised religious association such as the Roman Catholic Church under the supreme authority of the Pope of Rome, persons who become members of that body at a particular place cannot in respect of their local church derogate from the authority of the rulers of their community by any agreement made among themselves, or adopt rules for the conduct of ceremonial observances at variance with the canons of the church so long as they profess allegiance to the same. If they wish to do so, they must secede from that church and form a new religious association for themselves. A congregation has no power to select what canons it will follow and what disregard. The rules and jurisdiction of officers in the church are to be sought in the canons of the church and must be given effect to by the Courts.

A member of a church need not sue by virtue of an office.

Per *Sadasiva Aiyar, J.*—The recognition by Courts of Hindu castes as distinct corporations with exclusive legal rights for certain purposes ought not to be extended to Christian communities, as it would lead to complications and anomalies of a far-reaching character.

Though the Courts have power, in any matter of a mixed spiritual and temporal character, to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury, the sentiment of pollution in a Christian Church, indulged in by the so-called caste Christians, is not such spiritual or temporal injury as can be recognised as a legal injury giving rise to a civil cause of action.

A bad usage, not accepted as lawful or invariable by a party, cannot be recognised as a reasonable custom having the force of law.

Favours and indulgences granted by an ecclesiastical authority can only be interfered with by the authority granting the same, or by an appellate ecclesiastical authority. Though a Civil Court must recognise the favour or indulgence granted

CIVIL PROCEDURE CODE—(1908)—contd.

by the proper ecclesiastical authority when temporal or mixed spiritual and temporal rights flowing from the favour or indulgence are interfered with by wrongdoers, it cannot interfere with the jurisdiction of the ecclesiastical authorities in the grant or revocation of such favours and indulgences.

A grantee of a favour or indulgence can make no claim against his grantor that the favour or indulgence should be treated as irrevocable unless he can invoke the doctrine of estoppel in his favour. **M. KATTALAI MICHAEL PILLAI v. J. M. BARTHE**, 19 M. L. T. 249; 30 M. L. J. 423; 3 L. W. 348; (1916) 1 M. W. M. 307 **557**

———— S. 11 **149, 581**

———— S. 11, O. XXI, R. 22—*Execution—Interest claimed in previous application for execution—Objection, no opportunity of—Subsequent application—Objection, if barred.*

Where in a previous application for execution of a decree by the transferee of the decree interest was claimed but there was no occasion to issue a notice to the judgment-debtor to show cause as required by Order XXI, rule 22 of the Civil Procedure Code, 1908, and the judgment-debtor had no opportunity of raising any objection as to the interest claimed:

Held, that the judgment-debtor was not debarred from contending in a subsequent application for execution of the decree that he was not liable for the amount claimed. **A. RATAN LAL v. BIBA KUNRIA** **144**

———— S. 11—*Res judicata, applicability of, to co-defendants.*

In order that a finding in a case should be *res judicata* between co-defendants three things are necessary—(1) that there should be a conflict of interest between the co-defendants, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit and (3) that the judgment should contain a decision of the question raised as between the co-defendants.

Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and it has been applied, where it has been applied with great caution.

Where in a suit for money, all the defendants denied the claim of the plaintiff and the Court decreed the suit against some of the defendants, whilst against the others it dismissed the suit on the ground that they were not liable:

Held, that this decision could not operate as *res judicata* in a suit for contribution which the defendants, against whom the decree was made and who satisfied the decree, brought against the other defendants who were held not to be liable. **C. JADAV CHANDRA SARKAR v. KAILASH CHANDRA SINGH** **929**

———— S. 11—*Res judicata—Previous suit for rent and of nature cognizable by Small Cause Court—Title incidentally determined—Suit for title, if barred.*

An incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title. **A. BALDEO PERSHAD v. NARAIN HALWAI** **123**

CIVIL PROCEDURE CODE—(1908)—contd.

———— S. 11—*Res judicata—Suit for possession by defendant against plaintiff—Plea of mortgage to plaintiff—Possession decreed—Subsequent suit on foot of mortgage—Maintainability—Transfer of Property Act (IV of 1882), s. 41—Transfer by person whose name was registered in Revenue Records against will of real owner—Absence of enquiry by transferee, effect of—Real owner, how far bound by the transfer—Hindu Law—Reversioner—Loan raised by mortgage utilised in payment of widow's debts—Reversioner not found entitled to property mortgaged—Real owner, if bound by mortgage.*

The Raja of Basti brought a suit against N and others for possession of certain immoveable properties. N set up the suit mortgage as a defence. The suit was, however, decreed in favour of the Raja and possession of the properties was also delivered to him. Subsequently N instituted the present suit against the Raja on the foot of the same mortgage:

Held, that the decision in the prior suit operated as *res judicata* and that the suit was barred.

Where a person advanced money upon mortgage to another person, without making any enquiry whatever to ascertain the latter's title to the property mortgaged, and where it appeared that adequate enquiries would have disclosed the fact that the mortgagor was only the ostensible owner and that his name was registered in the revenue papers without the consent of the real owner and in spite of his objections, and where it further appeared that the mortgagee resided in the same locality and was acquainted with all the circumstances of the family with which he had had money dealings for a long time:

Held, that the mortgagee could not claim the benefit of section 41 of the Transfer of Property Act, 1882, as he was not a *bona fide* transferee without notice.

On the death of a Hindu widow, a person claiming to be the reversioner entered into possession of the property and created a mortgage over it for paying off the debts of the widow. Subsequently it was decided that the reversioner had no right to enter upon the estate and that the real owner was the Rajah of Basti. In a suit by the alienee from the reversioner to enforce his mortgage:

Held, that the mortgage was not binding upon the real owner, even though the money was applied for paying the widow's debts. **P. C. NAGESHAR PRASAD PANDE v. PATESHRI PRATAP NARAIN SINGH**, 3 L. W. 454; 20 C. W. N. 265; (1916) 1 M. W. N. 142 **673**

———— S. 11—*Madras Estates Land Act (I of 1908), s. 189—Revenue Courts—Jurisdiction—Decision on question of title—Subsequent suit on same title in Civil Court—Res judicata—Suit for rent—Improper addition of prayer for declaration to oust jurisdiction—By which Court suit cognizable.*

The decision of a Revenue Court on a question of title will not operate as *res judicata* in a claim based on the same title laid subsequently in the Civil Court.

A claim for arrears of rent is one exclusively cognizable by a Revenue Court, even if it contains a *bona fide* prayer for a declaration of title.

Where such a claim is laid in a Civil Court, the plaintiff may be allowed to amend the plaint by

CIVIL PROCEDURE CODE—(1905)—contd.

striking out the prayer for recovery of rent, and on the plaint so amended, the Civil Court can take cognizance of the suit.

If, however, the prayer for a declaration of title is added to that for rent with the improper object of ousting the jurisdiction of the Revenue Court, the suit is liable to be dismissed. **M SUBHANNA ACHARIAR v. GOPALA KRISHNA ACHARIAR** 354

— **S. 11, EXPL. IV—Wilfully restraining from urging all grounds of suit or attack, effect of—Suit in ejectment, dismissal of—Claim based on ancestral right—Subsequent suit for same relief against same party—Claim based on succession as heir—Subsequent suit, whether barred.**

If a defendant has two grounds of attack to a claim made by the plaintiff and wilfully chooses to keep back one of the grounds of attack, he is not entitled to put forward the omitted ground in a later suit. This principle enunciated with regard to a defendant equally applies to the case of a plaintiff.

If, however, the claims are mutually destructive, or if there will be embarrassment in joining the rights, the two titles can be separately litigated.

Where, therefore, the plaintiff sued to eject a trespasser basing his claim on an ancestral right, and failing therein brought another ejectment suit against the same defendant claiming to be the heir of a certain person:

Held, that the title as heir could and ought to have been made a ground of attack in the former suit, and this not having been done the present suit was barred by the rule of *res judicata*. **M GARIYA RANGANWAMY PATRUDU v. MAJJI APPALASWAMY**, (1910) 1 M. W. N. 280 456

— **S. 20** 191

— **S. 21** 411

— **Ss. 22, 23—Plaintiff, right of—Suit, forum of, selection of—Transfer of case, grounds for.**

The plaintiff has a right to bring a suit in any Court which the law allows, and a strong case based either on some ground of expense or convenience must be made out in order to overrule the right of the plaintiff to select the forum of his suit. **O SYED HUSAIN v. SAJJADI BEGAM** 686

— **S. 23** 686

— **S. 24 (4)—Court of Small Causes—Transfer of suit to Munsif—Procedure—Ex parte decree, setting aside of—Deposit of, or security for, decretal amount, necessity of—Provincial Small Cause Courts Act (IX of 1887), ss. 17, 23—Revision.**

The 'Court of Small Causes' from whose file a suit may be transferred under section 24, Civil Procedure Code, includes Courts vested with the powers of a Small Cause Court. When a suit is transferred from that Court to another Court, the Court trying it is to be deemed to be a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act.

Therefore, when such a suit is transferred to a Munsif and he passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of that amount. **A CHHOTRY LAL v. FIRM LAKHMI CHAND**, 14 A. L. J. 640 113

CIVIL PROCEDURE CODE—(1908)—contd.

— **S. 37**

791

— **S. 46—Attachment by precept—Objection to execution based on omission to transfer decree, if can be taken at hearing of appeal—Simultaneous execution in two Courts against same property, if permissible—Extension of time, petition for, presented before expiry of two months—Order passed after expiry of that period—Attachment, if ceases to be effective.**

An objection to the jurisdiction of an executing Court to order the sale of certain immoveable property attached by it under the precept of another Court based on the want of transfer of the decree to that Court for execution, will not be allowed to be taken up for the first time during the hearing of an appeal against the order for sale.

There is nothing in law to prevent a decree being simultaneously executed in more places than one against the property of the judgment-debtor.

Under section 46, Civil Procedure Code, an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months, during which the attachment will remain in force, is passed after the expiry of the said period, provided that the application for extension of time is put in before the expiry of that period. In such a case the order relates back to the date of the petition and has a retrospective effect. **SIVAKOLUNDU PILLAI v. GANAPATHI IYAR**, 3 L. W. 336 302

— **S. 47** 86, 231, 247, 747, 829

— **S. 47, O. XXI, r. 58—Attachment, threatened—Third party's property—Payment under protest to avoid attachment—Claim for refund—Separate suit.**

A, in execution of an award decree against B, sought to seize the moveable property of B's father, C, who thereupon, to avoid the attachment, paid the amount named in the warrant under protest and applied under Order XXI, rule 58, Civil Procedure Code, for return of the money:

Held, (1) that Order XXI, rule 58, Civil Procedure Code, was inapplicable as no property had been attached;

(2) that C's claim could not be determined in execution under section 47, Civil Procedure Code, as he was neither a party to the suit nor his representative, but could only be enforced in a separate suit. **S JAN MAHOMED v. MANTHAR**, 9 S. L. R. 213 492

— **Ss. 47, 151 to 153, O. XX, r. 8, O. XLVII, r. 1—Execution proceedings—Right of Court to review or vary decree—Decree on award—Decree at variance with award as to payment of costs—Jurisdiction of Court—Amendment of decree—Remedy of party.**

A party to a suit, who has not appealed against the decree or applied for review of the judgment passed therein, cannot be allowed to contend in execution proceedings that the judgment and decree are erroneous and to ask that they should be amended or corrected.

Where a decree passed on an award, by mistake or inadvertence, embodied a relief as to payment of costs not mentioned in the award, the defect can be remedied only by an appeal or by an application

CIVIL PROCEDURE CODE—(1908)—contd.

for review under Order XLVII, r. 1, Civil Procedure Code, and not by amendment of the decree.

Sections 151 to 153, Civil Procedure Code, do not apply to an erroneous judgment or decree.

M PITCHAYYA v. SUBBA RAO, 3 L. W. 499 **787**

S. 47—Money-decrees against same judgment-debtor in two suits by two separate creditors—Judgment-debtor's property sold in execution of one decree—Subsequent attachment of same property in other decree—Objection—Purchaser, whether legal representative of judgment-debtor—Appeal—Second appeal.

Two persons A and B obtained separate money-decrees against C. In execution of A's decree certain immoveable properties belonging to C were brought to sale and purchased by D. B then executed his decree and had the property purchased by D attached. D thereupon filed a claim petition objecting to the said attachment and being unsuccessful before the District Munsif, appealed to the District Judge. This appeal being dismissed, he preferred a civil miscellaneous second appeal to the High Court:

Held, that both the appeal to the District Court and the second appeal to the High Court were incompetent, inasmuch as D was not the representative of C in the suit of B. **M THANGAVELU MUDALIAR v. MAHOMED IBRAHIM**, 3 L. W. 377 **759**

Ss. 47, 144, 151—Restitution, suit for—Conversion of suit into application under s. 47—Application barred at date of suit, effect of—Limitation Act (IX of 1908), Sch. I, Art. 166.

The discretionary power given to a Court by section 151, Civil Procedure Code, cannot enlarge the scope of section 144, Civil Procedure Code, and cannot convert an application for a relief which has nothing to do with restitution into an application for restitution.

A suit can be converted into an application under section 47 of the Code of Civil Procedure only if the application under section 47 of the Code of Civil Procedure would not be barred by limitation on the date of the suit. **M GOPISETTI NARAYANA-SWAMY NAIDU GARU v. KUNAPARAJU CHINA VENKATARAJU** **774**

S. 48

393

S. 48—Civil Procedure Code (Act XIV of 1882), s. 230—General Clauses Act (X of 1897), s. 6—Mortgage-decree passed before enactment of Act V of 1908—Application for execution after 12 years—Acknowledgment, whether saves bar under s. 48, Civil Procedure Code—Limitation Act (IX of 1908), s. 19—Application for execution, when continuation of a prior application.

Section 48, Civil Procedure Code, 1908, applies to decrees for sale.

An application for execution of a mortgage decree made more than 12 years after it was passed is barred under section 48, Civil Procedure Code, and the fact that the old Code of 1882 was in force at the passing of the decree will not prevent the operation of the said section, as no vested right in the procedure prescribed by that Code was acquired by the decree-holder within the meaning of section 6 of the General Clauses Act.

The words 'fresh period of limitation' in section 19 of the Limitation Act do not refer to the term of 12 years prescribed by section 48, Civil Procedure Code.

CIVIL PROCEDURE CODE—(1908)—contd.

Hence an acknowledgment under section 19 of the Limitation Act, whether made before or after the passing of the new Civil Procedure Code, 1908, will not give the decree-holder a further period of 12 years from the date of the acknowledgment within which to apply for execution of his decree.

Per Chamier, C. J.—An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application.

Per Jwala Prasad, J.—The law of limitation is a branch of the adjective law and governs all proceedings, to which it is applicable, from the date of its enactment **PAT KRISHNA DAYAL GIR v. SAKINA BIBI**, 20 C. W. N. 952 **27**

Ss. 55 (3), (4), 47, 115, 145—Surety for judgment-debtor's filing insolvency application and his production—Party to suit—Failure of judgment-debtor to apply and appear—Forfeiture of security bond, application for—Rejection of application—Revision.

An order made under section 55 (4), Civil Procedure Code, rejecting an application for forfeiture of a security bond owing to the judgment-debtor's failure to file an application in insolvency and appear in Court, is appealable and no petition lies against it to the High Court under section 115, Civil Procedure Code.

Section 145, Civil Procedure Code, 1908, amplifies very considerably the provisions of section 253 of the old Code, so as to make a surety, who has executed a bond under section 55 (4), a party to the suit within the meaning of section 47. **U B NGA KYE v. NGA KYU**, U. B. R. (1916) II, 103 **247**

Ss. 55 (4), 145 (c)—Civil Procedure Code (Act XIV of 1882), s. 336—Surety bond—Presentation of insolvency petition by judgment-debtor, whether discharges surety—Undertaking to produce judgment-debtor—Issue of notice to judgment-debtor—Waiver of notice—Execution petition, dismissal of, effect of, on surety's liability—Construction of surety bond—Statutory obligations of surety.

Section 145 (c), Civil Procedure Code, is wide in its scope and includes a case where security is given for the production of a judgment-debtor, who is arrested in execution of a decree and who is released on furnishing security and on expressing his intention to apply to be declared an insolvent. The section provides a summary remedy in execution for the realization of the security in execution to the extent to which the surety has made himself personally liable.

Under section 55 (4), Civil Procedure Code, the mere filing of an insolvency petition by the judgment-debtor or the dismissal of an execution application does not terminate the surety's liability.

A surety bond under section 55 (4), Civil Procedure Code, should strictly conform to the provisions of the section, and even where the liability is limited in its terms, the extent of the surety's liability is that created by section 145.

Where, under the terms of a surety bond, the sureties agreed to produce the judgment-debtor if the latter failed to appear after notice by Court, but intimated to Court, when asked whether they wanted notice to be sent to the debtor, that it was not

CIVIL PROCEDURE CODE—(1908)—contd.

possible to produce him as he and the decree-holder were colluding:

Held, that, though the issue of notice to the judgment-debtor was a condition precedent to the sureties' obligation to produce him, the sureties had waived that benefit. **M SUNDARA REDDI v. VARADARAJA PILLAI** 407

— S. 60 (n)—Maintenance—Right to future maintenance, whether liable to attachment—Appointment of Receiver.

A mere right to future maintenance is not liable to attachment and sale in execution of a decree. A Court, therefore, has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. **M PALIKANDY MAMMAD v. CHINGORAN KELOTH VALIA APPA**, 30 M. L. J. 361 381

— S. 64, O. XXI, R. 54 (2)—Attachment of estate—Entry in Touzi Register, whether necessary—Supplementary information to Collector for entry in Touzi Register—Fresh attachment, effect of, on first attachment—Purchase pending attachment, legality of—Vendor and purchaser—Purchaser's lien, where sale void.

An attachment of immoveable property is complete when the formalities mentioned in Order XXI, rule 54 (2), are complied with.

An entry in the Touzi Register is no part of the procedure contemplated in the said rule.

A requisition from the Collector for additional information about the property for entry in the Touzi Register is no ground for the issue of a fresh attachment, if attachment has already been made in the manner provided by the said rule. If a fresh attachment is issued, it is a redundancy and does not render void the first attachment.

A purchase made during the pendency of an attachment is void against all claims enforceable under it and the purchaser has not even a lien on the property to the extent of the purchase-money paid by him. **PAT RAMKHELWAN SINGH v. SUNDER RAUT** 34

— S. 64—Attachment—Private sale of portion—Creditor, right of—Payment by one judgment-debtor—Charge—Contribution.

Where a portion of the property attached is sold privately by a judgment-debtor after the attachment and the decree-holder is unable to realize the amount of his decree out of the portion left unsold, he is entitled under section 64 of the Civil Procedure Code to proceed against the portion sold.

The fact that a judgment-debtor has paid more than his share of the decree does not create a charge in his favour on the property of his co-judgment-debtor. His right is to get a simple money contribution. **A BINDESHRI PERSHAD CHAND v. GIRDHAR DAS** 91

— S. 64, O. XXXVIII, R. 10, scope of—Attachment before judgment—Sale after attachment in pursuance of contract entered into before attachment, effect of.

The provision of section 64, Civil Procedure Code, is for the protection of a creditor against transactions subsequent to the attachment; but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by it.

There is no ground for holding that the provision in

CIVIL PROCEDURE CODE—(1908)—contd.

Order XXXVIII, rule 10, Civil Procedure Code, is limited to rights *in rem*.

Where after a contract for sale of a property had been made by the debtor in favour of the defendant, the plaintiff attached the property before judgment and the property was then sold to the defendant in a suit for specific performance of the contract:

Held, that the defendant's purchase must prevail against all claims of the plaintiff enforceable under the attachment. **C MADAN MOHAN DE SARKAR v. REBATI MOHAN PODDAR**, 23 C. L. J. 115 953

— S. 73 253

— S. 80, object of—Suit against Secretary of State—Notice—Defendant's agent threatening injury before expiry of notice—Institution of suit during currency of notice period.

The object of section 80 of the Civil Procedure Code is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice.

A plaintiff, however, will be justified in filing his suit before the expiry of the period of notice where the agents of the Secretary of State, during the currency of the notice, threaten to demolish the property which is the very subject-matter of the intended suit.

The right of suit, which is expressly granted by the Legislature, cannot in reason be deferred until its exercise has become illusory. **B SECRETARY OF STATE v. GULAM RASUL**, 18 Bom. L. R. 243; 40 B. 392 535

— S. 92 502

— S. 92, O. I, R. 10—Public trust—Suit by two worshippers with Advocate-General's sanction—Death of one plaintiff, if causes suit to abate—Court's power to add parties—Sanction of Advocate-General, if necessary for such addition.

A suit brought under section 92 of the Code of Civil Procedure, 1908, is a representative suit.

As soon as a suit is instituted by two persons with the previous sanction of the Advocate-General, all the worshippers become parties thereto as a representative suit and the subsequent death of one of the plaintiffs does not cause the suit to abate. The Court has ample power under Order I, rule 10, Civil Procedure Code, to add other worshippers as additional parties and the previous sanction of the Advocate-General is not necessary for such addition. **M PARAMESWARAM MUNPU v. NARAYANAN NAMBOODRI**, 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279 384

— S. 92—Scheme for settlement of charitable trust—Temple, evidence to prove public character of—Temple used for caste meetings, whether private property—Past user, how far material in framing scheme—Scheme, whether necessary when trustees not guilty of misconduct.

The facts that a temple is open for public worship, that the rites and ceremonies are such as are observed in public temples and that numerous *inam* lands have been granted to the temple, constitute strong evidence of its public character.

CIVIL PROCEDURE CODE—(1908)—contd.

A caste or a section of a caste can own a temple, but a temple which is managed by a certain caste is the subject of a public charitable trust and a scheme can be framed for it under section 92 of the Civil Procedure Code.

The fact that a temple is used for caste meetings and that moneys belonging to the temple have been spent not on the temple itself, but on various objects tending to promote the benefit of the caste, does not of itself prove that the temple is the private property of the caste.

In the absence of evidence of the intention of the founders, institutions like temples should be governed by user and though the past user of an institution is not binding on the Court in framing a scheme under section 92 of the Civil Procedure Code, yet it may well be taken into account and departed from only so far as may be necessary.

Even where no actual misconduct or mismanagement is proved against the trustees, a scheme may be properly framed, if necessary in order to set at rest questions which might give rise to difficulties in the future and to remove any uncertainty as to the right of management in the temple.

In framing a scheme a Court need not remove trustees already holding office when no misconduct is proved against them. **M MUTHIAH CHETTI v. PERIANNAN CHETTI** 551

— S 82—Suit by a trustee against co-trustee with whose conduct he was dissatisfied—Administration suit—Charitable bequests to be separated—Advocate-General or Collector to obtain directions of Court—Appointment of Receiver.

One of the two executors of the Will of a Hindu sued his co-executor, charging him with having misapplied the property of the testator and praying that the defendant should be held responsible for all sums of money which would be found to have been given or caused to be given to friends and relations, or proved to have been mismanaged, after taking an account, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing. There was not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts, and the plaint contained no description of the trusts or directions contained in the Will of the testator.

Held, (1) that the suit might be treated as a general administration suit brought by one trustee against another with whose conduct he was dissatisfied;

(2) that section 92 of the Civil Procedure Code did not apply and that if any question relating to charitable bequests should arise in the case, a notice might be given to the Advocate-General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code;

(3) that it would be quite possible for the Court to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate-General or the Collector had obtained the directions of the Court, if such were necessary, with reference to the

CIVIL PROCEDURE CODE—(1908)—contd.

disposal of those funds under some suitable scheme under section 92 of the Civil Procedure Code. **B BAPUJI JAGANNATH v. GOVINDLAL KASANDAS SHAH**, 18 Bom. L. R. 335 167

— S. 96 (2), O. XLI, R. 27—Ex parte decree, appeal from—Remand for further evidence—Appellate Court, powers of.

An Appellate Court has power under Order XLI, rule 27, to direct the production of additional evidence, which has been wrongly excluded by the original Court, even in appeals against *ex parte* decrees. **S KADUMAL v. AGA KHAN SULTAN MAHOMED SHAH**, 9 S. L. R. 191 493

— S. 98 (2) 714

— S. 100 30, 829

— S. 100—Practice—Taking up big original suits after 5.30 p.m.—Prejudice—Appeal, second.

A District Munsif called a big original suit pending on his file after 5.30 p.m. one day, and as the defendants were absent he examined one witness for the plaintiff and gave him a decree. This decree was upheld on appeal. In second appeal it was contended by the defendants, on the strength of an affidavit filed by them, that they were ready to go on with the case that day and waited in Court till 5.30 p.m., that they were then told by their Vakil that there was no likelihood of their case being taken up that day and that they might go home, that on the strength of that assurance they went home, that in their absence the case was called, that their Vakil then represented the above facts to the Court as also his inability to cross-examine the plaintiff's witness and an adjournment was prayed for but it was refused and that in consequence they were prejudiced in the conduct of the case. The plaintiff filed a counter-affidavit by his Vakil in the Court of first instance that it was usual for the District Munsif to take up big original suits only after 5.30 p.m., that the defendants had no witnesses ready that day and had told him at an earlier hour of the day that they were going to apply for an adjournment, but that he was not aware of the circumstances under which the defendants left the Court-house that day:

Held, that, though it was very irregular on the part of a Court to take up for trial and dispose of heavy original suits at that late hour and though such a practice was neither fair to the parties nor to the witnesses nor to the Court itself or anybody else and a Court in doing so would not be acting in the best interests of justice, in the present case, having regard to the fact that the defendants were not ready to go on with the case and had not instructed their Vakil to cross-examine the plaintiff's witnesses and having further regard to the circumstance that they had not filed any affidavit before the lower Appellate Court explaining the facts and showing how they were prejudiced, this was not a matter in which the High Court would interfere in second appeal. **M MURUGA PILLAY v. KRISHNA-MOORTHY CHETTI**, 3 L. W. 368 547

— Ss. 100, 115, O. IX, R. 13—Revision petition converted into second appeal—Appeal barred at time

CIVIL PROCEDURE CODE—(1908)—contd.

of alteration—Insertion of wrong section of law, effect of—Ex parte fraudulent decree, suit to set aside, whether lies.

An application for revision to the High Court was, by order of Court, altered into a second appeal under section 100, Civil Procedure Code. The respondent took the objection that, when the alteration was made, the appeal was barred:

Held, that as the application presented to Court was within time and complied with all the requirements of law for a second appeal, the appeal might be taken to have been filed as on the date of the application and the insertion of the wrong section of law did not deprive the appellants of their right to appeal.

A suit will lie to set aside an *ex parte* fraudulent decree, though it was not preceded by an application under Order IX, rule 13, Civil Procedure Code. **U B NGA YEIN v. NGA SO, U. B. R. (1916) II, 106 264**

— S. 102

697

— S. 102—*Claim for cancellation of document and damages—Appeal, second—Abandonment of prayer for cancellation—Damages, claim for, less than Rs. 500—Jurisdiction.*

The plaintiff sued for cancellation of a *kabuliyat* as against defendant No. 1 and for damages to the extent of Rs. 250 as against defendants Nos. 1 and 2. In second appeal the plaintiff abandoned his claim as against defendant No. 1:

Held, that no second appeal lay as against defendant No. 2 alone, as the claim against him was a matter cognizable by a Court of Small Causes exclusively. **PAT RAMTAHAL v. GANOO SAHU 909**

— S. 104 (1) (d), (f), Sch. II, Art. 17—*Reference to arbitration—Order rejecting award for misconduct—Appeal—Revision—Parties agreeing not to object to award, effect of—Estoppel—Contract Act (IX of 1872), s. 28—Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Punjab Land Revenue Act (XVII of 1887), s. 158—Prayer for setting aside award, valuation of.*

Plaintiff and defendants, members of a joint Hindu family, wished to separate. On 6th March 1910 they entered into an agreement to refer their disputes to arbitration and nominated three gentlemen as arbitrators, one of whom was to act as umpire. The arbitrators were authorized to partition the property in unequal shares, but not to exclude any party altogether. No award was written and in February 1913 an application was made to the Court asking that the agreement to refer be filed in Court and the usual proceedings be taken thereupon. On 28th March 1913 the parties put in a joint application saying that a compromise had been effected and that they agreed to the appointment of arbitrators as in the agreement of 6th March 1910, and asking that the arbitrators be directed to file their award. The parties agreed to abide by the award and to raise no objections to it. The reference having been made the arbitrators put in their award on 13th October 1913. Both sides filed objections, but the Court allowed only those filed by the defendants and declared the award invalid on the ground of misconduct, as the arbitrators gave only a life-interest to 1st defendant in some lands and excluded him contrary to the terms of the

CIVIL PROCEDURE CODE—(1908)—contd.

reference. Against this order the plaintiff appealed under section 104, Civil Procedure Code:

Held, (1) that neither clause (d) nor clause (f) of section 104, Civil Procedure Code, applied to the case, and, therefore, no appeal lay as an appeal from an order;

(2) that the proceeding was a "suit", and the order appealed against amounted to a "decree" and was consequently appealable as an appeal against decree and the mere fact that the plaintiff had appealed as from an order did not put him out of Court;

(3) that the rejection of an award not being open to revision, the present petition could not be treated as a revision;

(4) that the appeal fell under Article 17 (vi) of Schedule II of the Court Fees Act, for both the original application under Article 17, Schedule II, Civil Procedure Code, and the appeal embodied a prayer that could not be valued in money, and, therefore, the Rs. 10 Court-fee put in by the appellant was sufficient;

(5) that inasmuch as the arbitrators gave no "share" to defendant No. 1 but merely a life-interest in a small piece of land and so violated the injunction in the original agreement that no party was to be wholly excluded, the award was *mala fide* and consequently liable to be set aside;

(6) that the agreement by the parties not to raise objections to the award meant only the usual engagement to accept the award and that it was always open to the parties to object on the ground of fraud or bad faith on the part of the arbitrators.

Obiter.—It is not an unqualified rule that in arbitration cases, where there is no appeal, there can never be a revision.

It is not sufficient for an applicant for revision to show that the lower Court has erred, but he must also show that it acted without jurisdiction or refused to exercise its lawful jurisdiction or proceeded illegally or with material irregularity.

A mistaken view by the lower Court as to what amounted to the misconduct of an arbitrator is no ground for revision.

Quære.—Whether the exclusion of civil jurisdiction provided in section 158, Lands Revenue Act, as regards partition is intended to apply where the partition is done by private agency? **P. RAM JAWAYA MAL v. DEVI DITTA MAL, 107 P. W. R. 1916 192**

— Ss. 104 (1) (h), (2), 107 (2), O. XXXIX, r. 2 (2), (3), O. XLIII, r. 1 (r)—*Refusal to take action under O. XXXIX, r. 2 (3)—Appeal—Change in language, effect of—Orders of attachment and imprisonment, how to be passed—Injunction dissolved after disobedience—Effect of dissolution—Object of order of attachment or imprisonment explained.*

An order refusing to take action under rule 2 (3) of Order XXXIX for an alleged disobedience or breach of a temporary injunction granted under rule 2 (2) of the Order is appealable and in spite of the change "the Court granting an injunction may order" made in the wording of Order XXXIX, rule 2 (3), the Appellate Court is competent to pass the order which might have been passed by the Court of first instance.

Under Order XXXIX, rule 2 (3), a Court can, in its discretion, order either arrest or attachment of property and is not bound in the first instance

CIVIL PROCEDURE CODE—(1908)—contd.

to attach property and then only order imprisonment.

If a disobedience or breach of an injunction, granted under Order XXXIX, rule 2 (2), has occurred and an application for action being taken under Order XXXIX, rule 2 (3), is made while the suit is pending and the injunction has not been dissolved owing to the dismissal of the suit, a subsequent dissolution of the injunction by the dismissal of the suit can in no way excuse the party who has already disobeyed it.

Per *Srinivasa Aiyangar, J.*—An order for attachment of the property or imprisonment of the person of a party guilty of disobedience of an injunction is not, strictly speaking, enforcing the order of injunction. It is really a punishment for past disobedience.

M OTTAPURAKKAL THAZATH SUPPI v. ALABI MASHUR KOYANNA KOYA KUNHI KOYA, 3 L. W. 430; 20 M. L. J. 522; 19 M. L. T. 314; (1916) 1 M. W. N. 328 588

———— S. 105 (1) 713

———— S. 107 (2) 588

———— S. 115 247, 264, 372, 503, 829

———— S. 115, O. I, R. 10 (2), O. XXIII, R. 3, application under—Transposition of parties, power of Court to order—Application for transposition, dismissal of—Discretion of Court—Jurisdiction, failure to exercise—Erroneous view of law—Revision by High Court—Dismissal for want of prosecution—Decree, refusal to draw up—Appeal.

Order I, rule 10 (2), Civil Procedure Code, empowers a Court to make a transposition of parties, the omission in the new Code of the words "the Court might make a plaintiff a defendant or a defendant a plaintiff" in Act XIV of 1852 being due to avoidance of redundancy.

It is in the discretion of a Court to refuse an application under the said rule, and where a Court refuses to transpose parties in the exercise of its discretion, the High Court will not interfere in revision. Where, however, the order is expressly based on a want of jurisdiction by the Court the order is subject to revision by the High Court under section 115, Civil Procedure Code.

A Court is not bound to draw up a decree on an application under Order XXIII, rule 3, Civil Procedure Code, where the plaintiff, after compounding his differences with some of the defendants, prays only for withdrawal of the suit without further relief. The appropriate order to pass under the circumstances is one of dismissal for want of prosecution. Against such an order no appeal lies.

Plaintiffs sued defendants for dissolution of partnership and for accounts. During the pendency of the suit plaintiffs and some of the defendants entered into a compromise, and the plaintiffs, after stating the nature of the settlement to Court, applied for permission to withdraw the suit. The Court passed an order dismissing the suit for want of prosecution without entering a decree. Thereupon, the defendants who had not joined in the compromise, applied to be substituted as plaintiffs and to continue the suit. In the alternative they asked that a decree might be prepared to enable them to appeal. The Court refused both prayers, holding that it had no power to transpose parties under the

CIVIL PROCEDURE CODE—(1908)—contd.

new Civil Procedure Code and that a decree was unnecessary. The objectors-defendants then appealed to the High Court, and, as an alternative, invoked the High Court's interference under section 115, Civil Procedure Code:

Held, (1) that no appeal lay against the order under Order XXIII, rule 3, Civil Procedure Code;

(2) that the lower Court had power to transpose parties under Order I, rule 10 (2);

(3) that as the lower Court had failed to exercise a jurisdiction vested in it by law, it was competent to the High Court to interfere with the order in revision. **C BROJENDRA KUMAR DAS v. GOBINDA MOHAN DAS**, 20 C. W. N. 752 186

———— S. 144

760, 774

———— S. 144—Auction-sale—Bona fide purchaser for value, whether restitution can be obtained against.

Restitution cannot be obtained under section 144 of the Code of Civil Procedure against a bona fide purchaser for value at an auction-sale held by a Court which has jurisdiction to hold the same. **A PEAREY LAL v. HANIFUNNISSA BIBI**, 14 A. L. J. 302; 38 A. 240 303

———— S. 144—Restitution proceedings—Suit in ejectment—Decree for plaintiff—Reversal in appeal—Landlord and tenant—Claim for mesne profits by party succeeding in appeal—Set-off for rent due for period prior to decree and for period of landlord's possession, whether allowable.

In a proceeding in restitution under section 144, Civil Procedure Code, the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the period of litigation.

A suit for ejectment against a tenant was decreed and the landlord was put in possession. The decree was, however, reversed in appeal. In a claim by the tenant, under section 144, Civil Procedure Code, for mesne profits for the period during which the landlord was in possession under the reversed decree, the latter wanted to set off some arrears of rent due to him and also the rent which would have been due to him for the period of his possession if the tenants had remained in possession:

Held, (1) that the tenants' liability to pay rent before the period of the landlord's possession had nothing to do with their right to get restitution;

(2) that even assuming that the landlord had a right to recover rent for the period in which he was in wrongful possession, the moneys due to him under that right and which accrued to him during the period of litigation could not be taken into account in restitution proceedings. **M YADDANAPUDI LAKSHMI v. REPALLE SEETHARAMASWAMI**, 3 L. W. 405; 19 M. L. T. 336 2

———— Ss 144, 47—Scope of s. 144—Ex parte decree—Sale of defendant's holding in execution—Setting aside of decree—Mesne profits enjoyed by decree-holder purchaser, claim for, in restitution—Nature of remedy—Conversion of plaint into application under s. 47.

Section 144, Civil Procedure Code, is intended to be confined to cases in which the decree of a Trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior

CIVIL PROCEDURE CODE—(1908)—contd.

Court. In such cases, claims for restitution can only be enforced by proceedings in the suit under the said section.

Where a decree is varied or set aside by the Court passing it, a claim in restitution enforced by means of a suit is not barred by the provisions of section 144, Civil Procedure Code.

Plaintiffs obtained an *ex parte* decree against the defendants, and in execution thereof caused the defendants' holding to be sold and purchased it themselves. The *ex parte* decree was afterwards set aside. The defendants instituted the present suit for the value of crops reaped by the plaintiffs before the cancellation of the decree. It was pleaded in defence that the suit was barred both under sections 47 and 144, Civil Procedure Code:

Held, (1) that section 144, Civil Procedure Code, was no bar to the suit;

(2) that as the purchasers at auction were the decree-holders themselves and the sale was, as a matter of course, liable to be set aside at the instance of the judgment-debtors, the absence of a specific prayer for setting aside the sale was not a defect fatal to the suit, and that if necessary, the plaint might be amended so as to include that prayer;

(3) that if the relief could be had exclusively by means of an application under section 47, Civil Procedure Code, the plaint might be treated as an application under the said section.

Quære.—Whether the relief claimed could be obtained only by means of an application under section 47, Civil Procedure Code? **PAT CHINTAMAN SINGH v. CHUNI SAHU**, 1 P. L. J. 43 **747**

— S. 145 **247**

— S. 145 (c) **407**

— S. 148—*Enlargement of time by implication—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Step-in-aid of execution—Application by decree-holder certifying partial satisfaction of decree.*

An application by a decree-holder certifying payment of a portion of the decretal amount out of Court, is a step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act, provided the payment was actually made and even though the decree-holder by his application also prayed that the execution case might be struck off.

Where an application for execution was made just within the limitation period but was returned by Court for amendment of certain formal defects within a certain time and the application after amendment was re-filed after that time and beyond the limitation period, with a prayer that the delay might be excused in view of the circumstances stated therein and the Court accepted and acted upon the application:

Held, that the Court had in effect enlarged the time in the exercise of its discretion under section 148, Civil Procedure Code, and that, therefore, the application was not time-barred. **C GOPAL PROSHAD BHAGAT v. RAJENDRA LAL PANJA**, 20 C. W. N. 615 **25**

— S. 148, O. XX, R. 14—*Pre-emption decree—Extension of time for payment—Jurisdiction.*

Under section 148 of the Code of Civil Procedure Courts have a discretion to extend the time fixed in

CIVIL PROCEDURE CODE—(1908)—contd.

a pre-emption decree for deposit of the pre-emption money. **PAT ABU MUHAMMAD MIAN v. MUKUT PERTAP NARAIN**, 1 P. L. J. 92 **88**

— S. 151 **774, 787**

— Ss. 151 to 153, O. XXXIV, RR. 4, 5, *interpretation of—Preliminary mortgage-decree—Final decree—Court dealing with application for final decree, jurisdiction of—Mortgage, prior, not included in preliminary decree, if can be included in final decree—Courts, power of—Amendment of slips, mistakes, omissions—Jurisdiction—Appellate Court, power of.*

Order XXXIV, rule 5, of the Civil Procedure Code, 1908, means that the mortgaged property which a plaintiff is under the particular circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither rule 4 nor rule 5 of Order XXXIV says anything about the specification of the mortgaged property.

A Court which deals with an application for a final decree is still the same Court of original jurisdiction to which the plaint in the suit was presented, and it is still seized of the entire suit. It is entitled to frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree.

In a preliminary decree drawn up under Order XXXIV, rule 4, of the Civil Procedure Code, 1908, the mortgagors were given an opportunity to pay off the plaintiffs-mortgagees, failing this the plaintiffs-mortgagees were given an opportunity of paying off a prior mortgagee and in the event of the plaintiffs-mortgagees doing so they were to be allowed to bring the mortgaged property to sale. The mortgagors failed to redeem and the plaintiffs-mortgagees did pay off the prior mortgagee. They then applied for a final decree to entitle them to bring to sale not only the property originally covered by their mortgage but the additional property included in the mortgage of the prior mortgagee:

Held, that under the circumstances of the case the Court of first instance had jurisdiction to pass a final decree for sale in the terms desired by the plaintiffs-mortgagees.

Per Walsh, J.—Sections 151, 152, and 153 of the Code of Civil Procedure, 1908, are just as applicable to Courts of first instance as to Courts exercising appellate jurisdiction. The powers conferred upon Courts by these sections are wide, salutary and intended to enable the Court, where necessary, to take what is called a short indirect cut, and by curing breaches of technical rules to give effect to the real rights of the parties and to prevent multiplicity of suits.

A Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties.

In all cases where it is clear to an Appellate Court that it was open to the first Court or any lower Court to have taken steps by way of amendments, the Appellate Court ought to do what the lower Court might have done. **A UDHISHTER SINGH v. KAUSILLA**

CIVIL PROCEDURE CODE—(1908)—contd.

——— Ss. 152, 153	79, 787
——— O. I, R. 3	543
——— O. I, R. 10	384
——— O. I, R. 10 (2)	186
——— O. II, R. 2 (2)	51

——— O. III, R. 1—*Admission of fact by Pleader, for purpose of dispensing with further proof—Estoppel of party from disputing correctness thereof—Title to land—Possession, as evidence of title, nature of*

A party to a suit is estopped from disputing the correctness of an admission made by his Pleader for the purpose of dispensing with further proof.

A plaintiff, relying upon possession as evidence of his title, must show that he has juridical possession as against the defendant. The same possession which is juridical against one person may not be juridical against another.

Possession could not be said to be juridical, where it was taken behind the back of the defendant, who did not acquiesce therein but sought to evict the plaintiff as soon as he discovered his dispossession.

S VISHINDAS *v.* MUNICIPALITY OF HYDERABAD, 9 S. L. R. 220 494

——— O. III, R. 1—*Pleader, compromise by, without specific authority—Ratification by client, effect of—Evidence Act (1 of 1872), s. 115—Estoppel—Division of shares—Acceptance of specific share at first—Subsequent attempt at close of case to show incorrectness of that share.*

Although a Pleader cannot effect a compromise on behalf of his client without specific authority, yet, if a compromise is so effected by him and acquiesced in by his client, it is binding on the latter.

Where in the preliminary decree the Court presumed the plaintiff's share as equal with the other co-partners, fixed the value of his share on that presumption, and the plaintiff raised no objection:

Held, that the plaintiff could not be permitted subsequently, at the close of the case, to show that the share presumed was an excessive one. **S** SIRDAR KHATUN *v.* MURADALI, 9 S. L. R. 218 928

——— O. V, Rr. 12, 17, O. IX, R. 13—*Summons, service of—Substituted service by affixure, when to be effected—Ex parte decree, defendant's right to set aside, when not personally served after due diligence of serving officer.*

Where a bailiff for the purpose of serving summons upon the defendant went on three separate days to the place where the defendant carried on business with his partners and tried to find him there and on somebody in the place telling the bailiff on each of the occasions that the defendant was not at that time at the place, the bailiff eventually posted the writ of summons upon the premises after having cried aloud the name of the defendant three times:

Held, that there was no sufficient service according to law, even if the defendant might know of the issue of the writ.

Per *Sturgeson, C. J.*—Where it is a question of substituted service, and the defendant has not been served personally, it is most essential that the requirements of the rules (of the Civil Procedure Code) should be strictly observed in all respects.

CIVIL PROCEDURE CODE—(1908)—contd.

For serving summons upon the defendant proper enquiries and real and substantial effort, and not perfunctory, should be made to find out when and where the defendant is likely to be found.

Per *Mookerjee, J.*—The fundamental rule for service of summons upon a defendant is that wherever practicable service shall be made upon him personally, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient.

A defendant is entitled under Order IX, rule 13, Civil Procedure Code, to have the *ex parte* decree set aside as against him if the summons was not duly served, even when the defendant was aware of the institution of the suit against him. **C** KASSIM EBRAHIM SALEJI *v.* JOHURMULL KHEMKA, 23 C. L. J. 183; 43 C. 447; 20 C. W. N. 173 799

——— O. V, R. 17 799

——— O. VI, R. 17—*Plaint, amendment of—Declaration of easement to take water by erection of dam across river, suit for—Proof of permissive user—Conversion of suit into one for title to river-bed, whether can be allowed.*

Plaintiff sued for a declaration that he had acquired prescriptive right to take water by building a dam across a river. It was proved that the dam was erected by permission of the defendant. Plaintiff then prayed for permission to amend the plaint and convert the suit into one for a declaration of his title to the river-bed:

Held, that the amendment prayed for was inconsistent with the plaint and should not be allowed. **M** MUKKOOSA NAIR VEETIL *v.* SECRETARY OF STATE 541

——— O. VIII, Rr. 3, 5 235

——— O. VIII, R. 6 859

——— O. IX, R. 5—*Summons to defendant returned unserved—Trial of suit—Decree against defendant, whether ex parte—Remedy of party—Principal and agent—Power-of-attorney, construction of—Compromise of suit by agent.*

Under Order IX, rule 5, Civil Procedure Code, the Court should not proceed with the trial of a suit when summons to a defendant has been returned unserved. The position, in substance, is the same as if no summons had ever been issued a decree passed against such defendant without giving him notice of the suit is in no sense an *ex parte* decree, and it is liable to be set aside. 8

The effect of an order discharging a decree on the ground that it was passed without service of summons on a defendant is that the entire decree is discharged and the suit revived for re-trial.

Where a power-of-attorney authorized the agent to manage the business of the principal, to continue, institute, prosecute, defend or oppose all the suits that were or might be brought by or against the principal in respect of his business and property:

Held, that no power was conferred on the agent to compromise a suit by or against his principal. **C** CHATTERJEE BRAHMIN *v.* DURGADUTT AGARWALLA, 23 C. L. J. 436; 20 C. W. N. 913 394

——— O. IX, R. 6, O. VIII, Rr. 3, 5, O. XXXVII, R. 2, O. XLI, Rr. 23, 25—*Suit, first hearing of—Ex parte decree, passing of, without evidence—Jurisdiction*

CIVIL PROCEDURE CODE—(1908)—contd.

—O. VIII, r. 5, scope of—Admission by non-traverse
—Verified plaint, whether legal evidence—Penal Code
(Act XLV of 1860), ss. 191, 193—Breach of contract
—Unliquidated damages, suit for—Strict proof of
claim, necessity of, even when undefended—High
Court—Power to remand case.

No decree can legally be given without evidence in a case where the defendant is *ex parte* or does not choose to contest, except in suits on negotiable instruments governed by the provisions of Order XXXVII, rule 2, Civil Procedure Code.

A Court cannot, except in the said class of suits, dispense with evidence either on the principle of admission by non-traverse under Order VIII, rule 5, or on the ground that a verified plaint is itself legal evidence.

Order VIII, rule 5, Civil Procedure Code, is limited in its application to cases where there is, in fact, a pleading of the defendant before the Court.

Per Sanderson, C. J., and Mookerjee, J.—It is especially necessary in an undefended action for unliquidated damages based on a breach of contract, wherein the quantum of damages is either wilfully or unintentionally inflated, that the plaintiff should be required to offer proof of all the material averments in his plaint, that is, not only the cause of action upon which he relies, but also the actual amount of damages which he has sustained.

Per Sanderson, C. J.—The fundamental principle is that the plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. The only exceptions to this are cases provided for in Order XXXVII, rule 2, Civil Procedure Code.

The language of section 191, Indian Penal Code, does not justify the inference that a verified plaint must be taken to be legal evidence of the facts contained in it. The object of the verification is to insist on a guarantee that a false or totally trivial claim is not put before the Court. Section 191, Indian Penal Code, was framed in the way in which it stands only with the intention of bringing verifications of statements in pleadings by a person knowing them to be untrue within section 193, Indian Penal Code.

Per Woodroffe, J.—A decree cannot be given on pleadings without evidence in undefended cases. Verification does not dispense with evidence. It is merely a form of giving authenticity to the pleadings. The object of the verification of the plaint is to fix on the plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith.

Because a false verification may be the basis of a prosecution under section 193, Indian Penal Code, and comes within the definition of 'false evidence' for the purposes of the Penal Code, it does not make a verification evidence on which a decree can be founded in a civil suit.

Order VIII, rule 5, is really a rule of construction of the defendant's pleading. This rule does not apply where there is no written statement at all. The law says, as a rule of construction, that if there is a written statement and the fact as alleged in the plaint is not denied, then the written statement must be so construed ■ to be

CIVIL PROCEDURE CODE—(1908)—contd.

taken to have admitted such allegation. The rule does not justify the passing of a decree on no evidence where there is no written statement.

The words 'proceed *ex parte*' in Order IX, rule 6, Civil Procedure Code, mean 'proceed to take and determine evidence, i. e., in defendant's absence by the taking of evidence.'

Per Mookerjee, J.—It is an elementary principle which forms the basis of all legal procedure that no litigant is entitled to obtain relief from a Court of Justice unless he establishes to the satisfaction of the Court that his claim is well founded.

A verification is required with a view to discourage, if not to prevent, the institution of false suits; the Legislature never contemplated that verified statements should be treated as evidence on behalf of a plaintiff against a defendant. The inference may legitimately be drawn from the language used in section 191 read with section 193, Indian Penal Code, that a verified statement would not be 'evidence' but for the special provision of section 191 which has been enacted for a special purpose.

Great caution should be exercised when suits are heard *ex parte*.

The powers of the High Court as to remand are not restricted by the provisions of Order XLI, rules 23, 25, Civil Procedure Code, and the High Court can always make an order of remand if the exigencies of a case demand it. C J. B. ROSS v. C. R. SCRIVEN, 20 C. W. N. 1192 235

— O. IX, R. 9, O. XLIII, R. 1, cl. (c)—Order refusing to restore suit dismissed for default by Judge on Original Side—Legal advisers, mistake or laches of—Party, whether should be penalized for—Appeal, if maintainable—Order, if judgment—Letters Patent, cl. 15.

An order of a Judge of the High Court in its original jurisdiction rejecting an application under Order IX, rule 9, Civil Procedure Code, for the restoration of a suit dismissed for default, is a judgment within the meaning of clause 15 of the Letters Patent and is appealable.

Per Sanderson, C. J., and Mookerjee, J.—Such an order is appealable under Order XLIII, rule 1, clause (c), of the Civil Procedure Code, as the Code and the rules made under it apply to an appeal from a decision of a Judge of the High Court on the original side.

Per Mookerjee, J.—Where the competency of an appeal is in question it is incumbent upon the appellant to establish that he has a right of appeal, for a right of appeal does not exist in the nature of things but must be given by express enactment.

Even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs. C MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA, 20 C. W. N. 594; 23 C. L. J. 443 634

— O. IX, R. 13 254, 799, 865

— O. XI, applicability of, to Probate proceedings—Discovery, power to direct, on submission of interrogatories—Probate and Administration Act (V of 1881), s. 55.

Order XI of the Code of Civil Procedure applies

CIVIL PROCEDURE CODE—(1908)—contd.

to proceedings in Probate and a Probate Court can, on submission of interrogatories, direct the executors to make a full discovery of the assets of the testator by an affidavit sworn by them.

But until the interrogatories are filed, the Court is absolutely without any power in the matter.

Semble.—In matters of Probate the strictest relevancy in the interrogatories may not be required, but the Court should exclude whatever is offensive or improper. **C** ANILA BALA DASI v. RAJENDRA NATH DALAL, 23 C. L. J. 480; 43 C. 300 **227**

— O. XVII, R. 3 **866**

— O. XX, R. 6 **787**

— O. XX, R. 11 **393**

— O. XX, R. 14 **111**

— O. XXI, R. 2—Certification, how to be made—

Record of certification, where unnecessary—Payment of interest on judgment-debt, notified to Court by an application for execution, if saves limitation—Limitation Act (IX of 1908), ss. 19, 20.

Order XXI, rule 2, of the Civil Procedure Code, does not stand in the way of payment of a sum by the judgment-debtor to the decree-holder by way of interest on the judgment-debt operating to save limitation, when that payment, though not certified separately, was notified to the executing Court by a subsequent application of the decree-holder for execution and was acted upon by that Court.

The certification which may be given by a decree-holder under Order XXI, rule 2, of the Civil Procedure Code, need not be a certification on some days or at some time different from that on which the application for execution is made; a decree-holder may apply to certify payment on his application for execution of the decree and where such application is acted upon by the Court, no formal recording of certification is necessary. **C** EUSUFFZEMAN SARKAR v. SANCHIA LAL NAHATA, 43 C. 207; 20 C. W. N. 272; 23 C. L. J. 390 **606**

— O. XXI, R. 13—Application for attachment not specifying immovable property—Court, power of, to require amendment—Limitation—Previous application for execution need not be examined.

Where in an application for execution the property sought to be attached has not been described as required by rule 13 of Order XXI, Civil Procedure Code, it is open to the Court to require amendment in this particular; before any immovable property is attached the decree-holder can be called upon to furnish the necessary particulars.

In considering whether an application for execution of a decree is within time, it is not necessary to examine the previous applications to ascertain whether they in all respects comply with the provisions of law. **P** BALDEO SAHAI v. KANHAYA LAL, 65 P. L. R. 1916 **955**

— O. XXI, R. 19—Joint and several money-decree against two judgment-debtors—Both judgment-debtors individually awarded costs exceeding the decree in aggregate—Execution—Decree-holder, whether can execute decree against only one judgment-debtor without deducting costs of both.

A held a "joint and several" money-decree against B and C. In the same decree both B and C were individually awarded costs which in the aggregate exceeded the amount due to A. After deducting the

CIVIL PROCEDURE CODE—(1908)—contd.

amount of costs due to B under the decree A took out execution against B for the whole balance due to him from both B and C:

Held, that A could proceed as he did, until C made an application in execution to recover the amount due to him from A. **M** KOTIGARI RANGIAH CHETTI v. CHINTALAPALLI NARASAYYA, 3 L. W. 267 **388**

— O. XXI, R. 22 **144**

— O. XXI, R. 22—Irregular or defective application, notice under—Limitation.

The issue of a notice under Order XXI, rule 22, Civil Procedure Code, gives a new start for limitation, even though the preceding application upon which the notice was issued was defective or irregular. **O** SRI RAM v. MOHAN LAL, 19 O. C. 17 **280**

— O. XXI, Rr. 30, 31—Judgment written and signed by retired Judge, if good judgment—Appeal under Letters Patent, extension of time for.

The judgment of one of the two Judges constituting a Division Bench of the High Court which heard an appeal written and signed by him after retirement, is a good judgment if it is read out and delivered on his behalf by the other Judge.

In the special circumstances of the case the High Court extended the time by more than five years for preferring an appeal under section 15 of the Letters Patent. **C** ADWAITYA CHARAN v. SORAJ-RANJAN **584**

— O. XXI, R. 31 **584**

— O. XXI, R. 41—Application for examination of judgment-debtor, grounds for—Ex parte order—Right of judgment-debtor to apply to set aside.

An application for examination of the judgment-debtor under Order XXI, rule 41, Civil Procedure Code, can be made at any stage of the execution proceedings.

An order for such examination may be made *ex parte* on a verified tabular statement but it is open to the Court to hear the objections of the person summoned before he is actually examined.

The application should be encouraged where it may be necessary to prevent unduly dilatory, troublesome and expensive execution proceedings. It is not compulsory on the decree-holder to exhaust all the usual methods of execution before applying under this rule, but this procedure must be resorted to only when there is any difficulty about obtaining sufficient particulars of the judgment-debtor's property. **C** NATIONAL BANK OF INDIA, LTD. v. GHUZNABI, 43 C. 285 **287**

— O. XXI, R. 54 (2) **34**

— O. XXI, R. 58 **492**

— O. XXI, R. 63—Claim by purchaser from judgment-debtor, rejection of—Suit by unsuccessful claimant—Sale in fraud of creditors, plea of, in defence, whether lies—Attachment after sale—Avoidance of sale necessary before proceeding in execution—Suit to set aside sale, whether should be representative—Transfer of Property Act (IV of 1882), s. 53—English and Indian Law.

In a declaratory suit under Order XXI, rule 63, Civil Procedure Code, by a vendee from the judgment-debtor, the decree-holder cannot plead in defence that

CIVIL PROCEDURE CODE—(1908)—contd.

the sale was in fraud of creditors and could not prevail over his decree. If the sale was prior to the attachment, the decree-holder must first set aside the sale by a separate suit.

Per *Coutts Trotter, J.*—The mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and, therefore, he must follow up his judgment by attaching the properties in order to enable him to utilize section 53 of the Transfer of Property Act in answer to a claim founded on the impeached deed of transfer.

Per *Seshagiri Aiyar, J.*—A suit to set aside a sale is voidable under section 53 of the Transfer of Property Act need not be a representative one by all the creditors in a body. Any person deeming himself to be defrauded, defeated or delayed may sue to impeach the transaction, provided he alleges in his plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff but would enure for the benefit of all creditors like himself.

Such suit, however, is not necessary either by the creditor individually or conjointly with the other creditors where the transfer is void or has been found to be a sham transaction.

In England, if a judgment was obtained at Common Law, and a further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in the matter until all the Common Law remedies had been exhausted. A judgment-creditor in England is in a very favourable position as compared with the judgment-creditor in India. He becomes practically the owner of the property which he seizes either under a writ of *eligiti* or *fi fa*. The judgment-creditor in India is, for all practical purposes, in the same position as any ordinary creditor and there is nothing in the words of section 53 of the Transfer of Property Act to differentiate between the position of the decree-holder and that of an ordinary creditor.

M PALANIANDI CHETTIAR v. APPAYU CHETTIAR, 30 M. L. J. 565; 19 M. L. T. 390 **778**

— O. XXI, R. 63—*Right to sue for mere declaration—Specific Relief Act (I of 1877), s. 42—Sale consideration—Transfer of title.*

The right of suit under Order XXI, rule 63, Civil Procedure Code, is not controlled by the provisions of section 42 of the Specific Relief Act and a claimant has a right to sue for a mere declaratory decree.

Where there is a registered-deed of sale, which is not tainted by any fraud or the like, it passes the title and interest conveyed, although the purchase-money has not been paid. The vendee need not prove the passing of consideration as against third persons. **L B K. Y. K. M. CHETTY FIRM v. S. N. V. R. CHETTY FIRM** **125**

— O. XXI, R. 90 **86, 829**

— O. XXI, R. 90—*Person 'whose interests are affected by the sale', meaning of—Declaratory suit by person alleging exclusive ownership in himself—Application in execution to set aside sale during pendency of suit, whether lies.*

CIVIL PROCEDURE CODE—(1908)—contd.

After the passing of a decree absolute, but before the actual sale of the mortgaged property in pursuance of that decree, the plaintiff, who was neither the decree-holder nor the judgment-debtor, filed a suit asking for a declaration that he was the real owner of the property covered by the mortgage and ordered to be sold by the Court. The property, however, was sold. Then, he applied to have the sale set aside under the provisions of Order XXI, rule 90, while his declaratory suit was yet pending:

Held, that the plaintiff could not apply under Order XXI, rule 90, Civil Procedure Code, before the declaratory suit was decided, as any decision come to on the said application would amount to prejudging the suit. **A HARDWARI LAL v. MUHAMMAD SALAMAT ULLAH KHAN**, 14 A. L. J. 409; 38 A. 358 **272**

— O. XXI, R. 100 **231**

— O. XXII, R. 1 **249**

— O. XXII, R. 3 **57, 372**

— O. XXII, R. 4 **372**

— O. XXII, R. 5 **57**

— O. XXII, R. 9 **822**

— O. XXII, Rr. 11, 1—*Action for slander—*

Appeal, second—Death of party—Second appeal, whether abates.

The expression 'right to sue' in Order XXII, rule 1, Civil Procedure Code, means the right to seek relief.

The plaintiff in an action for slander was awarded damages in a certain amount. The decree was, however, set aside on appeal. The plaintiff then filed a second appeal, and, while it was pending, the defendant died:

Held, that as the plaintiff was trying to recover the benefit which accrued to his estate in consequence of the decree of the first Court and of which he was deprived by the decree of the lower Appellate Court, the second appeal did not abate. **U B NGA KYET SEIN v. MI KYIN MYA**, U. B. R. (1916) II, 105; 9 BUR. L. T. 38 **249**

— O. XXIII, R. 1—*Withdrawal of suit, order for—Grounds not specified—Application made at late stage—High Court—Revision—Remand—Amendment of plaint.*

Where in a title suit, after evidence on both sides was finished, the plaintiff made an application for permission to withdraw the suit with liberty to bring a fresh suit on the same cause of action without specifying any defects in the plaint and the Munsif granted the permission, the High Court, in the exercise of its revisional powers, set aside the order granting permission and remitted the case to the Munsif to be heard, leaving it open to him to consider any application that might be made to him for amendment of the plaint. **C RAJENDRA NATH v. BAIKUNTHA NATH** **934**

— O. XXIII, R. 3 **186**

— O. XXIII, R. 3—*Agreement for disposal of suit on ascertainment of a simple fact—Adjudication of suit—Agreement to refer to arbitration.*

An application presented to Court by the parties to a suit requesting it to dispose of the suit in particular manner on ascertainment of a simple fact should be dealt with under Order XXIII, rule 5, Civil Procedure Code, and the Court should not allow either party to resile from the agreement if

CIVIL PROCEDURE CODE—(1908)—contd.

the result is against him. Such an agreement is not in the nature of a reference to arbitration. **C** KHO-BHARI SAH v. JHAMAN SAH, 23 C. L. J. 482 220

— O. XXIV, Rr. 4, 5 79

— O. XXVI, R. 15 855

— O. XXIX, R. 2 (2), (3) 588

— O. XXXII, R. 7—*Civil Procedure Code (Act XIV of 1882), s. 462—Compromise of suit on behalf of minors—Court's sanction not obtained—Bond executed by minor and adult—Liability of promisors.*

By way of compromise of a suit a bond was executed by a minor jointly with another person for the payment of a certain amount. The compromise, however, was not sanctioned by Court under section 462, Civil Procedure Code, 1882:

Held, that the minor was not bound under the bond, but that his immunity could not be pleaded in bar of the claim against his co-promisor.

Quere.—Whether the minor would be liable if the terms of section 462 had been complied with? **P C** JAMNA BAI SAHEB MOHITAI AVERGAL v. VASANTA RAO, 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 3; (1916) 1 M. W. N. 452; 39 M. 409 213

— O. XXXIV, R. 6—*Mortgage-decree—Decree-holder, right of, to recover balance due on mortgage without bringing mortgaged property to sale—Interpretation of Statutes.*

Where a prior mortgagee obtained a decree against the mortgagor and the puisne mortgagee on the basis of the prior mortgage, and shortly afterwards the puisne mortgagee obtained a decree against the mortgagor on the basis of the puisne mortgage, but did not pay the money due on the prior mortgage and allowed the mortgaged property to be sold in execution of the former decree, contenting himself with what he received out of the surplus sale-proceeds in part satisfaction of his puisne encumbrance:

Held, that the puisne mortgagee could subsequently obtain a decree under Order XXXIV, rule 6, Civil Procedure Code, for the balance of the money due to him against the person and other property of the mortgagor, without bringing the already sold mortgaged property to sale in execution of his own decree.

A section of an Act should be interpreted so as not to conflict with other known principles of law. **O**

WASI ALI v. JANG BAHADUR SINGH, 2 O. L. J. 614 48

— O. XXXVII, R. 2 235

— O. XXXVIII, R. 10 953

— O. XL, R. 1 83

— O. XL, R. 1 (1)—*"Just and convenient," meaning of—Receiver, discretion of Court to appoint.*

The words "just and convenient" in Order XL, rule 1 (1), Civil Procedure Code, do not mean that the Court can appoint a Receiver simply because it thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property, or the prevention of injury, according to legal principles. They confer no arbitrary and non-regulated discretion on the Court.

Where in a suit relating to title to the office of *mutwalli*, it was established that the defendant,

CIVIL PROCEDURE CODE—(1908)—contd.

since he took possession as *mutwalli* had not paid allowances to the beneficiaries, but there was no allegation of waste or mismanagement against him, the High Court held that, at that stage of the suit, no ground was established to justify an order for appointment of a Receiver. **C** HOBIBULLAH v. ABTIKALLAH, 23 C. L. J. 567 693

— O. XLI, R. 1 706, 867

— O. XLI, R. 4 714

— O. XLI, Rr. 23, 25 235

— O. XLI, R. 27 493

— O. XLI, R. 31—*Appeal—Judgment of reversal what should contain—Discussion of evidence—Jotedar, meaning of.*

A judgment of an Appellate Court reversing that of the Court of first instance was in the following terms:—

"I am unable to agree with the Munsif that this entry (Record of Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion":

Held, that the judgment was in contravention of the provisions of Order XLI, rule 31, of the Code of Civil Procedure, 1908.

When the judgment of an Appellate Court is one of reversal, the aggrieved party is entitled to a consideration of the points on which the lower Court relied for the purpose of giving the successful party a decree.

The expression '*jotedar*' may mean either tenure-holder or *raiyat*. **PAT** GANGA RAM RAI v. MAULA BAKSH 185

— O. XLI, R. 33 714

— O. XLII, R. 1 706

— O. XLIII, R. 1—*Oudh Rent Act (XXII of 1886), s. 107K—Decree, ex parte, setting aside of—Resumption suit—Appeal.*

An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under Order XLIII, rule 1, Civil Procedure Code, is nevertheless appealable in view of the provisions of section 107K of the Oudh Rent Act. **UPPER** MUHAMMAD ALI MUHAMMAD v. SHAUKAT ALI, 3 O. L. J. 229 702

— O. XLIII, R. 1 (c) 634

— O. XLIII, R. 1 (r) 588

— O. XLV, R. 5—*Investigation as to amount or value of subject-matter of suit, who can hold.*

The Court of first instance, to which a reference is made under rule 5, Order XLV, Civil Procedure Code, for the purpose of settling a dispute as to the amount or value of the subject-matter of the suit, has no power to remit the investigation to some other officer: it must be carried out by that Court itself. **C** HANSMAN JHA v. BAHUJI JHA, 43 C. 225 203

— O. XLVI, R. 7, S. 115—*Reference by District Judge on findings of Small Cause Court—Reference on questions of fact—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

The Court of Small Causes is a Court subordinate to the District Judge, so the District Judge is competent to make reference of cases tried by the Small Cause Court to the High Court under Order XLVI, rule 7, Civil Procedure Code.

CIVIL PROCEDURE CODE—(1908)—contd.

Where the Court of Small Causes, upon evidence, came to the conclusion that the defendant was a servant remunerated by a part of the proceeds of the land and the District Judge, holding that the conclusion of the Small Cause Court as regards the nature of the suit was erroneous and that the defendant ought to have been held to be a tenant against whom the plaintiff's suit in the Small Cause Court could not have been entertained, made a reference under Order XLVI, rule 7, Civil Procedure Code, to the High Court, the High Court refused to accept the reference on the ground that no case was made out for its interference on a question of facts. **C** RATAN BIPARI v. HIRA LAL 527

———— O. XLVII, R. 1 787

———— O. XLVII, R. 8, *scope of—Review, whether whole case re-opened in.*

After the retirement of one of the two Judges of a Division Bench of the High Court which heard an appeal, an application for review of judgment made to the other Judge was granted and the judgment and decree were amended, but subsequently the Judge on being moved to re-hear the case, heard it again and made an order which was the same as that made on the review application. On appeal this order was set aside on the ground that the Judge, sitting by himself had no jurisdiction to re-hear the case as he was not a Division Bench and the appeal was directed to be re-heard by a Division Bench. The Division Bench when hearing the appeal did not allow the whole case to be re-opened, but confining itself to the point involved in the review proceeding made an order which had already been made in that proceeding. An application for review of this order was made on the ground that the Division Bench ought to have heard the whole case:

*Held, per Sanderson, C. J.—*That after the amendment of the decree in the review application, every other proceeding that took place was superfluous.

*Per Mookerjee, J.—*That the appeal was concluded by the final decree made by the order in the review application and the judgment of the Division Bench need not be interfered with, as it merely repeated the decision of the Judge who granted the review.

That it was not incumbent upon the Division Bench to re-hear the entire appeal.

A review may be granted either as to the entirety of the order assailed or as to a portion only thereof.

Rule 8 of Order XLVII, Civil Procedure Code, clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be re-opened in part or its entirety, so when a review of a decision has been admitted the whole case is not necessarily re-opened thereby. **C** GOUR SUNDAR BHOUMIK v. RAKHAL RAJ BHOUMIK, 20 C. W. N. 1165 592

———— SCH. II—Arbitration 549

———— SCH. II—Award, *submission of, before due date—Limitation Act (IX of 1908), Sch. I, Art. 158.*

The presenting of an award, without the knowledge of the parties, before the date fixed by Court for its filing is not *submission of the award to the Court* within the meaning of Article 158, Schedule I, of the Limitation Act.

CIVIL PROCEDURE CODE—(1908)—contd.

The submission will be deemed to have been made only on the date fixed by Court for its filing, and the ten days' time for filing objections should be counted from that date. **P** JAWAHIR SINGH v. MEHR SINGH, 14 P. W. R. 1916 250

———— SCH. II, PARA. 1 (1)—*Reference to arbitration—Application for adjournment praying for records to be sent to arbitrators, whether falls under Sch. II, s. 1.*

An application for adjournment, in which the Court is asked to send the records to a certain arbitrator to whom the parties had already referred the matter in dispute in the pending suit, is an application under Schedule II, section 1, paragraph (1), Civil Procedure Code, to the Court itself to make a reference to the said arbitrator. **M** NIDAMARTHI KRISHNAMOORTHY v. GARIGIPARTI GANAPATILINGAM, 3 L. W. 375 741

———— SCH. II, PARAS. 10, 16—*Arbitration—Award 'recorded' by Court—Appeal—Agreement to abide by decision of majority—Refusal of minority to sign award—Award, validity of.*

No appeal lies against the order of a Court recording an award.

Where the parties to a suit refer the matter in dispute to arbitration, agreeing to abide by the decision of the majority, it is enough if the award is signed by the majority. The refusal of the minority to sign will not affect its validity if they were present throughout the proceedings and took part in the deliberations. **PAT** RAM NARAIN RAM v. PATI RAM TEWARI, 1 P. L. J. 90 105

———— SCH. II, PARAS. 15, 16—*Arbitration—Award, questions affecting validity of—Forum for decision—Appeal—Revision—Irregularities in procedure, rectification of, by High Court—Judgment on award before expiry of time allowed for objections—Jurisdiction—Pleader, power of, to apply for reference—Minor, benefit to, consideration of, before decree on award.*

Under paragraph 15 (1) of Schedule II, Civil Procedure Code, all questions affecting the validity of an award are to be decided by the Court in which the award is being filed.

The Legislature has allowed no right of appeal from that decision and a revision application seems to have been prohibited by the Limitation Act.

The High Court has power, under section 115, Civil Procedure Code, to revise the proceedings of the lower Court, after the delivery of the award to it; and it can rectify any illegality or material irregularity in the procedure of the lower Court in dealing with the award.

A judgment ordering a decree in terms of an award on a reference through Court under the Civil Procedure Code, on receipt of the award and before the expiry of the time allowed by law for making an application to set aside the award, is illegal, notwithstanding that before the expiry of such time an application may have been made to set aside the award or that the parties may have stated that they had no objections to urge.

Such statements do not amount to estoppel, nor do they prevent the parties from retracting them at any time within the 10 days on the ground of mistake or fraud.

CIVIL PROCEDURE CODE—(1908)—concl'd.

A decree passed on an award will not be binding on a minor who is a party, unless the Court considered and found that its terms were beneficial to the minor. And the Court is not absolved of this duty by reason of its having considered it prior to the reference.

Under the new Civil Procedure Code (Act V of 1908), a Pleader duly appointed to act for a party has authority under Order III, rule 1, to make any application, including an application for a reference to arbitration. **S SRIKISHIN-ROCHUMAL v. RELUMAL-PARIONAL**, 9 S. L. R. 183 **845**

— SCH. II, PARA. 15 (c)—Award filed after time fixed therefor, whether nullity—Agreement not to raise any objection to award, how far binding.

An award made after the expiration of the time fixed by the Court is not a mere nullity, though it is liable to be set aside upon an application by one or other of the parties affected thereby.

On the date fixed for the hearing of a second appeal, the parties presented an application in writing signed by themselves and their respective Counsel appointing two persons as their sole arbitrators and authorising them to decide all matters in dispute between them. They agreed that they would have "no objections whatever" to the award. The Court thereupon referred the matter in dispute to the two arbitrators, who were directed to make an award within one month from the date of the order, i.e., the 29th March 1913. On the 29th April the arbitrators applied for an extension of one month from the date of the application, which was allowed on the 5th May. The award was made on the 30th May 1913. On the 26th June the appellant filed objections, claiming that the award should be set aside because (1) it was filed after the time fixed and (2) the arbitrators were guilty of misconduct:

Held, (1) that the mere fact that the award was filed after the time fixed therefor did not make it a nullity;

(2) that in view of his agreement the appellant was debarred from urging any objections to the award of the arbitrators. **P KAHAN SINGH v. MOHAN LAL**, 44 P. W. R. 1916 **177**

— SCH. II, PARA. 16 **105, 845**

— SCH. II, PARA. 17 **192**

COERCION. See CONTRACT ACT, s. 72.

COMPANIES ACT (VI OF 1882), Ss. 48, 50—Complaint by clerk under authority of Registrar, Joint Stock Companies, whether legal—Person acting as Director, whether can plead that he was not legally a Director or that he was not appointed till after penalty first accrued.

Under the Punjab Government Notification No. 3, dated the 23rd February 1910, the Registrar of the Joint Stock Companies is empowered to authorise any person to institute complaints of offences under the Companies Act.

Where, therefore, a clerk "acting under the instructions of the Registrar, Joint Stock Companies, Punjab," instituted complaints against the petitioner under sections 48, 50 and 74 of the Companies Act:

Held, that the clerk having been duly authorised by the Registrar, the complaint was good in law.

COMPANIES ACT—(1882)—concl'd.

A person who acts as a Director or Manager of a Company cannot set up in answer to a penalty under section 50 of the Companies Act that he was not legally a Director or Manager.

It is the bounden duty of a Company and of its Directors and Managers to forward to the Registrar the summary and list specified in section 48 of the Companies Act and this obligation does not come to an end on the date on which by default on the part of the Company, Directors and Managers the penalty begins to accrue. Therefore, every person who at any time during the default in complying with the provisions of section 48 acted as Director or Manager can be convicted under sections 48 and 50, and it is immaterial that some or all of these persons were not legally qualified to act as Directors or Managers or that they did not in fact become Directors or Managers until after the date when the penalty first accrued. **P TOTA RAM v. EMPEROR**, 14 P. R. 1916 CR.; 17 CR. L. J. 242 **962**

— S. 50 **962**

COMPANY—Voluntary liquidation—Attachment prior to liquidation—Property, whether vests in liquidator—Sale—Distribution of proceeds—Civil Procedure Code (Act V of 1908), s. 73.

The property of a limited liability company attached before its liquidation does not vest in the liquidator. The powers of the liquidator differ in this respect from those of the Receiver of an insolvent's estate in whom the property vests under the Provincial Insolvency Act.

The proceeds of a sale held in pursuance of the attachment must, therefore, be distributed in the manner provided for by the Civil Procedure Code. **C AMRITA LAL KUNDU v. ANUKUL CHANDRA DAS**, 20 C. W. N. 358; 43 C. 586 **253**

COMPENSATION. See LEASE; MESNE PROFITS.

COMPROMISE, offer of, of a claim to be filed in Court—Negotiations between Pleader of one party and his adversary—Statement by party, admissibility of—Admission of defendant, whether receivable against co-defendants **571**

— of suit on behalf of minors—Court's sanction not obtained—Bond executed by minor and adult—Liability of promisors **213**

— Suit for partition of family properties—Parties coming to settlement on appeal—Compromise not signed by one party to decree, whether binding on signatories.

Where a suit for partition of family properties was, on appeal to the High Court, compromised, but one of the parties to the decree of the lower Court, who was the son of the managing member, did not sign the *razinamah*:

Held, that as the compromise did not in terms modify the decree, but only altered the mode of payment of the decretal amount, it was binding on those who were parties to it. **M ACHAMA NAIDU v. KRISHNASWAMI NAIDU** **518**

CONFESSION. See EVIDENCE ACT, s. 24.

CONSIDERATION. See CONTRACT.

CONSTRUCTION OF CONTRACT **520**

CONSTRUCTION OF DOCUMENT. *See* DOCUMENT.

Extrinsic evidence, admissibility of	450
Mortgage of widow's right and interest	277
Sale or mortgage	414
Sale-deed	390
Settlement decree, interpretation of—Under-proprietary title claimed—Claim admitted by superior proprietor—Alienation, decree restraining, effect of.	

Where in a claim before a Settlement Court for under-proprietary title, the superior proprietor admitted the claim, and the Court declared the claimant to be entitled to under-proprietary rights subject to the payment of a certain annual rent without any power of mortgage or sale:

Held, that the above imposition of a restraint on alienation was void and ineffectual. ○ SARJU DIN PANDEY v. KANTA SINGH, 3 O. L. J. 187 353

CONSTRUCTION OF LEASE	464
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CONSTRUCTION OF SURETY-BOND	407
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CONTINGENT CONTRACT. *See* CONTRACT ACT, s. 32.

Agency for sale on commission—Power limited to a term—Right of agent to brokerage—Appeal—Court of appeal, functions of—Decision on facts—Reversal.	
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The defendant, an owner of an oil mill, employed the plaintiff to sell his mill on an agreement embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date," and there was added a postscript to the effect that "on the sale-proceeds being received in hand brokerage will be paid."

Held (Woodroffe, J., *dubitante*), on the construction of the agreement, that it was essential for the plaintiff, if he was to earn his commission, that he introduced within fifteen days to the defendant a person who would be ready and willing to purchase for Rs. 40,000, but it was not necessary that the sale should be completed within 15 days.

Per Sanderson, C. J.—That the postscript did not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; if the defendant chose to agree with the purchaser to receive the purchase-money partly in cash and partly by *hundis*, the plaintiff's right to commission on the stipulated date would not be affected.

Where the decision of a question depends to a large extent upon the verbal evidence of witnesses examined before the Trial Court which had the advantage of seeing and hearing the witnesses, the Appellate Court ought not to interfere with the decision of the Trial Court unless it is clear that that Court has come to a wrong decision.

Per Woodroffe, J.—If, after arguments, an Appellate Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed, and this is not the less so because the judgment raised a question of fact.

Per Mookerjee, J.—When the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended.

CONTRACT—contd.

It is the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

Duty and functions of a Court of Appeal in this country discussed. C LALLJEE MAHOMED v. DADABHAI JIVANJI GUZDAR, 23 C. L. J. 190 807

CONTRACT—Agreement to settle property on condition of donee living with donor—Promise—Consideration—Acceptance by actings—Part-performance by donor—Completed agreement—Right to repudiate—Locus penitentie—Specific performance, right of donee to claim—Dying declaration re-affirming original promise—Nuncupative Will.

In all cases of contracts the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention, and that true issue is, is a contract proved, and if a contract is proved, the law will not refuse to give effect to it by way of specific performance.

A contract may be constituted by a promise followed by actings by the promisee on the faith thereof, though not by an express acceptance. The question in each case is one of fact, and if the Court finds that the actings did take place on the footing of a proposal made by the promisor, and that they were known by the latter to have taken place on that footing, the objection that the contract was inchoate or incomplete cannot be maintained.

After such actings, *locus penitentie* or the power of resiling as from an incomplete engagement or an unaccepted offer is barred.

The dying declaration of a person, making reference to his previous promise or proposal on the faith of which the promisee has acted and after recognizing the latter's right to the thing promised declaring that it shall be given effect to after his death, cannot be treated as a nuncupative Will because the true effect of the declaration is to recognize a right already vested in the promisee. It constitutes only a re-affirmation and confirmation of the original contract.

P, a childless Hindu widow, agreed to settle some property on the plaintiff, her grand-niece, to whom she was very much attached in consideration of the plaintiff and her husband living with her till her death. The date of the settlement was in 1886, the year of the plaintiff's marriage, and the arrangement was indefinite. Following upon it the plaintiff and her husband resided with P up to 1893. During this interval of time P purchased some properties in her own name which she afterwards conveyed to the plaintiff. In 1893 the plaintiff purchased a valuable property known as Repudi in her own name, but distinctly stated that it was purchased for the plaintiff. This dissatisfied the plaintiff's husband who separated from P. P. then started negotiations asking the plaintiff's husband to return, which culminated in a letter to plaintiff wherein it was distinctly set out that Repudi was purchased for plaintiff and would be duly delivered to her after P's death. In consequence of these assurance the plaintiff and her husband continued to live with P till her death in 1899. On her death bed P declared that Repudi was purchased solely for plaintiff which she could take after her

CONTRACT—contd.

death. After P's death plaintiff sued for recovery of possession of Repudi from persons who alleged to have derived interest from P:

Held, (1) that P's letter was a definite promise vesting the ownership of Repudi in the plaintiff and contracting that possession was to be given immediately upon the expiry of P's life-interest;

(2) that the said promise accompanied by compliance with the stipulations on the part of the plaintiff constituted a completed contract of which plaintiff was entitled to claim specific performance;

(3) that the dying declaration of P could not be regarded as a nuncupative Will, but was a re-affirmation and confirmation of the original contract. **P C LAKSHMI VENKAYYAMMA v. VENKATA-NARASIMHA**, 20 C. W. N. 1034; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651 **921**

— *Carriage by sea—Agreement to ship cargo at certain port—Shipper not ready to ship—Ship not putting at appointed port and proceeding to another destination—Dispensing with laying days—Breach of contract—Damages.*

Engagements to ship goods and to keep space for goods must be punctually performed. The shipper must be ready with his cargo before he can enforce the obligation on the shipowner to call at the port of shipment and proceed against him in damages for its breach.

A ship is not bound to remain for the whole of the laying days at a port, if the charterer dispenses with it.

Plaintiff contracted with the defendant Company to ship cargo in their ship, the City of Madras, at Cuddalore during July-August. The City of Madras arrived in Madras harbour on August 7th en route for Cuddalore. The defendant Company repeatedly asked plaintiff to advise them if he was ready to make the shipment. The plaintiff intimated to them that, owing to war conditions and other causes, he was not ready with his cargo and the City of Madras proceeded to another destination on the 21st August:

Held, that, under the circumstances, the plaintiff dispensed with the ship's coming from Madras to Cuddalore, that the defendants performed their contract and that plaintiff broke it and that defendants were not liable in damages to plaintiff.

M GOVINDA PILLAI v. MESSRS. BEST & CO., LTD.

843

— *Carriage by sea—Charter party, terms of, conflicting with bill of lading—Dominant contract—Liability for shortage, stowage, damage and sweepings—Nomination of stevedores by charterer, effect of—Duty of stevedores—Servants of shipowner—Charterer sub-leasing cargo space—Relations between shipowner and charterer's lessees.*

Under the general law, and apart from special conditions in a charter party, the shipowner is liable to the charterer for the damage to cargo occasioned by bad stowage or improper and insufficient damage, and this *prima facie* liability is not modified by the nomination of the stevedores by the charterer or by a clause in the charter party that stevedores are to be employed at current market rates not exceeding the owners' contract rate.

CONTRACT—contd.

Where a charter party contains the above provision, stevedores chosen by the charterers are to be the agents and paid servants of the shipowner in loading the cargo.

Where there is a difference or conflict between the terms of the charter party and the bill of lading, the former prevails.

Where the charter party provides that the charterer shall be entitled to all sweepings and shortage occasioned by escape from the bags at the port of discharge, effect must be given to it, and the shipowner cannot seek protection in a condition in the bill of lading which renders the ship immune against loss or damage caused by insufficient packing and torn, weak or fragile bags and say in defence that the shortage was caused by the charterer's negligence.

Where, under the terms of a charter party, all the sweepings are to be delivered to the charterer, the shipowner cannot apportion them between the charterer and other shippers to whom the former had let out cargo space in proportion of the quantity owned by each of them. Their contract is with the charterer who is entitled to all the sweepings. **B BOMBAY & AFRICA STEAM NAVIGATION CO., LTD. v. AJUM GOOLAM HOOSAIN**, 18 Bom. L. R. 230 **525**

— *construction of—Sale of goods, contract for—Covenant to supply goods ordered—Omission to fix the maximum limit of purchases—Indefiniteness—Discretion of vendor to withhold any article ordered—Failure to comply with order—Breach of contract—Damages.*

Plaintiffs, a firm carrying on business in Bombay and Ellichpur, contracted with defendants, merchants in Bombay, for the purchase of alizarine dyes. On April 25th 1914, the plaintiffs executed a document whereby they agreed to place all their orders with defendants for alizarine dyes at a specified rate. A varying scale of discount was allowed up to a purchase of 300 drums. On the back of the document were noted the defendants' conditions signed by their agent. One of them was that the defendants were responsible for the immediate despatch of goods ordered which were in their godown and as to the balance, intimation was to be given to plaintiffs of their probable arrival who should not refuse to purchase on the ground of delay. The last condition was that the goods were to be credited according to the date of despatch mentioned in the railway receipt and the vendors were to have the discretion to send or not to send every single article out of those comprised in the order. In pursuance of this agreement the plaintiffs ordered from the defendants on various dates 36 casks of alizarine paste which were all duly despatched. Subsequently, further orders were placed for large quantities of the same commodity. The defendants expressed their inability to comply with these orders owing to conditions created by the War. Plaintiffs thereupon instituted the present suit for Rs. 71,400 for damages, being the difference between the contract rate and the market price of the goods. The Trial Judge, Mr. Justice Macleod, held that the omission to fix in the contract the maximum limit of purchase rendered the contract indefinite and unenforceable and that the condition giving the vendors freedom to

CONTRACT—concl'd.

send or not to send any articles out of those ordered was fatal to the plaintiffs' claim. On appeal:

Held, (1) that, on a proper construction of the written document, as soon as the plaintiffs placed an order with defendants, there was a binding contract for the supply of goods mentioned in the order, but, until such order was received, it was open to the defendants to withdraw from the transaction by giving notice to the plaintiffs;

(2) that the contract was not indefinite by reason of the omission of the maximum limit of purchase and that it was open to Courts to reject dishonest claims for damages based on alleged failure to comply with large and unreasonable orders;

(3) that the last condition of the contract was not applicable to the order for hermetically sealed drums of one uniform quality, and that it did not empower the defendants to refuse altogether to perform an order which they had received. **B GANI LATIF v. MANILAL MULJI**, 18 Bom. L. R. 217 520

to sell—Breach—Compensation - Mesne profits 737

— Specific performance, suit for—Discretion of Court—Suit against minor—Court, duty of—Certificated guardian—Benefit of minor.

In a suit for specific performance it is in the discretion of the Court to decree specific performance or not, and in no case would the Court be justified in enforcing specific performance against a minor when such enforcement would be to his detriment.

The certificated guardian of a minor applied to the District Judge for permission to sell a house of the minor for the payment of debts due by the minor. The Judge ordered the property to be sold by auction to the highest bidder. The property was knocked down to the plaintiff who offered to pay Rs. 1,300, but he did not accept the draft deed. Later on he accepted it but nothing was done. Meanwhile another person offered Rs. 2,000 and the Judge ordered the guardian to sell the property to him. The plaintiff sued for specific performance. The certificated guardian did not agree to be guardian *ad litem* in the suit and another person was appointed:

Held, that the plaintiff was not entitled to the decree asked for inasmuch as he had not acquired any interest in the property. **A IMAMI v. KALLU**, 14 A. L. J. 645 298

CONTRACT ACT (IX of 1872) 543

— S. 4 500

— Ss. 15, 23, 24, 72—Coercion—Agreement to stifle prosecution of non-compoundable offence—Payment of money by accused to prosecutor—Suit for return of money—Hundi executed by accused, whether enforceable—Arbitration—Payment under award, whether makes any difference—Malicious prosecution, requisites of.

Where, during the pendency of a criminal prosecution for a non-compoundable offence, the parties referred the matter to arbitration, and, in pursuance of the arbitrators' decision, the accused paid a sum of money to the prosecutor and executed a hundi for the balance of the total amount agreed upon, as consideration for the abandonment of the prosecution:

Held, that the money, having been paid with a view to stifle a prosecution by a person under arrest, amounted to payment under coercion within the

CONTRACT ACT—cont'd.

meaning of section 72 of the Contract Act and that the person to whom it was paid was bound to return it, the parties were not *in pari delicto*;

that even if the payment was induced only in part by the illegal agreement, the whole consideration must fail under section 24 of the Contract Act;

that the mere fact that the payment had been directed by the award of arbitrators did not make it legal or disentitle the person who had made it from recovering, inasmuch as the latter's consent to the arbitration was obtained by means of the criminal prosecution;

that as the consideration for the hundi was illegal under section 23 of the Contract Act, it was unenforceable and no action lay on it.

Per Wallis, C. J.—The right of a person, who pays money to another under coercion or in pursuance of an illegal agreement, to claim its refund is not lost by the fact that it was really due to the payee.

Per Seshagiri Aiyar, J.—The defendant in a suit for refund of money paid to stifle a prosecution is not estopped from showing that the money which he seeks to retain was really due to him if he has specifically put forth such a plea.

To sustain an action for malicious prosecution, the plaintiff is bound to prove that the prosecution was launched without reasonable or proper cause and not simply that it was improper or had an ulterior object. The fact that, as the result of a compact between the parties who had settled their civil disputes, evidence as little incriminating the plaintiff as possible was let in by the defendant, is no proof of absence of reasonable or probable cause. **M MUTHU-VEERAPPA CHETTI v RAMASWAMI CHETTI**, 31 M. L. J. 264 401

— Ss. 15, 16 (2) (b)—'Coercion', from whom it must proceed—Release-deed, execution of, by threat of suicide—Contract voidable—'To the prejudice of any other person', meaning of.

The 'coercion' that will invalidate a contract under section 15 of the Contract Act need not proceed from a party to the contract, or be immediately directed against the party whom it is intended to coerce to enter into the contract, or affect his property or be specifically to his prejudice.

Plaintiffs Nos. 1 and 2, mother and son, executed a deed of release of their properties to defendant under pressure from S, husband of 1st plaintiff and father of the 2nd, as S threatened to commit suicide if the plaintiffs did not effect the release. In the present action to set aside the deed:

Held, per *Sadasiva Aiyar, J.*—That S's threat to commit suicide amounted to 'coercion' and 'undue influence' invalidating the release under sections 15 and 16 of the Contract Act.

Per Moore, J.—That the prejudice to S's own life was not sufficient to bring the threat to commit suicide within the definition of coercion, and that, though S was in a position to dominate the will of the plaintiffs, the document was not voidable for undue influence as S was not a party to the contract under section 16 (2) (b) of the Contract Act.

In dealing with a case of coercion, the Court should decide whether the alleged act of coercion amounts to an offence under the Indian Penal Code. **M AMMIRAJU v. SESHAMMA**, 3 L. W. 490; (1916) 1 M. W. N. 358 578

CONTRACT ACT—contd.

———— S. 16 (2) (b) 578

———— Ss. 20, 65—*Contract—Parties under material mistake of fact—Mortgage by person personating real owner—Transfer of mortgage rights by mortgagee—Covenant for good title—Rescission of contract—Right of transferee to refund of consideration—Caveat emptor, rule of, whether applies.*

C executed a mortgage-deed to D falsely personating M, the real owner of the mortgaged property. D transferred his mortgage right to A for a consideration and in the deed of transfer both C and D covenanted good title. C forged M's signature in both the deed of mortgage and its transfer. A, having discovered the fraud, instituted the present suit against D, for refund of the consideration paid by him to D:

Held, (1) that, as both plaintiff and defendant were under a mistake as to an essential fact, viz., that the real owner M made himself liable on the mortgage and confirmed the covenant as to title, the transfer-deed was void under section 20 of the Contract Act and the defendant was bound to repay the transfer money to plaintiff under section 65 of the Act;

(2) that the maxim *caveat emptor* did not apply as the real owner of the property never, in fact, joined in the transfer. **B ISMAIL ALLARAKHIA v. DATTATRAYA R. GANDHI**, 18 Bom. L. R. 201 515

———— S. 23 148, 401, 927

———— S. 23—*Lease—Agreement to trade in particular place—Public policy—Kabuliat registered—Rent reserved, action for—Limitation Act (IX of 1908), Sch. I, Arts. 110, 116.*

The defendant executed a *kabuliat* in favour of the plaintiff agreeing to pay him a specified rent for the privilege of carrying on a trade within a certain area. In an action for arrears of rent brought by the lessor, the defendant pleaded that the contract was in the nature of a monopoly and was, therefore, void under section 23 of the Contract Act:

Held, that, as the lessor did not bind himself against giving a similar lease to others, the contract was not opposed to public policy and was not void under section 23 of the Contract Act.

A suit to recover the rent reserved in a registered *kabuliat* is governed by Article 116 and not by Article 140 of the Limitation Act. **PAT MACKENZIE, K. L. v. RAMESHWAR SINGH**, 1 P. L. J. 37 751

———— S. 23—*Pleader and client—Pleader advancing money to client on mortgage—Interest—Void transaction—Public policy—Legal Practitioners Act (XVIII of 1879), s. 6—Oudh Civil Digest, para. 267, cl. (8)—Purchase of actionable claim—Transfer of Property Act (IV of 1882), s. 136.*

Where a Pleader advanced money on a mortgage to a client of his resident in the district in which he practised for the purpose of payment towards a redemption decree passed in the client's favour:

Held, that the transaction amounted to advancing money on interest within the meaning of clause (8), paragraph 267, Oudh Civil Digest, that though the conduct of the Pleader was not absolutely forbidden by law, it was opposed to public policy, being a violation of the rule which imposes in the interests of the

CONTRACT ACT—contd.

public certain restrictions upon dealings between Pleaders and their clients, and that the transaction was consequently void.

Held, also, that the transaction did not amount to a transfer of an actionable claim within the meaning of section 136 of the Transfer of Property Act. **O SAHIB-UN-NISSA v. ABDUL GHAFUR**, 3 O. L. J. 140; 19 O. C. 60 360

———— S. 24 431

———— S. 28 192

———— S. 32—*Contingent contract—Performance dependent on will of third person—Contract becoming impossible of performance—Specific performance, suit for—Alternative relief—Partial performance on abatement of price or for full stipulated consideration, whether can be decreed—Specific Relief Act (I of 1877), ss. 14, 15.*

Where parties enter into a contingent contract dependent for its performance on a future event, if the future event provided for becomes impossible, the contract falls through.

Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus perform an impossibility.

In such a case, specific performance will not be decreed for partial performance of so much of the contract as is possible on abatement of price or even for the full stipulated consideration under section 14 or section 15 of the Specific Relief Act.

Sections 14 and 15 of the Specific Relief Act refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. They have no application where the obstacle to the full performance of the contract is known to the parties and no provision is made to meet the eventuality.

Defendant agreed to sell his 4-annas share in a village without reservation of occupancy rights to plaintiff for Rs. 4,500 after obtaining the requisite sanction under section 45 of the Central Provinces Tenancy Act. The defendant applied for sanction as aforesaid, but sanction to sell with occupancy rights was refused. Plaintiff sued defendant for specific performance of the agreement, or, in the alternative, for conveyance without cultivating rights on an abatement of Rs. 1,000. The District Judge refused both the reliefs, the latter, on the ground that the value of the cultivating rights did not bear only a small proportion to the value of the whole property within the meaning of section 14 of the Specific Relief Act. On appeal, the plaintiff offered to submit to a decree for specific performance without occupancy rights on payment of the full consideration of Rs. 4,500:

Held, (1) that the contract between the parties could not be enforced for want of sanction and that there was no alternative contract to meet the event of its being refused;

(2) that no partial performance could be decreed under section 14 or 15 of the Specific Relief Act which did not apply to this contract. **N SHARDA-PRASAD v. SIKANDAR**, 12 N. L. R. 69 461

CONTRACT ACT—contd.

— Ss. 43, 44—Joint promisors, dismissal of suit against—Appeal, non-joinder of some of defendants in — Relinquishment of claim — Maintainability of appeal—Right to proportionate relief.

When a suit against a number of joint promisors or joint contractors has been dismissed, the plaintiff cannot prosecute an appeal against some only of them, renouncing his claim against the rest, or their legal representatives.

Such an appeal cannot be sustained either on the footing of the promisee's right to release any of the promisors under section 44 of a joint and several liability under section 43 of the Contract Act, because, if the appeal is allowed, the respondents on record cannot, by reason of the decree of the Trial Court, which is conclusive in favour of the respondents not impleaded, sue the latter for contribution.

The plaintiff cannot, in appeal, be awarded, in the alternative, the shares of the respondents on record if the same cannot be determined in the absence of the respondents who have been given up. **C JOGESH CHANDRA v. BAMA SUNDARI DEBI** 138

— S. 44 138
— S. 65 515
— S. 69 480

— Ss. 69, 70—Contribution — Mortgage—Foreclosure decree—Redemption by one of the parties—Contribution, claim for, against part transferee of mortgaged property—Non-joinder in foreclosure suit—Party impleaded as owner found to be trespasser—Action misconceived—Maintainability of suit.

A foreclosure decree having been passed in a suit *W*, one of the defendants therein, redeemed the entire mortgage by payment of the decretal amount in full. He then instituted the present suit for contribution against a number of defendants who were said to possess some interest in portions of the mortgaged property. Defendants Nos. 9 to 12, who were alleged to be transferees of part of the mortgaged property after the execution of the mortgage, pleaded *inter alia* that they were not liable to contribution as they were not parties to the foreclosure suit. In that suit defendants Nos. 7 and 8 were alleged to be owners of the property and were joined as such owners. They were, however, found to be trespassers in a subsequent action for their ejection by the present defendants Nos. 9 to 12:

Held, (1) that plaintiff could not claim contribution against defendants Nos. 9 to 12 either under section 69 or section 70 of the Contract Act, as the payment was made by the plaintiff in his own interest for a decree to which the defendants were not parties;

(2) that defendants Nos. 9 to 12 had a right to redemption in respect of the property in their possession, if it was included in the mortgage, and could not be compelled by a suit for contribution to pay to the plaintiff any portion of the money which he paid up under the mortgage-decree. **O SURAJ DIN v. WAJID ALI** 367

— Ss. 69, 70—Bengal Tenancy Act (VIII of 1885), ss. 170, 171—Rent-decree against tenant—Order for sale—Deposit by fictitious mortgagee—Claim for recovery of deposited amount from judgment-debtor, sustainability of—'Lawfully paid' in s. 70 of Contract Act, meaning of.

CONTRACT ACT—contd.

Defendants' holding having been advertised for sale in execution of a rent-decree against them, plaintiff deposited the decree amount into Court under section 171 of the Bengal Tenancy Act, alleging that he was mortgagee in respect of the property and was, therefore, interested in preventing the sale. The defendants objected that the alleged mortgage was a forgery and that plaintiff had no 'interest voidable on the sale' within the meaning of section 171. The Court, however, accepted the payment as the plaintiff was a mortgagee on the face of his deed of mortgage, reserving to parties the right to fight out the other questions in a separate suit. The plaintiff then sued on his mortgage and the suit was dismissed on the ground that the mortgage document was a concocted one. In the present action for recovery of the money deposited in Court:

Held, (1) that the plaintiff was not a person having an 'interest voidable under the sale' within the meaning of section 171 of the Bengal Tenancy Act and should not have been allowed to make the deposit;

(2) that the claim was not enforceable either under section 69 or section 70 of the Contract Act.

To entitle a person to claim the benefit of section 70 of the Contract Act, the payment must have been lawfully made, that is, by a person having a lawful interest in making it and not some interest from the point of view of the payer.

The obligation to repay by a person enjoying the benefit of a non-gratuitous act under section 70 of the Contract Act should not be determined by nice considerations of what is fair or proper according to the highest morality. The obligation must be either express or implied, and does not arise from the fact that the person who is asked to repay was benefited by the payment, especially when he entered a protest against the payment at the earliest opportunity. **C PANCHKORI GHOSH v. HARI DAS JATI** 341

— S. 70 341, 367
— S. 70—Contribution, suit for—Institution of action by several plaintiffs to secure common benefit—Expenses borne by one plaintiff—Liability of co-plaintiffs in contribution.

Where several persons join together in instituting a suit to secure a common benefit and only one of them bears the expenses of the litigation, he is entitled to be re-imbursed by his co-plaintiffs in contribution (1) by virtue of an express agreement between them settling the proportion in which the expenses had to be met by each, (2) by reason of the plaintiff having paid Counsel after he was engaged by all the plaintiffs jointly, or (3) under the provisions of section 70 of the Contract Act. **PAT UMATOL SOGHRA v. ZOHRA** 54

— S. 72 401, 480
— S. 74 159

— S. 74—Contract Act Amendment Act (VI of 1899), s. 4—Contract, breach of—Agreement to sell house on failure to repay loan—Penalty.

A penal provision, under section 74 of the Contract Act as amended by section 4 of the Amending Act of

CONTRACT ACT—contd.

1899, is not restricted to money, increased interest or the like. It is wide enough to include a stipulation to convey a house on default of payment of a debt on a fixed date. **M. RAJAH OF RAMNAD v. SELLACHAMI TEVAR**, 4 L. W. 173 **500**

— S. 74—Interest—Penalty, stipulation by way of—Mortgage—Mortgagors ignorant cultivators—Interest at 75 per cent. per annum—Oral agreement making mortgagors individually liable, admissibility of—Evidence Act (I of 1872), s. 92.

A mortgage-bond provided for interest at the rate of 75 per cent. per annum and it was found that the mortgagors were ignorant cultivators who were in urgent need of money and the lands hypothecated were amply sufficient as security:

Held, that the stipulation for payment of interest at the said rate was penal.

Per *Sanderson, C. J.*—A subsequent verbal agreement entered into by the mortgagee and mortgagors by which the mortgagee agrees to hold each of the mortgagors liable only for his share of the mortgage-debt, is not admissible in evidence under section 92 of the Evidence Act, when the mortgage-bond by its terms provides that each one of the mortgagors would be liable for the whole amount of the mortgage.

Under the Indian Law, a release by the creditor of one of the mortgagors, jointly and severally liable, without expressly reserving his remedies against the other mortgagors, does not release the others.

Per *Mookerjee, J.*—A covenant for payment of interest on a mortgage-debt at a high rate may be, in the circumstances of a case, a stipulation by way of penalty and a Court is competent to grant relief to the debtor whenever the rate of interest appears to be penal, although the provision in the mortgage bond for payment of interest mentions one rate only and not alternative rates in different contingencies.

It would be clearly wrong for a Court to lay down a rigid definition of a legal expression and thereby to crystallise the law, when the Legislature for the best of reasons, has not defined the expression.

What stipulation for payment of interest on a debt may be decreed a stipulation by way of penalty, should not be defined by judicial decisions.

When under the contract embodied in a registered mortgage-bond the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage-debt, a variation in that contract to the effect that each mortgagor is liable only in respect of a proportionate share of the debt, could be effected only by another written and registered instrument, so that the entire mortgage contract would thereafter be found in two instead of one document.

Where in a mortgage suit the primary case of the mortgagors-defendants was that the mortgage contract was split up by a subsequent oral agreement between the mortgagee and the mortgagors, the defendants could not, on its being held that the agreement was not admissible in evidence, turn round and set up the inconsistent case that the mortgage contract had been split up because one of the

CONTRACT ACT—concl'd.

mortgagors had been released by the mortgagee without the consent of the other mortgagors. **C. KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS** **609**

— S. 118 **290**

— S. 160—Bailment—Conversion of goods—Damages, measure of—Executor of deceased bailee, liability of, on refusal to deliver on demand—Wrongful use by executor, liability for, when bailor delays action.

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of damages.

When goods are let out on hire, the executor of a deceased bailee is bound to return them on the expiry of the term of the hire. He will be guilty of conversion of the goods to his own use from the time when he fails to return them in response to a demand by the hirer and, for this conversion, he is personally liable.

A bailor is not entitled to any damages for wrongful use, beyond getting the value of the goods, when, after issuing notice of demand, he causes a long delay to ensue before filing the suit. **L. B. EBRAHIM AHMED v. SAMUEL BALTHAZAR** **297**

— S. 178—Commission agent—Pledge of jewel entrusted to agent for sale—Suit for return of jewel by owner—Liability of pawnee—Redemption of pledge before decree—Pawnee in good faith—Limitation—Cause of action—Conversion of article—Limitation Act (IX of 1908), Sch. I, Art. 48.

A suit for the return of a jewel pledged by an agent, to whom it was entrusted for sale by the owner, or its value is governed by Article 48 of Schedule I of the Limitation Act, time running from the date of the plaintiff's knowledge of the pawnee's possession.

The plaintiff will not be entitled to a decree until payment of the amount due to the pledgee and interest that accrued due thereon under section 178 of the Contract Act.

Three things are required by section 178, (1) juridical possession on the part of the pawnor as distinguished from mere custody, (2) good faith on the part of the pawnee and (3) lawful acquisition on the part of the pawnor.

Section 178 and exception 1 to section 108 of the Contract Act deal with cases where the pledgor has other than a limited interest and has lawful juridical possession unconnected and independent of any interest therein, such a juridical possession as a factor or agent has, in other words, such possession as is had by an agent entrusted as such and ordinarily having as such agent power of sale or pledge. **M. SESHAPPIER v. SUBRAMANIA CHETTIAR**, 30 M. L. J. 587; 19 M. L. T. 386 **751**

— S. 196 **760**

— S. 200 **221**

— S. 216 **760**

CONTRIBUTION. See CONTRACT ACT, Ss. 69, 70.

— Decree—Payment by one judgment-debtor—Charge **91**

CONTRIBUTION—concl'd.

———, suit for—Institution of action by several plaintiffs to secure common benefit—Expenses borne by one plaintiff—Liability of co-plaintiffs in contribution 54

COPYRIGHT—Selections of courses of study, lists of, by member of Board of Studies—Publication of lists by University, effect of—Surrender of copyright.

The plaintiff, a member of the Board of Studies of the Allahabad University, was asked by the Convener of the Board to prepare lists of selections from Persian authors suitable for courses of study for the Matriculation, the Intermediate and the B. A. Examinations. The lists prepared by the plaintiff for the Matriculation and the Intermediate Examinations were approved as they stood and the list for the B. A. Examination was passed with slight alterations. The Syndicate of the University published the lists in the syllabus. The plaintiff desired that the books that he was preparing on the basis of his selections should be prescribed and his right protected by copyright, or in the alternative wanted the University to remunerate him for the labour. The defendants on the basis of the information contained in the syllabus sought out the original texts and printed and published the listed extracts in book form before the plaintiff published them. The plaintiff sued for a perpetual injunction and damages:

Held, that the plaintiff retained no copyright in the selections as such, inasmuch as when he laid the results of his skill and experience before the Board of Studies and then joined with the other members of the Board in preparing the syllabus for the examinations he placed the result of his labours unreservedly at the disposal of the University Authorities.

Held, further, that although the plaintiff desired that the University Authorities should either remunerate him for his labours or take suitable measures to protect his copyright in the selections themselves, the University Authorities when they published their syllabus surrendered any copyright, which may or may not have existed, unreservedly into the hands of the general public. **A MUHAMMAD ABDUL JALIL v. RAM DAYAL**, 14 A. L. J. 724 357

COURT FEES ACT (VII OF 1870), Sch. II, Art. 17 (vi) 192, 587

CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 5 641

——— S. 35, meaning of—Court's duty to determine whether sentences to run consecutively or concurrently.

Notwithstanding the use of the word "or" between the terms "imprisonment" and "transportation" in section 35, sub section (1), Criminal Procedure Code, the section is intended to cover cases in which one of the punishments inflicted is imprisonment whilst the other is transportation.

A Court when sentencing an accused at one trial to imprisonment as well as to transportation ought to determine whether the sentence will run consecutively or concurrently, otherwise the sentence is defective in form. **C KHORUA MOVAN v. EMPEROR**, 28 C. L. J. 596; 17 Cr. L. J. 238 654

——— S. 106, order under, findings necessary for—High Court, jurisdiction of—Revision—Penal Code (Act XLV of 1860), s. 143.

CRIMINAL PROCEDURE CODE—cont'd.

Where the findings of the lower Courts do not sufficiently and clearly show that the acts for which the accused were convicted under section 143, Indian Penal Code, necessarily involved a breach of the peace or any evident intention of committing the same, a High Court in revision would set aside an order under section 106, Criminal Procedure Code, binding down the accused to keep the peace. **C ABDUL ALI CHOWDHURY v. EMPEROR**, 20 C. W. N. 197; 23 C. L. J. 108; 43 C. 671; 17 Cr. L. J. 241 961

——— S. 107 309, 312

——— S. 108 (b)—Intention to promote or attempt to promote feelings of enmity or hatred, if necessary—Penal Code (Act XLV of 1860), s. 153A, ingredients of.

To justify an order under section 108 (b) of the Criminal Procedure Code, it is not necessary to find that there was an actual intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects; it will be sufficient when it is found that there are words in the leaflet or matter complained of which were likely to promote feelings of enmity or hatred.

Obiter dictum.—To constitute an offence under section 153A, Indian Penal Code, there must clearly be an intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects. **C SITAL PRASAD v. EMPEROR**, 20 C. W. N. 119; 23 C. L. J. 105; 43 C. 591; 17 Cr. L. J. 254 974

——— Ss. 144, cl. (5), 107—Enlargement of time by successive orders—Illegality.

It is clearly improper for a Magistrate to extend the period of two months prescribed by clause 5 of section 144, Criminal Procedure Code, by passing successive orders under that section.

When one order under section 144 does not prove sufficient for the purpose, the right procedure to adopt is to commence proceedings under section 107, Criminal Procedure Code. **C BISHESSUR CHUCKERBUTTY v. EMPEROR**, 20 C. W. N. 758; 17 Cr. L. J. 200; 24 C. L. J. 272 312

——— S. 145, applicability of—Joint property.

The mere fact of there being joint title to the land in dispute would not prevent the application of section 145, Criminal Procedure Code, where one of the joint owners is in actual and exclusive possession. **C BAIJNATH MARWARI v. W. S. STREET**, 20 C. W. N. 518; 17 Cr. L. J. 251 971

——— S. 145—Revision—High Court, interference by Exclusion of some of the properties in dispute from enquiry—Final order by another Magistrate as to possession of excluded lands, legality of.

A High Court will interfere in only very exceptional cases with orders made under section 145 of the Code of Criminal Procedure.

Where a Magistrate, after a protracted enquiry into a dispute relating to certain lands, excluded some specified plots from the scope of the enquiry and cancelled the proceedings in respect of those plots, and another Magistrate, who succeeded him in office, passed orders declaring one of the parties in the possession of such excluded plots:

Held, that the Magistrate had no legal authority to go into the question of possession in those plots and

CRIMINAL PROCEDURE CODE—contd.

that his final order with regard to them was passed without jurisdiction. **P HARDEO SINGH v. RAM CHARITER SINGH**, 17 Cr. L. J. 286 1006

— Ss. 145 to 147—*Temple, dispute as to possession and management of and right to perform puja in—Whether a dispute as to 'use of land' in s. 145 or 147—Order subject to reservations, whether valid—Jurisdiction.*

Disputes with regard to the management of a temple and the right to the performance of puja therein are not disputes of the kind to which section 147, Criminal Procedure Code, applies, as the words 'land or water' in that section are used in their ordinary significance without the extended meaning assigned to them in section 145 (2).

As a temple is a 'building' within the meaning of section 145 (2), Criminal Procedure Code, a dispute as to the possession of a temple and for such indicia of its possession as the holding of its key is cognizable by a Magistrate under section 145.

Where a dispute is in effect for possession of the temple and the right to perform puja therein is only a portion of the larger relief claimed, a Magistrate can deal with it under section 145.

An order as to possession subject to reservations is not forbidden by clause (6) of section 145.

It is competent, therefore, for a Magistrate, while upholding one party's possession of a temple, to direct by his order that the opposite party be allowed to enter the temple and perform puja to one of the idols therein, without adopting the stringent procedure of attaching the temple under section 146.

M PALANIYANDI PANDARAM v. PALANIAPPA THEVAN, 17 Cr. L. J. 235 651

— S. 145 (4)—*Magistrate's refusal to examine witnesses—Failure to record finding as to possession at date of preliminary order—Declining jurisdiction—Irregularity—High Court—Revision.*

If a Magistrate refuses to examine, except on the ground of vexation or delay, the witnesses tendered by parties to proceedings under section 145, Criminal Procedure Code, or fails to record a finding as to which party was in possession at the date of his preliminary order, he fails to exercise a jurisdiction vested in him by law, and the High Court would be justified to interfere in revision.

Obiter.—The High Court has jurisdiction to interfere in cases of illegalities or manifest irregularities in procedure committed by the subordinate Courts in proceedings under section 145, Criminal Procedure Code. **M MARUDANAYAKAM PILLAI v. MOHAMMAD ROWTHEN**, 17 Cr. L. J. 217 329

— Ss. 146, 147 651

— Ss. 164, 364—*Inculpatory statements by persons not treated as accused persons—Perjury, prosecution for—Evidence—Admissibility of statements—Penal Code (Act XLV of 1860), s. 193—Evidence Act (I of 1872), s. 25.*

Section 164 of the Criminal Procedure Code distinguishes sharply between statements of witnesses and confessions of accused persons. If the statement made by a person is recorded as a 'confession,' the procedure prescribed by section 364 must be followed. Whether a statement is to be called a confession or not depends, not merely on the

CRIMINAL PROCEDURE CODE—contd.

nature of the statement itself, but the use that is sought to be made of it.

Whether a statement is taken as a statement or as a confession, the record can be used only for the purpose for which it was taken. A 'confession' cannot be made the basis of a prosecution for perjury. A 'statement' cannot be used as a 'confession', that is, an admission of the truth of the facts set out in it in a criminal prosecution based on those facts, either against the person making it or against others with whom he may be jointly tried.

Inculpatory statements made, under section 164, Criminal Procedure Code, by a person who was not treated as an accused, nor subsequently tried for any offence based on such statements, are admissible in a prosecution against him for perjury. Such statements are not 'confessions' and the Magistrate's failure to record them in the manner laid down in section 364 does not preclude their being used in evidence.

In the course of the investigation of an offence under section 372 of the Indian Penal Code against an accused person for purchasing a minor girl for purposes of prostitution, a Magistrate recorded, under section 164 of the Code of Criminal Procedure, a statement made to him by the mother of the minor girl (which, in effect, implicated her also). She was, however, all along treated as a complainant and a witness and never as an accused person.

Held, in a prosecution for perjury against her, that the statement was not treated as a 'confession' and that it was unnecessary to follow the procedure prescribed by section 364 of the Code of Criminal Procedure while recording it, and the statement was admissible in evidence against the accused. **M MADDELA RAMANIYAMMA, In re**, 20 M. L. T. 21; 17 Cr. L. J. 195 307

— S. 195 (1) (c)—*Sanction to prosecute for producing false receipt—District Judge hearing appeal, jurisdiction of.*

Where the defendant in a case produced a certain receipt in answer to the plaintiff's claim, but this receipt being found to have been fraudulently altered, the District Judge who heard and decided the appeal granted sanction to prosecute the defendant under section 471, Indian Penal Code:

Held, that the District Judge was fully authorised to entertain the application for sanction to prosecute the defendant for an offence alleged to have been committed by him in respect of a document produced in evidence in that suit. **P MIRAN BAKSH v. BELI RAM**, 67 P. L. R. 1916; 17 Cr. L. J. 238 654

— S. 195 (6)—*Order granting or refusing sanction—Appeal—Jurisdiction of Appellate Court—Remand.*

The powers of revision exercisable by an Appellate Court under section 195 clause (6), Criminal Procedure Code, are confined to revoking or granting the sanction given or refused by a subordinate Court. It has no jurisdiction to make an order of remand even when the order appealed against was passed by a Civil Court. **L B SIT TAW v. MAUNG YE**, 17 Cr. L. J. 222 334

— S. 195 (6), (7) (c)—*Sanction to prosecute—Sanction granted or refused by Small Cause Court—*

CRIMINAL PROCEDURE CODE—contd.

Appeal to District Judge—'Where no appeal lies,' meaning of, in s. 195 (7) (c).

Clause (c) of sub-section 7 of section 195 of the Criminal Procedure Code cannot be construed as if it were an independent sub-section.

The whole sub-section (7) is confined to Courts against whose decisions or some of whose decisions appeals do lie. The words 'where no appeal lies' in clause (c) of the sub-section do not refer to Courts against none of whose decisions an appeal lies, but refer to particular cases in which no appeal lies.

A District Judge cannot entertain an appeal under section 195 (6) against an order granting or refusing sanction by a Small Cause Court situate within the local limits of his jurisdiction. **PAT AMBICA TEWARI v. EMPEROR**, 17 Cr. L. J. 208 **320**

— S. 234—*Penal Code (Act XLV of 1860), ss. 379, 380, offences under, for theft of same person's property on two successive days, if triable together, where accused more than one—Misjoinder of charges.*

Two persons, accused of offences under sections 379 and 380, Indian Penal Code, for committing theft of the complainant's property in a building and of his paddy in a field on two successive days, cannot be charged with and tried at one trial for both the offences under section 234, Criminal Procedure Code. **C RAHIMAN BIBI v. MOBARAK MONDAL**, 20 C. W. N. 672; 17 Cr. L. J. 224 **336**

— S. 237 (2) **992**

— S. 239—*Receiving stolen property—Joint trial of two persons in possession of portions of stolen property—Accused acting in concert and in joint control of property—Penal Code (Act XLV of 1860), s. 411.*

Where part of a stolen property was found in the possession of one person and another part in the possession of another, and it was proved that both had been acting in concert and had joint control over the property:

Held, that their joint trial was not illegal. **PAT JADUNANDAN PRASAD v. EMPEROR**, 1 P. L. J. 64; 17 Cr. L. J. 234 **650**

— S. 252—*Right of accused to cross-examine prosecution witnesses—Adjournment for securing services of Counsel.*

A Magistrate should grant an accused an adjournment of the case in order to enable him to secure the services of Counsel for the purpose of cross-examining the prosecution witnesses. **P SHER SINGH v. EMPEROR**, 14 P. W. R. 1916 Cr.; 17 Cr. L. J. 278 **998**

— Ss. 253, 259—*Procedure—Accused, when can be discharged in complainant's absence.*

The discharge of an accused person in the absence of the complainant can only be made under section 259, Criminal Procedure Code, and that only in the case of a compoundable offence. It cannot be made under section 253. **C ALEXANDER v. CONNORS**, 20 C. W. N. 698; 17 Cr. L. J. 193 **305**

— S. 259 **305**

— S. 271—*Sessions case—Committal for offences under ss. 457 and 75, Penal Code (Act XLV of 1860)—Charge under s. 75, Penal Code, omission of, by Sessions Court—Conviction under ss. 457 and 511, Penal Code—Previous convictions put to prisoner,*

CRIMINAL PROCEDURE CODE—contd.

and admitted and taken into consideration in passing sentence—Sentence passed, legal, even without proof of previous convictions—Interference in appeal—Practice—Procedure.

In a case in which the prisoner was committed to the Sessions on charges under sections 457 and 75, Indian Penal Code, the Sessions Judge omitted the charge under section 75, Indian Penal Code, and after trying the prisoner on the other charges, convicted him under sections 457, 511, Indian Penal Code. He then put to the prisoner the previous convictions and on his admitting them, took into consideration the existence of such previous convictions and passed a sentence which was legal even without proof of the said previous convictions:

Held, that the sentence was legal, even though the same was influenced by a consideration of the gravity of the offence for which the prisoner had been previously convicted.

The desirability of Magistrates and Judges taking the ordinary precaution of charging prisoners under section 75 also in such cases pointed out. **M SUBRAMANIAN v. EMPEROR**, 3 L. W. 403; (1916) 1 M. W. N. 327; 17 Cr. L. J. :88 **1008**

— Ss. 342 (4), 343 **976**

— S. 344—*Charge of criminal misappropriation—Declaratory suit by accused—Stay of criminal proceedings, when to be ordered.*

A person against whom criminal proceedings are instituted cannot claim as a matter of course that such proceedings shall be stayed pending the result of civil proceedings, in each case discretion must be exercised and the particular circumstances of the case duly considered.

Where, therefore, the petitioner was on the 3rd October charged with criminal misappropriation in respect of a necklace and on the 4th idem filed a civil suit for a declaration that the necklace belonged to him making all other claimants defendants and on the 7th applied for postponement of the criminal proceedings:

Held, that as the civil suit had been instituted without any unnecessary delay, and as all the claimants to the property had been made defendants in the suit, the petitioner was entitled to the relief claimed and the criminal proceedings should be stayed. **P NUR DIN v. EMPEROR**, 1 P. W. R. 1916 Cr.; 17 Cr. L. J. 205 **317**

— Ss. 348, 349—*Procedure, when previous conviction of accused brought to Magistrate's notice.*

It is not illegal or irregular for a Magistrate of the 2nd or 3rd class acting under section 349, Criminal Procedure Code, to frame a charge against an accused person.

A Magistrate acting under section 348, Criminal Procedure Code, should, on the accused's previous conviction being brought to his notice, either commit the accused to the Sessions or transfer the case to the District Magistrate, unless he thinks he can pass adequate sentence. In either case, he is not entitled to submit the records to the higher Court with a finding as to the accused's guilt. Such a procedure is wrong and *ultra vires*. **L B EMPEROR v. PO YIN**, 17 Cr. L. J. 201 **313**

— S. 349 **313**

CRIMINAL PROCEDURE CODE—contd.

— S. 364	397
— S. 408	641, 986
— S. 423 (1)	305
— Ss. 436, 437—Order of discharge passed by first class Magistrate with powers under section 30—Revision to District Magistrate, whether competent—Further inquiry, when to be directed—Proper order.	

When a Subordinate Magistrate of the first class, invested with powers under section 30, Criminal Procedure Code, makes an order of discharge in a case which, under Schedule II of the Code read with section 28 or 29 thereof, is triable exclusively by the Court of Session, such order is open to revision by the District Magistrate under sections 436 and 437 of the Code.

Where a District Magistrate considers that a case triable only by a Court of Session, which has been tried by a specially empowered Magistrate and has ended in a discharge, has been incompletely or imperfectly tried, he may order further inquiry by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate without special powers and, therefore, in a sense, a Court of inferior jurisdiction to the Court which ordered the discharge. But if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment under section 436 of the Code. *N YADO v. EMPEROR*, 12 N. L. R. 94; 17 CR. L. J. 245

— S. 437	965
— S. 476	656
— Ss. 476, 477—Enquiry under s. 476—Statement of witness—Right of party against whom proceedings instituted to cross-examine—Trial based on result of enquiry—Witness not available—Statement, whether can go upon record—Evidence Act (I of 1872), s. 33.	

The person against whom proceedings have been instituted under section 476, Criminal Procedure Code, has not the right to cross-examine witnesses during the enquiry under the said section. Therefore, if a witness is not forthcoming at the trial that is started on the result of such enquiry, his previous statement is not admissible under section 33 of the Evidence Act.

Per *Batchelor, J.*—It is open to a Court to make an order under section 476, Criminal Procedure Code, without taking any evidence at all. If it chooses to take evidence it is entirely within its discretion to say when and where that evidence should stop. The section gives the widest discretionary power to a criminal Court and deliberately refrains from imposing any special formalities to hamper the discretion of the Court.

Per *Shah, J.*—The scope of the enquiry under section 476 depends on the discretion of the Court. It is optional to the Court to make a preliminary enquiry and the nature of that enquiry must be determined with reference to the circumstances of each case. If a witness be examined in the course of such enquiry, it cannot be said that it is the right of the person against whom the enquiry is being made, to cross-examine the witness. There is nothing either in section 476 or section 477 to suggest that the person concerned has any such right. *B BAKIR SAHEB AMIR SAHEB v. EMPEROR*, 18 BOM. L. R. 284; 17 CR. L. J. 249

CRIMINAL PROCEDURE CODE—contd

— S. 477	969
— Ss. 492, 495, 342 (4), 343—Separate trials of accused persons on distinct charges—Withdrawal of charge against one of the accused at first trial—Pendency of second charge—Competency of accused against whom charge withdrawn to give evidence—Oath, administering of, to such person—Such person, whether accused under s. 342 (4)—Inducement by prosecution to speak truth, whether excludes evidence altogether—Appointment of Public Prosecutor—Accused subsequently impleaded—Right of Public Prosecutor to withdraw case against such accused—Accomplice, evidence of—Evidence Act (I of 1872), ss. 133, 114 ill. (b).	

The accused, a first grade Subordinate Judge, was charged with receiving illegal gratification from one N in respect of (1) a horse and (2) two hundis for Rs. 55 and Rs 50, respectively. N was impleaded as a co-accused. By direction of the Court, the two charges were split and were ordered to be tried separately. A Pleader was appointed to conduct the prosecution of the accused before N was joined as co-accused. The horse case having been taken up for trial, the Public Prosecutor withdrew from the prosecution of N. N received an assurance from the District Magistrate that if he gave truthful evidence, the hundi case against him would also be dropped. The Magistrate discharged N under section 494, Criminal Procedure Code. Objections were taken to the competency of N to give evidence under section 343, Criminal Procedure Code, and to the power of the Court to administer to him oath under section 342 (4). It was also urged that the Public Prosecutor had no power to withdraw from the prosecution of N:

Held, (1) that the appointment of the Public Prosecutor was for the case and not with reference to any particular accused, and that the Public Prosecutor had every right to conduct the prosecution as against persons subsequently impleaded or to withdraw from the prosecution as against any of the accused;

(2) that section 342 (4), Criminal Procedure Code, did not apply, as N was only a witness in the horse case that was then actually before the Court;

(3) that as the inducement was offered to N only as a witness and not as an accused, the evidence of N was admissible, though that circumstance might materially affect the weight to be attached to his evidence;

(4) that, in so far as N was an accomplice, his evidence should be tested in the light of what corroboration it received from other independent evidence.

Clause 4 of section 342, Criminal Procedure Code, lays down the manner in which the Court is to examine an accused person then before it as an accused person, and the words 'the accused' must be read as referring to the accused then under trial and examination by the Court.

Per *Batchelor, J.*—Section 343 of the Criminal Procedure Code does not declare what would be the consequences if an accused person did make a state-

CRIMINAL PROCEDURE CODE—contd.

ment under inducement. Where the inducement is offered to a discharged accused who is taken as a witness, the objection to his evidence is good only so far as it relates to his credit. This construction seems to be favoured by section 118 of the Evidence Act which suggests that, in India, the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration.

An accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is important that the requirements of the Legislature in this respect should not be so exaggerated by the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are, in their very nature, difficult of detection. When all legal precautions are taken and all relevant considerations are duly weighed, there remains the plain question whether the Judge or the Magistrate does or does not believe the particular accomplice. If, after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, it is his duty to say so and to give effect to his mental conviction.

Per Shah, J.—It is legally open to the Crown to withdraw from the prosecution of any particular accused, even if it be for the purpose of securing him as a witness in the case. Of course, it is for the Court, whose consent is necessary under section 494, Criminal Procedure Code, to exercise its discretion according to the circumstances of each case, and it is open to that Court to give or withhold its consent.

Obiter.—There are no words in section 343, Criminal Procedure Code, to show that the prohibition contemplated by the section refers to the Court and not to any other person and that an 'accused person' within the meaning of the section is the accused under examination and trial. A person who ceases to be an accused person in consequence of his discharge under section 494 is a competent witness in the case against the other accused.

There is a material difference between the position of a pardoned approver and the position of a witness to whom an inducement is given by the Crown that, if he speaks the truth, a separate charge against him would be withdrawn. In the one case the pardon is given openly to the knowledge of the parties and subject to the statutory conditions and limitations. In the other case, the fact of the inducement is known only to the party to whom inducement is given and to the party who gives the inducement and not to all the parties, not even to the Court, before the evidence relating to the inducement is given in the course of the trial. Besides, the approver's liberty is subject to the control of the Court, whereas the liberty of the witness is in the hands of the party who is supposed to have held out the inducement. **B. GOVIND BALWANT LAGHATE v. EMPEROR**, 18 Bom. L. R. 266; 17 Cr. L. J. 256 **976**

CRIMINAL PROCEDURE CODE—concl'd.

———— S. 495 **976**

———— S. 520—*Confiscation of property, subject of offence—Notice to complainant.*

No order for the confiscation of property, the subject of an offence, can be passed under section 520, Criminal Procedure Code, without giving notice to the complainant and hearing his objections, if any. **L B MA SEIN v. EMPEROR**, 17 Cr. L. J. 207 **319**

———— S. 537 **321, 993**

———— S. 562, *scope of—Applicability to adults.*

Section 562 of the Criminal Procedure Code is not restricted to juvenile offenders only.

Where, therefore, in a petty case of theft it appeared that the accused had been about 2 months in the lock-up and that there was no previous conviction against any of them:

Held, that an order calling upon the accused to execute a bond under section 562, Criminal Procedure Code, was good even though the accused were adults. **P EMPEROR v. SALIMI**, 11 P. R. 1916 Cr.; 17 Cr. L. J. 254 **974**

CUSTOM. See MALABAR LAW; MATH.

———— ALIENATION—*Dhillon Jats of Ambala District—Status of married daughter to contest alienations by mother or step-mother—Adequate proof of custom, what is—Claim based on custom—Custom not proved—Right of plaintiff to rely on Hindu Law—Civil Procedure Code (Act V of 1908), s. 11—'Court,' meaning of—'Former' suit, meaning of—Several suits decided by one judgment—Appeals—Appeals cognizable by different Courts—Pecuniary jurisdiction—Decision of Divisional Judge in appeal from decree in one suit—Whether res judicata in appeal to Chief Court from the simultaneous decision in another suit where parties identical—Provision in bar of suit—Interpretation.*

Where a claim is based on custom, the plaintiff must adduce clear evidence of instances in which the custom has been followed. Opinions, however numerous, that the custom ought to have been followed are not sufficient to justify a Court in holding that the custom had been established.

Among the Dhillon Jats of the Amballa District a married daughter succeeding to her father's estate has the right to contest alienations effected by her mother or step-mother.

Where a custom on which a claim is based is not proved, the plaintiff cannot fall back on any provision of Hindu Law in support of his case which he did not press at the first hearing.

Obiter.—The right of a Hindu female to challenge the alienations of an earlier female life incumbent must be decided on the evidence adduced in each particular case and no general proposition can be laid down to cover all cases.

The Court referred to in section 11 of the Civil Procedure Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided.

Legal provisions in bar of any suit must be strictly interpreted in favour of the suit.

Plaintiff, a married daughter, on succeeding to her father's estate brought one consolidated suit in the

CUSTOM—contd.

District Court contesting a number of alienations effected by her mother or step-mother. By order of Court, however, the suit was split up into three separate suits, some of the alienations being retained in the original suit and the rest forming the subject-matter of the other two suits. All the three suits were decided by one judgment, and the decree in one of the suits of the jurisdictional value of Rs. 295 was taken in appeal to the Divisional Court, Ambala, which confirmed the decree of the lower Court. There was no second appeal preferred against that decision. This present appeal to the Chief Court was preferred against the decree in another connected suit. It was urged for the respondent that the decision of the Divisional Court of Ambala between the same parties operated as *res judicata* to this appeal:

Held, that the decision of the Ambala Divisional Judge, though a decision in a 'former' suit, was not a decision by a Court which could have dealt with this appeal and did not, therefore, operate as *res judicata*. **P DALIPA v. SURAJ KAUR**, 48 P. R. 1916 581

—ALIENATION—Gujars of Phillour Tahsil—

Gift by sonless proprietor to daughter and daughter's son, whether valid.

A sonless proprietor among Gujars of the Phillour Tahsil in the Jullundur district can gift his land to a daughter whose husband was a *khana-damad* and to a daughter's son whom he had appointed as his heir. **P ISA v. SAMMAN**, 29 P. R. 1916 936

—SUCCESSION—Arains of Jullundur City—
—Custom or Personal Law—Burden of proof—Alienation inter vivos and testation, powers of.

The power of alienation *inter vivos* and the power of testation go together, and if in a particular case the former is proved to be governed by custom, the latter is presumed to follow the same rule.

The Arains of the Jullundur City are governed in matters of testamentary and intestate succession by the ordinary Customary Law of the Province.

As a rule, the onus lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed; but the onus shifts on to the opposite party in the case of a tribe which is one of the dominant agricultural tribes in the Province and to which the ordinary agricultural custom is generally applicable. **P TAJ MUHAMMAD v. SAYAD MUHAMMAD**, 94 P. W. R. 1916 126

—Parachas of Makhad, Attock District—Widow's estate—Custom or Personal Law—Presumption—Evidence in favour of certain rule of succession, value of.

In matters of succession, the Parachas of Makhad in the Attock District follow custom rather than Personal Law.

Where a widow in the Punjab takes the whole of her late husband's estate there is a presumption that she takes only for life.

Where there is a respectable body of evidence in favour of a rule of succession in controversy, the fact that in other matters connected with succession, the parties appear to follow such custom is certainly some support to the party relying on custom. **P NUR MUHAMMAD v. KHUDA BAKHSH**, 93 P. W. R. 1916 135

CUSTOM—concl'd.

—WIDOW—Maintenance, right to, whether lost by refusal to live in family house—'Family house,' meaning of—Adoption, power of making—Consent of husband's nearest male relatives 99

DACOITY. See PENAL CODE, S. 399.

DAMAGES. See CONTRACT.

—Bailment—Conversion of goods—Damages, measure of—Executor of deceased bailee, liability of, on refusal to deliver on demand—Wrongful use by executor, liability for, when bailor delays action 297

—Breach of contract—Practice 173

—Breach of contract—Strict proof of claim, necessity of, even when suit undefended 235

—Breach of promise of marriage—Substantial damages, award of 159

—Principal, liability of, for fraud of agent 598

—Trade mark, infringement of 529

DEBT. See HINDU LAW.

DECLARATION, suit for, that defendant not under-proprietor—Revenue Court's decision that defendant superior to ordinary tenant—Cause of action—Jurisdiction.

The decision of a Revenue Court to the effect that a person sought to be ejected has a status superior to that of an ordinary tenant, affords a sufficient cause of action to the landlord to go to the Civil Court for a declaration that that person does not possess under-proprietary rights. In order to maintain such a suit in the Civil Court it is not necessary that the Revenue Court should definitely hold such person to possess under-proprietary rights. **O BANDI BAKHSH v. INDAR PAL**, 3 O. L. J. 191 304

DECLARATORY SUIT—Irrigation right—Tank—Cause of action.

The plaintiffs brought a suit for a declaration and damages against the defendant, on the allegation that they had a right to draw water from a tank and were further entitled to exercise that right before the defendant could do the same for his own crops, and that they had sustained damages owing to the defendant's not allowing them to exercise that right. The defence set up was a denial of the plaintiffs' right to draw any water from the tank. There was also a denial that the plaintiffs had been obstructed or that they had suffered any damage. The lower Courts found that the plaintiffs were entitled to draw water from the tank in proportion to the extent of their cultivation, although without any preference over the right of the defendant, and that they had failed to prove that they had been obstructed in such a way as to cause them any damage. Their suit being dismissed *in toto*:

Held, that in view of the defence set up the lower Courts ought to have declared the plaintiffs' right to the extent to which they were found to be entitled, as there was a sufficient cause of action for such a declaratory relief. **O BAKHTAWAR SINGH v. DHARAM SINGH**, 3 O. L. J. 40 9

DECLARATORY SUIT—concl'd.

—Revenue registers, entry in, adverse to plaintiff's title—Limitation.

Where a plaintiff's case is that a cloud is thrown upon his title by reason of an entry in the revenue registers, and he seeks by a declaratory suit for the removal of that cloud, the limitation for such suit runs from the date in which the entry in the revenue registers was first made. **O ALI HUSAIN KHAN v. BANDI BIBI, 3 O. L. J. 226 775**

DECREE, consent, how far binding 57

—, *ex parte*, order setting aside—Civil Procedure Code (Act V of 1908), s. 105 (1)—Resumption—Service-grant—Suit, non-maintainability of.

An order setting aside an *ex parte* decree cannot subsequently be questioned under section 105 (1), Civil Procedure Code, in appeal from the decree passed after restoration, as that order does not affect the decision of the case with reference to its merits.

A suit for resumption of a service-grant is, in the absence of any allegation of specific service, not maintainable. **UPPER MUHAMMAD ALI MUHAMMAD v. SHAUKAT ALI, 3 O. L. J. 231 713**

—, final—Appeal, time for, expiry of.

A decision cannot be said to become final until the time for the last appeal allowed has expired, or if appealed, it has become final by the decree of the High Court. **A RAM AUTAR SHUKUL v. BHAGELU SAHAI 204**

DEFAMATION—Complaint of grievance to person in authority—Privilege—Good faith—Imputation honestly believed though untrue in fact—Absence of unnecessary publication—Seeking redress 325

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879), Ss. 3 (y), 10A—Suit by money-lender against agriculturist—Nature of suit, how to be determined.

Illustrations (a) and (c) to section 10A of the Dekkhan Agriculturists' Relief Act show that the intention of the Legislature was to apply the provisions of the section to suits by a money-lender to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage.

Reading clause (y) of section 3 of the Act by the light of section 10A the intention of the Legislature was that the nature of the suit under clause (y) should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage or no mortgage. **B GAUTAM JAYACHAND GUJAR v. MALHARI BAPU BHONG, 18 Bom. L. R. 247; 40 B. 397 406**

—S. 10A 406

DISTRAINT PROCEEDINGS. See MADRAS ESTATES LAND ACT, s. 122.

DOCUMENT, construction of—Mortgage—Periodical payment of interest—Right of suit for whole amount on default of payment of one instalment—Appeal—Appellate Court, right of, to entertain matters happening after suit—Jurisdiction, objection to—'Place of suing'—Civil Procedure Code (Act V of 1908), s. 21.

DOCUMENT—concl'd.

Under a mortgage-deed executed by defendant to plaintiff the principal amount was repayable on 4th January 1916, the interest was payable regularly on the 4th January of each year, and, in default of payment of interest on the due dates, the mortgagee was entitled to recover 'the said amount then and there without waiting for the due date, viz., 4th January 1916'. Default having been made in payment of interest, the mortgagee filed a suit on 21st July 1913 for the principal amount as well as for the arrears of interest due in the Vizagapatam Sub-Court. The Court decreed the claim. On appeal, it was contended that the claim for the principal amount was premature and the Sub-Court of Vizagapatam had no jurisdiction in respect of a portion of the mortgaged property situate in the Agency Tracts, which were not governed by the Code of Civil Procedure:

Held, (1) that under the mortgage-deed only the balance of interest was claimable on default of payment of any one instalment and that, therefore, an action for the principal was premature;

(2) that as the time for payment of the principal had passed when the appeal was heard, the decree for the entire amount due under the mortgage need not be disturbed;

(3) that objection to the jurisdiction of the Vizagapatam Court was an objection to the 'place of suing' within the meaning of section 21, Civil Procedure Code, which, not having been raised in the Trial Court, could not be taken in appeal.

In all cases where objection is taken that the Court taking cognizance of the suit is not entitled to adjudicate on the claim, whether in whole or in part, for want of jurisdiction, it is an objection to the place of suing.

An Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action. **M SETHRUCHERLA RAMA CHADDRA v. MAHARAJAH OF JEYPORE, (1916) 1 M. W. N. 354; 19 M. L. T. 360 411**

EASEMENT—Right of way, grant of, for consideration—Verbal grant—Registration, absence of, whether invalidates transaction—Creation and transfer of easements, distinction between 95

—Right of way—Landlord and tenant—Acquisition of right on landlord's other lands—Prescription—Grant—Writing, whether necessary to create easement—Registration—'Immoveable property,' whether includes right of way 450

EASEMENTS ACT (V of 1882), Ss. 15, 17, 26, Ch. VI 450

—Ss. 52, 53, 60, 62—License, coupled with a void grant—Licensee, whether trespasser—Revocation of license, when valid—Adverse possession, nature of.

The transfer of a mill or factory and a license to use the site are two distinct rights.

The grant of a mere license need not be in writing and it may be proved by oral evidence.

Where a license is coupled with an invalid grant of property, the grant exists independently of the

EASEMENTS ACT—concl'd.

license. If the grant is void, the license, stripped of its accompaniment, remains a license.

Quare:—Whether the sale of an oil mill is the sale of chattels only or the sale of realty by reason of the buildings in and on which the machinery of the mill is fixed.

The licensee, in such an event, is not a trespasser and cannot acquire a title by adverse possession where the first entry was permissive.

A license is in its nature revocable, but a license coupled with a grant is irrevocable.

A license coupled with a void grant is revocable save (1) where the licensee entered into occupation and paid rent and (2) where the licensee, acting on the license, has executed a work of a permanent character and incurred expense in so doing. **N NARSINGDAS v. RATANLAL**, 12 N. L. R. 75

471

— Ss. 53, 60, 62

471

EJECTMENT. See **BENGAL TENANCY ACT**, s. 155; **ESTOPPEL**; **LANDLORD AND TENANT**; **REVENUE SALE**.

—, assistance to—*Co-sharer, right of only one, to eject—Oudh Rent Act (XXII of 1886), s. 60.*

Where two co-sharers joined in issuing a notice of ejectment against their tenant, but after this one of them was not willing to eject him:

Held, that the other co-sharer alone could not apply for assistance to ejectment under section 60 of the Oudh Rent Act. **U P B R BITTO v. RAM NIDH**, 3 O. L. J. 208

693

— case—*Under-proprietary rights, decision as to—Prima facie claim—Revenue Court decision, interpretation of.*

Where, in an ejectment case, the Revenue Court decides that the plaintiff is an under-proprietor, it simply means that the plaintiff has made out a *prima facie* claim to under-proprietary rights, and it does not bar the defendant's remedy of seeking from the Civil Court a declaration that the plaintiff is not an under-proprietor. **U P ■ ■ KRISHNAPAL SINGH v. RAM DULARI**, 3 O. L. J. 234

753

— House site—*Possession, long—Adverse possession—Presumption—Building license.*

The plaintiff sued for possession of a plot in an enclosure on the ground of having purchased it at an auction-sale. The defendant pleaded that he was in adverse possession of the property in dispute. But he was not found to be in adverse possession nor was any arrangement between the parties proved by which the defendant was to remain in possession for all time:

Held, that the fact that the defendant remained in possession for a long time raised no presumption that he was in possession by virtue of a building license and that the defendant was liable to ejectment. **A ANAND SARUP v. CHAWWA**, 14 A. L. J. 115

952

—, notice of, validity of—*Holding of father succeeded to by two sons—Patwari's papers showing only one son's name—Notice issued against such son alone, when valid.*

Where two brothers jointly succeeded as ordinary tenants to their father's holding, but the name of only one of them was entered in the *patwaris*

EJECTMENT—concl'd.

papers, and it was not clear as to whether the landlord ever accepted rent from the other as co-tenant:

Held, that the notice of ejectment issued against that son alone whose name appeared in the *patwari's* papers, was under the circumstances perfectly valid. **U P B R JHUMAK LAL v. SARJU PRASAD**, 3 O. L. J. 211

711

—, suit for—*Title with neither party but with stranger—Claim based on long possession—Defendant's possession not derived from owner—Owner supporting defendant in litigation—Permissive occupation—Finding that defendant trespasser—Question of law—High Court—Appeal, second.*

Where, in a suit for ejectment, the title to the property is admittedly with a third party and plaintiff's claim is based only on long possession, the plaintiff cannot succeed unless he proves the defendant to be a trespasser.

The fact that the defendant's possession is not derived by any settlement with the owner will not constitute him a trespasser, when, as a matter of fact, he is supported by the owner in the litigation. The defendant must then be considered as a permissive occupant and in possession co-ordinate to that of the plaintiff and not liable to be ejected by the latter.

The term 'trespasser' is a term of law, and it is competent for the High Court to examine in second appeal whether the finding of the lower Court that a person was a trespasser, is correct on the evidence tendered at the trial. **PAT CENTRAL KARKEND COAL CO., LTD. v. KARTIC REWANI**, 1 P. L. J. 47

616

EQUITABLE ESTOPPEL. See **ESTOPPEL**.

MORTGAGE, document purporting to create—*Recital of terms—Registration—Evidence* 853

ESTOPPEL. See **EVIDENCE ACT**, s. 115.

— Admission—Burden of proof—Inherent power 165

—, equitable—*Bona fide purchaser for value from benamidar of owner adjudicated insolvent, rights of—Official assignee* 435

Landlord and tenant—Co-sharer, lease from—Suit for rent—Tenant estopped from disputing right of co-sharer to receive rent.

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or to sue in ejectment. **L B MAUNG SHWE GYAW v. MA SHWE THET** 71

— Landlord and tenant—*Purchase of portion of tenant's non-transferable holding in execution sale—Deposit by purchaser of amount of subsequent rent-decree—Withdrawal by landlord—Acknowledgment of purchaser's interest, whether amounts to.*

The plaintiffs, purchasers of a moiety of a non-transferable holding in execution of a mortgage-decree deposited in Court the amount of a subsequent rent-decree obtained by the landlord against the recorded tenants, to prevent its sale in execution. The deposit was withdrawn by the landlord:

Held, that in the absence of anything in the making of that deposit which would bring to the

ESTOPPEL—concl'd.

landlord's notice the fact of the plaintiffs' interest, the landlord was not estopped from disputing the plaintiffs' right. **C BHARAT CHANDER GALUI v. PRAMOTHA NATH ROY** 337

——— *Lands not transferable mortgaged—Rent, receipt of, from mortgagees, effect of—Mortgage, validity of, whether can be questioned—Landlord, position of—Relinquishment by mortgagor in favour of landlord—Mortgagees, position of—Ejectment.*

Where in respect of lands mortgaged by a person who holds them with a heritable but non-transferable rights, the landlord receives rent either from the mortgagees really on behalf of the mortgagor or jointly from the mortgagor and the mortgagees, he is not estopped by reason of merely such receipt of rent from subsequently questioning the validity of the mortgage; and once the mortgagor has relinquished his right to hold the lands in favour of the landlord, the mortgagees have no rights left and can be ejected. **U P B R RAJPAL KUAR v. RUDRA PRATAP NARAIN SINGH**, 3 O. L. J. 219 764

———, plea of, when not put in issue 956

———Sub-tenants, whether can question their lessor's title 570

EVIDENCE. See WILL.

———Bank, deposit of money in—Proof of payment—Burden of proof—Fraud.

When a Bank denies the alleged payment of money to it by any of its constituents, the onus is on the latter to prove payment and the burden is discharged when it is shown that the money was made over to the cashier or to some employee of the Bank authorized to receive moneys on its behalf. It is not necessary for such constituent either to allege or prove fraud on the part of any of the Bank officials. **L B MANECKJEE PALONJEE v. NEDERLANDSCHE HANDEL** 176

———Circumstantial evidence, value of 999

———Custom, proof of 159
Mahalwar Register, copy of entries in, if admissible in evidence 283

———Parol evidence, use of, to prove identity of debt acknowledged in writing 417

———Recital of terms 853

———Unregistered sale-deed for less than hundred rupees—Admissibility to prove contract of sale 921

EVIDENCE ACT (I of 1872), S. 3—Test of proof—Bengal Tenancy Act (VIII B. C of 1885), ss. 29, 30 (c)—Enhancement of rent, validity of.

Where the District Judge in appeal held that in all human probability the tenant defendants had paid an enhanced rent but he declined to draw the inference that this rent paid was at the enhanced rate contracted for by the tenants as in his opinion it was absolutely impossible to determine what the sum paid was:

Held, that the treatment of the case by the District Judge involved an error of law, as he had applied a test of proof other than that embodied in section 3 of the Indian Evidence Act.

EVIDENCE ACT—concl'd.

If two elements are proved, namely, first, that there was an agreement to pay rent at a rate higher than the previous rate; and secondly, that rent has been paid at a higher rate, the inference follows that the requirements of proviso (1) of section 29, Bengal Tenancy Act, have been fulfilled, although it is not proved that the whole of the amount payable at the stipulated enhanced rate has been actually realised by the landlord from the tenant.

Obiter.—The enhancement under section 30 (c) of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent by the landlord for the improvement, and the enhancement agreed to by the tenant may be taken *prima facie* as his own estimate of what would be fair rent under section 30 (c) till, at any rate, the tenant shows that his estimate was erroneous.

Where in consequence of a long standing dispute between the landlord and the tenant regarding enhanced rent payable by the tenant under section 30 (c) the tenant did not pay the rent:

Held, that in decreeing the landlord's suit for arrears of rent damages should not be awarded against the tenant. **C GANES DUTT SINGH v. LACHMI NARAIN SINGH**, 23 C. L. J. 209 783

———S. 13 215

———S. 13—Evidence, admissibility of—Proceedings in a suit not inter partes, when admissible.

In a suit by the plaintiffs to recover possession of certain lands on the allegation that the same were included in a sub-lease granted to them by the lessees of C, the defence being that the lands in suit were comprised within a lease granted by C to the defendants prior to the lease of the plaintiffs' lessors:

Held, that the proceedings of a rent suit by C against the plaintiffs' lessors including the judgment and decree and the *amin's* maps, report and field-book filed in that suit were admissible in evidence, although the defendants were not parties to that suit. **C MADAN CHANDRA PAL v. KRITIRAM BISWAS** 163

———Ss. 18, 23—Compromise, offer of, of a claim to be filed in Court—Negotiations between Pleader of one party and his adversary—Statement by party, admissibility of—Admission of defendant, whether receivable against co-defendants.

Plaintiff sued the defendants for rent. Defendants pleaded discharge. At the trial, the plaintiff's Pleader deposed that, a month prior to the institution of the suit, the 2nd defendant had approached him for a compromise and requested him to persuade the plaintiff to make a reduction of claim. The Pleader also stated that on the day the suit was filed, the defendant No. 2 went to him with a relation and asked him not to file the deficit Court-fee, but to make a compromise. This evidence was admitted and the claim was decreed. The decree was affirmed on appeal. In second appeal to the High Court, Mr. Justice Chapman held that the Pleader's evidence was inadmissible under section 23 of the Evidence Act and remanded the suit. On further appeal under section 15 of the Letters Patent:

EVIDENCE ACT—contd.

Held, (1) that the 2nd defendant's statement to the plaintiff's Pleader was admissible in evidence, in the absence of an express or implied understanding between the parties that evidence of the same was not to be tendered;

(2) that the statement was admissible against the other defendants.

Per Sanderson, C. J.—The mere fact that it was contemplated between the parties that a suit was about to be instituted will not make a conversation as regards settlement of the claim a privileged conversation or a conversation without prejudice, or prevent it from being given in evidence.

The second conversation is a natural consequence of the first conversation which took place a month before, and as the first conversation is not privileged, no difference can be drawn between the first and second conversation as to their being admissible in evidence.

The defendants can be looked upon as co-contractors as they were joint tenants of the plaintiffs. When one of those contractors or partners came to the plaintiff's Pleader for the purpose of seeing whether he could not settle the action which was brought by the plaintiff against all the defendants, he must be implied to have authority to act on behalf of all the defendants.

Per Mookerjee, J.—When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself, but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

An offer of compromise, the essence whereof is that the party making it is willing to submit to a sacrifice or to make a concession, is rejected, though nothing was expressly said at the time respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected. In the absence, however, of any express or strongly implied restriction as to confidence, an offer of a compromise is clearly admissible and may be material as some evidence of liability, although it may not be proper to enquire into the exact terms offered, as such offer might have been made for the sake of purchasing peace, and without any intention to admit liability to the extent of the claim. **C. MEA-JAN MATBOR v. ALIMUDDIN MEA**, 20 C. W. N. 1217

571

— Ss. 18, 32 (3)—*Sale*—*Statement by vendor as to ownership of lands mentioned as boundaries—Admissibility—Statement against interest—Evidence, failure to object to relevancy, effect of, in appeal.*

Evidence admitted without any objection in the Trial Court cannot be objected to being on the record in the Appellate Court; but an erroneous omission to object in the primary Court to the admissibility of a certain piece of irrelevant evidence does not make it relevant in the Appellate Court.

EVIDENCE ACT—contd

The statement of the vendor in a deed of sale as to the ownership of a land described as a boundary of the land sold is relevant under section 32, clause (3), of the Evidence Act as a statement against interest and is evidence against the vendee and strangers. But such a statement cannot be proved against the vendee as an admission under section 18 of the Evidence Act. **C. KANGALI MOLLA v. BENI MADHAB BISWAS**

534

— S. 23

571

— Ss. 24, 25—*Confession to zaildar in consequence of inducement, whether admissible—Retracted confession, value of—Corroboration necessary.*

Where a person suspected of having committed a murder made a confession to the zaildar, in consequence of the latter dropping a remark to the effect that his own brother had committed a murder but had got off on making a clean breast of the matter,

Held, that the zaildar, although not in charge of the investigation, was a leading man holding a responsible post, and that this remark of his was a distinct inducement to the accused to make a confession which rendered the confession inadmissible in evidence;

that inasmuch as the Police were in the immediate vicinity at the time of the confession and the accused, though not handcuffed, was in Police detention as a suspect, he was to all intents and purposes in Police custody and the confession could not be proved unless made to a Magistrate.

Where a retracted confession is the sole evidence against an accused, it can be of but little value, especially remembering the race for a pardon which sometimes occurs when a number of persons are suspected of an offence and others have already confessed or are believed to have already confessed.

As against a co-accused, a confession which has been retracted at the first opportunity should not be relied upon, unless corroborated by independent testimony.

The mere fact that a blood-stained garment is found in a house is not sufficient proof that any particular member of the family residing in that house is guilty of a murder which has recently been committed in the village. **P. KARM SINGH v. EMPEROR**, 32 P. W. R. 1916 Cr.; 17 Cr. L. J. 226

642

— S. 25

307, 642

— S. 27—*Information given by two persons leading to discovery—Only that given first admissible—Necessity of proving specifically the information given by each—Approver's story—Corroboration.*

Where two persons are alleged to have given certain information to the Police which led to the arrest of another accused, it is only the information given first which can be admitted under section 27 of the Evidence Act. It is also necessary that the information given by each should be precisely and separately stated.

The statement of an approver, veracious though it may appear to be and though the truth of a large part of it be established beyond all doubt, nevertheless requires corroboration. **P. RAM SINGH v. EMPEROR**, 7 P. R. 1916 Cr.; 17 Cr. L. J. 273

993

EVIDENCE ACT—contd.

——— Ss. 30, 114, *Ill.* (b), 133—Approver, evidence of—Corroboration in material particulars.

Courts should not ordinarily depart from the well-recognized practice of accepting the evidence of an approver against an accused person only when it is corroborated in material particulars by other independent evidence. It is the more necessary to follow this rule where the accused belong to a low class and it is a matter of no difficulty for the approver to include the name of any person of that class among the offenders even though he had no connection with the offence and it might be difficult for him to establish his innocence.

In exceptional cases Courts might, for reasons stated, act upon the evidence of an approver as a whole, though uncorroborated in particular details by independent evidence. **P** GHULAM RASUL v. EMPEROR, 17 Cr. L. J. 220; 31 P. W. R. 1916 Cr. 332

——— S. 32 875

——— Ss. 32, 33—Facts in issue, whether relevant facts—Statements of deceased persons as to facts in issue, admissibility of—Depositions of deceased witnesses in prior litigation, when admissible 875

——— S. 32 (3) 534

——— S. 33 875, 969

——— S. 44 714

——— S. 65 153

——— Ss. 65, cl. (b), 91—Registered deed of sale not produced—Secondary evidence, admissibility of—Estoppel, plea of, when not put in issue—Admission by vendor.

A person to whom property has been sold by a registered deed, cannot, when that deed is not produced, adduce any evidence of the sale to prove his title without laying a foundation for the admission of secondary evidence with respect to it.

A question of estoppel, which ultimately depends on questions of fact, unless put clearly in issue, cannot be raised in argument.

An admission by a vendor as to sale of immoveable property in favour of vendee cannot be admitted as secondary evidence in the absence of conditions mentioned in clause (b) of section 65 of the Evidence Act.

Obiter dictum.—When a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. **C** SAFAR ALI v. MOHESH LAL, 23 C. L. J. 122 956

——— Ss. 68, 70—Document requiring attestation—Admission of execution by executant, effect of.

Per Woodroffe, J. (concurring with D. Chatterjee, J.)—In the case of a document required by law to be attested, the admission by a party to it of its execution dispenses with the necessity of proving its execution as against him, but as against persons other than the party making the admission the document is not admissible in evidence until it has been proved by attesting witnesses in the manner prescribed by section 68 of the Evidence Act.

Per Newbould, J., dissentient.—An admission by the sole executant of an attested document of its execution by himself dispenses with the necessity of calling an attesting witness under section 68 of

EVIDENCE ACT—contd.

the Evidence Act for the purpose of proving its execution as against any person.

Per D. Chatterjee, J.—Section 70 of the Evidence Act seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it, and so reading the section, the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution of a document required by law to be attested if the executant admits execution, but this proof must be considered as confined in its operation only to the person making the admission.

Per Newbould, J.—Section 70 of the Evidence Act must be read as a proviso to section 68 and section 68 must be read subject to the provisions of the subsequent sections. Where an executant admits execution of an attested document, the document is admissible as against persons other than the executant without the formality of proof by an attester, but such admission will not prove the document as against such persons. **C** SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANOBIS, 20 C. W. N. 1044; 24 C. L. J. 175 862

——— S. 70 862

——— S. 70—Registration Act (XVI of 1908), s. 60—Execution of document, proof of—Admission of execution, meaning of—Registrar's certificate, whether proof of execution.

Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, signed by the party making the transfer.

Section 70 of the Evidence Act refers only to admissions made in the course of a trial and any admission which can be availed of under section 70 is only evidence against the party himself.

The endorsement of a Registrar cannot be relied upon under section 60 of the Registration Act in proof of the execution of a document. **O** HORI LAL v. THAKER BHAGWAN BAKSH, 19 O. C. 23 281

——— S. 71 397

——— S. 90—Will professing to be over 30 years old—Suspicious circumstances—Presumption, whether to be drawn—Delay in suing, whether proves acquiescence or waiver.

The last male owner of the property in suit died, leaving two widows and a daughter. On 2nd January 1884, the widows gifted the property to the daughter who died on 7th November 1894. On the death of the surviving widow on 24th October 1902, the reversioners got mutation of the landed property effected in their favour, but the property in suit remained with defendant No. 2 (the husband of the donee). On 17th September 1906, he sold the property to defendant No. 1. On 29th November 1910 the reversioners sued to recover their share. It was contended that the deceased male owner had gifted this property to his widows absolutely, who had gifted it absolutely to the daughter on whose death her husband became the owner:

Held, (1) that the suit was within time, having been brought within 12 years of the death of the second widow;

EVIDENCE ACT—contd.

(2) that mere delay in suing was no proof of acquiescence or waiver by the plaintiffs of their rights;

(3) that as there were circumstances giving rise to grave suspicions as to the genuineness of the Will alleged to be executed by the last male owner the presumption allowed by section 90 of the Evidence Act could not be drawn;

(4) that the alleged Will not having been proved, the widows must be regarded as having held only on the usual tenure for life, and no gift by them could defeat the claims of the reversioners on the widows' death;

(5) that, therefore, the plaintiffs were entitled to a decree. **P. GUJAR SINGH v. MEHR SINGH** 168

— S. 91 956

— Ss. 91, 65—*Deed of sale—Intention to create mortgage—Oral evidence, admissibility of—Secondary evidence—Loss of original document, sufficient proof of—Discretion of Trial Court.*

Oral evidence is inadmissible under section 91 of the Evidence Act to show that a transaction effected by a registered deed, which purports to be a sale, is in reality a mortgage.

The question, whether sufficient proof has been given of search for and loss of an original document, to lay ground for the admission of secondary evidence, is a point proper to be decided by a Judge of first instance and his conclusion should not be overruled except in a clear case of miscarriage. **L. B. MA PAIK v. MA NWAI PAUK** 153

— S. 92 745, 609

— S. 92—*Partition, registered deed of, purporting to divide moveables—Evidence that some moveables were left undivided, whether admissible.*

Notwithstanding the apparent tenor of a deed of partition, it is open to parties to prove either that the partition was incomplete or that certain properties were reserved for future division.

Plaintiff sued for division of paddy belonging to the parties. Defendant pleaded that there was already a registered partition-deed purporting to divide all the 'moveables' of the family and that oral evidence was inadmissible to prove that paddy was not divided.

Held, that the use of the expression 'moveables' in the partition-deed did not make it clear that even paddy was divided and that evidence was admissible to prove that it was left undivided. **DURAI SWAMI REDDIAR v. RAJAGOPALA REDDIAR** 712

— S. 114 504

— S. 114, ill. (b) 332, 976

— S. 115 375, 890, 918, 928

— S. 115—*Estoppel, statement, when amounts to—Admission on point of law, effect of—Hindu Law—Co-widows' right to partition property—One co-widow, whether can alienate her share.*

A representation in order to work an estoppel must generally be a material statement of fact. An admission on a point of law cannot operate as an estoppel under section 115 of the Evidence Act.

Where, therefore, a Hindu widow adopted the defendant, who was an orphan, as a son to her

EVIDENCE ACT—concl.

deceased husband and subsequently sued for a declaration that the adoption was invalid:

Held, that, in so far as the plaintiff's conduct in adopting the defendant and subsequently supporting the adoption could be regarded as equivalent to a representation that an orphan can be validly adopted, it did not give rise to an estoppel and did not preclude her from maintaining the suit.

According to Hindu Law, two co-widows are entitled to partition the estate inherited from their husband; and one co-widow can alienate for her life her share whether before or after partition, though the alienation will only be binding on the other, so as to defeat her right of survivorship, if that other consented to it. **N. GOVIND v. CHANDRA-BHAGA**, 12 N. L. R. 100 675

— S. 133 332, 976

EXECUTION OF DECREE. See MORTGAGE-DECREE.

— Application for amendment of decree—Order postponing execution, whether order for amendment of decree 393

—, application for—Appointment of Commissioner to take accounts and help in preparing decree—Decree signed after Commissioner's report—Starting point—Limitation 504

— Application for attachment not specifying immoveable property—Court, power of, to require amendment—Limitation—Previous application for execution need not be examined 955

— Attachment of estate—Entry in *Touzi* Register, whether necessary—Supplementary information to Collector for entry in *Touzi* Register—Fresh attachment, effect of, on first attachment—Purchase pending—Attachment, legality of 34

— Attachment by precept—Objection to execution based on omission to transfer decree, if can be taken at hearing of appeal—Simultaneous execution in two Courts against same property, if permissible—Extension of time, petition for, presented before expiry of two months—Order passed after expiry of that period—Attachment, if ceases to be effective 302

— Attachment—Private sale of portion—Creditor, right of—Payment by one judgment-debtor—Charge—Contribution 91

— Attachment, threatened—Third party's property—Payment under protest to avoid attachment—Claim for refund—Separate suit 492

— Decree passed against two defendants and affirmed in appeal preferred by only one defendant—Execution against non-appealing defendant—Limitation—Transfer of decree, non-recognition of, by Court—Right of decree-holder to execute 791

— Interest claimed in previous application for execution—Objection, no opportunity of—Subsequent application—Objection, if barred 144

— Joint and several money-decree against two judgment-debtors—Both judgment-debtors individually awarded costs exceeding the decree in aggregate—Decree-holder, whether can execute decree against only one judgment-debtor without deducting costs of both 388

EXECUTION OF DECREE—contd.

— Judgment-debtor dispossessed of land outside decree—Remedy of judgment-debtor—Application for restoration of possession—Period of limitation 231

— Payment into Court of decretal amount by persons other than judgment-debtor, whether amounts to satisfaction of decree—Order as to rateable distribution, when justified—Sale proclamation mentioning larger amount than what is really due, effect of—Sale, whether valid 350

— Person 'whose interests are affected by the sale', meaning of—Declaratory suit by person alleging exclusive ownership in himself—Application in execution to set aside sale during pendency of suit, whether lies 272

— Power of executing Court—Suit by prior mortgagee for sale of property—Failure of puisne mortgagee to prove amount due to him though impleaded—Executing Court, whether can ascertain amount due to puisne mortgagee.

Ordinarily when a decree is to be executed, the executing Court only has the power to carry out the specific orders contained in the decree.

A suit was brought by the 1st mortgagee impleading both the mortgagor and the 2nd mortgagee for sale of the property. A decree was passed directing the property to be sold. The 1st plaintiff was paid out of the sale-proceeds and the balance deposited in Court. The puisne mortgagee allowed the suit to go on *ex parte* as against him and did not prove the amount due to him under the mortgage. He sought to do so in the Court executing the decree:

Held, that it was not open to the petitioner to apply to the executing Court to ascertain the amount due to him on his mortgage, as he had failed to take the necessary steps in the suit in which he was properly impleaded. **M. SESA IYER v. ARIMUTHU VATHYAR**, (1916) 1 M. W. N. 323 362

— Rent decree Arrest of judgment-debtor, effect of—Stay of proceedings for sale 22

— Rent decree against—Hindu widow—Execution after widow's death—Tenure in hands of reversioners, liability of, for sale 581

— Step-in-aid of execution—Application by decree-holder certifying partial satisfaction of decree 625

— Withdrawal of portion of appeal in High Court, effect of—Interpretation of decree—Practice.

Plaintiffs sued for a declaration of title and their right of way and for demolition of certain constructions. The Munsif granted a decree for declaration, but refused to order demolition of the constructions. On appeal by the plaintiffs, the District Judge gave them joint possession over the land and ordered the demolition of the constructions. The defendants appealed to the High Court on two grounds, viz., (i) that they had a right of way over the land and (ii) that the order as to the demolition of the constructions was wrong. The second plea was abandoned. The decree of the District Judge was set aside and that of the Munsif restored. The plaintiffs went up under the Letters Patent but their appeal was dismissed. The plaintiffs then sought to execute that portion

EXECUTION OF DECREE—concl'd.

of the decree of the District Judge which ordered the demolition of the constructions:

Held per Piggott, J., Walsh, J., dissenting, that the execution Court could not be permitted to get round the terms of a decree, which was on the face of it perfectly clear and unambiguous, and that plaintiffs, not having applied for review of judgment to the single Judge of the High Court or challenged the decree on this point under the Letters Patent, were not entitled to seek relief by asking the Court executing the decree to interpret it in the light of the pleadings and of the record generally, so as to put a meaning upon it inconsistent with its plain and unambiguous terms.

Per Walsh, J.—When the withdrawal was made in the High Court, the District Judge's decree so far as it related to the removal of the buildings became final.

Even if the decree was erroneously drawn up in the High Court, the High Court had inherent powers, and ought to amend it in the present appeal.

A decree of a Court cannot operate upon a subject-matter which was not before the Court. A decree can only operate upon the pleadings. It cannot operate upon or be construed as dealing with any matter not in the suit.

The practice of construing decrees discussed. **A. MUHAMMAD MARUF v. SULTAN AHMAD** 344

EXECUTION PROCEEDINGS—Right of Court to review or vary decree 787

EX PARTE DECREE, defendant's right to set aside, when not personally served after due diligence of serving officer. 799

— Merits, decision on—Defendant's evidence partly recorded—Default of defendant on adjourned hearing—Remedy—Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 3.

Where some of the defendant's evidence is recorded and he makes default on an adjourned date of hearing and the Court proceeds to decide the suit on merits, although professing to pass an *ex parte* decree, the defendant's remedy lies by appeal and not by application for setting aside the *ex parte* decree. **O. BISMILLA BEG v. AZAM ALI BEG**, 3 O. L. J. 127 865

— Sale of defendant's holding in execution—Setting aside of decree—Mesne profits enjoyed by decree-holder purchaser, claim for, in restitution—Nature of remedy—Conversion of plaint into application under s. 47, C. P. C. 747

EXPERT EVIDENCE—Corroboration 315

FISHERY, right of—Union of two rivers—Fishery owners, rights of, in united waters.

Where a stream or river flows into another, the owners of the fishery rights in the former river do not necessarily become entitled to share in the fishery in the mingled waters of the two rivers. The test to be applied to determine the right is, whether the invading river has lost or retained its identity in the united waters. No hard and fast rules can be laid down to ascertain the conditions in which the river may be said to have lost or retained its identity, though in extreme cases, as where one river is insignificant in size in proportion to the other, the matter is easily decided. **C. SARADA PRASAD ROY v. MUHAMMAD YUSUF**, 24 C. L. J. 158 228

FOREIGN JUDGMENT, *suit on—Scope of enquiry—Foreign judgment being contrary to natural justice—Civil Procedure Code (Act V of 1908), s. 13.*

Suits based on foreign judgments should not be dismissed on the ground that they are contrary to natural justice merely because such rules as obtain in British India are not, in a more rough and ready Court of a Foreign State, regarded as being of imperative force even if, in such a State, they are of legal application. **P MULK SHAH v. TARA SINGH**, 13 P. W. R. 1916

FOREIGNERS ORDINANCE (III of 1914), Ss. 3, 4, 7—Infringement of order under s. 3—Procedure for trial of offender—Appeal, right of—Criminal Procedure Code (Act V of 1898), ss. 5, 408.

An ordinance is a law and an infringement of its provisions is an offence. Consequently an inquiry into such an offence must, under section 5 of the Criminal Procedure Code, be dealt with according to the provisions of that Code, unless there is any other enactment in force prescribing a different method of inquiry into such an offence and in the case of an offence under Ordinance III of 1914, unless there are rules promulgated in exercise of the power conferred by section 7 of the Ordinance.

Where, therefore, the petitioner was charged with having infringed an order under section 3 of Ordinance III of 1914, and the District Magistrate held a regular trial under the Criminal Procedure Code and convicted the petitioner:

Held, that the District Magistrate was bound as he did, to conduct the trial in accordance with the provisions of the Criminal Procedure Code and that accordingly an appeal lay to the Sessions Judge under section 408 of the Code. **P SHER SINGH v. EMPEROR**, 10 P. R. 1916 CR.; 15 P. W. R. 1916 CR.; 17 CR. L. J. 225

641

— Ss. 4, 7

641

FORFEITURE OF LEASE. See **LEASE**.

FORGED DOCUMENT. See **PENAL CODE**, s. 474.

FRAUD—Bank, deposit of money in—Proof of payment

176

—, condonation of—Fraud pleaded in defence to an action—Limitation

37

FRAUDULENT TRANSFER, by guardian, effect of

188

— Transfer in favour of children

744

GENERAL CLAUSES ACT (X of 1897), S. 25

450

— S. 6

27, 349

GIFT. See **HINDU LAW**.

— Money left with third person as donee's money—Money payable on majority or demand of donee—Completion of gift—Privity of contract—Deposit—Loan—Presumption—Limitation Act (IX of 1908), Sch. I, Art. 60.

A donor, with the intention of making a gift of some money to his granddaughter, left the money with the defendant with the direction that he would pay it to her when she attained her majority or when she might demand it, with interest at a certain rate. In defendant's book the money was shown as that of the donee;

GIFT—concl'd.

Held, (1) that there was a completed gift by the donor to the donee and that, therefore, no question of privity of contract arose;

(2) that the money being a deposit with the defendant, a suit for its recovery would be governed by Article 60 of Schedule I of the Limitation Act.

Per **Seshagiri Aiyar, J.**—There is only a thin difference between a loan and a deposit. Where the arrangement is that the money handed over is to be paid to a third party on demand or on the happening of a specified event, the transaction should be regarded as a deposit and not as a loan.

If there is any doubt as to whether a transaction amounts to a loan or a deposit, the presumption is that it is a deposit, and not a loan. **M NARAYANAN CHETTYAR v. VELLAYAPPA CHETTYAR**, (1916) 1 M. W. N. 206; 19 M. L. T. 237

347

GRANT—Rent-free service grant—Grant, non-transferable—Purchaser of rent-free grant, title of, against grantor.

A rent-free grant made in lieu of service is non-transferable, and the purchaser of such grant from the original grantee cannot acquire any valid title as against the grantor. **U P B R GIRDHAR GOPAL v. GAYA PRASAD**, 3 O. L. J. 235

672

GROVE, when liable to assessment—General custom

155

— Trees planted by occupancy tenant—Mortgage of grove—Death of mortgagor without heirs—Suit to eject mortgagee—**Agia Tenancy Act (II of 1901), s. 58.**

A transfer of a grove by means of a usufructuary mortgage is a perfectly valid transfer and vests the rights of the mortgagor in the mortgagee.

Where, therefore, on the death without heirs of an occupancy tenant, who had planted a grove on the land in his occupation and subsequently mortgaged the grove, the landlord sued to eject the mortgagee:

Held, that the mortgagee could not be ejected, for the right of the mortgagor to occupy the land so long as the grove lasted had been transferred to him by the mortgage. **U P B R BENI RAI v. RAM PRASAD RAI**

84

GUARDIAN AND MINOR—Alienation of minor sons' property by mother, validity of—Right of sons to deal with property alienated

85

— Fraudulent sale by guardian, only voidable—Minor's right to possession, extinction of, after bar of right to avoid sale

111

GUARDIANS AND WARDS ACT (VIII of 1890), Ss. 1, 34 38, 45, 47, 50—Appointment of guardian of property on furnishing security—Confirmation of order after security is furnished—Appeal against latter order, whether lies—High Court Rules under s. 50—Mussasil Courts, practice of.

An appeal lies only against the order appointing a person guardian of the property of a minor, and not against an order approving of the security furnished by him and ratifying the original appointment, inasmuch as such order is not appealable under section 47 of the Act.

Per **Sadasiva Aiyar, J.**—The Guardians and Wards Act, 1890, does not provide for two orders viz., an interim order of approval and a 'final order' of appointment of the guardian of property, nor does

GUARDIANS AND WARDS ACT—concl'd.

it postpone the appointment till security is furnished. On the other hand, the appointment has to precede the requisition for and the furnishing of security.

Rules and forms made by the High Court under section 50 of the Act requiring the appointment to be postponed to the furnishing and approval of security *ultra vires*.

Per *Moore, J.*—The rules framed by the High Court under section 50 of the Act are *intra vires* and the procedure prevailing in the Muffasil Courts of first making the appointment conditional on security being furnished and of confirming the same later on being satisfied with the security or treating the petition as pending till proper security is furnished, is correct. **M GOPPAMMAL v. SRINIVASA AIYANGAR**, 30 M. L. J. 508 **432**

— S. 30—*Suit by minor to set aside alienation by guardian—Agreement to pay interest not sanctioned by Court, whether binding on minor—Duty of minor to restore benefit received—Court's power to award compensation—Respondent, whether can claim additional relief by cross-objections.*

Plaintiff sued to recover a certain sum of money with interest at 9 per cent. per annum as agreed, due on the foot of two mortgage-deeds, dated 10th August 1904 and 31st August 1905, respectively, executed by one *Musammal H. B.* on behalf of herself and as guardian of her two minor sons and one daughter. His claim was decreed. The said sons and daughter appealed:

Held, that 9 per cent. per annum was a reasonable rate of interest;

(2) that the guardian's agreement to pay interest and to make that interest a charge upon the property, though not sanctioned by the District Judge, was under section 30 of the Guardians and Wards Act merely voidable at the instance of the minors; but that, inasmuch as the guardian could not have succeeded in borrowing money unless she had agreed to pay interest and the loan was in the interests and for the benefit of the minors, they could be allowed to go back upon the agreement only on the condition that they on their part restored all benefits which they had received under it, i.e., the principal amount and a reasonable interest thereon;

(3) that, notwithstanding the expiry of four years from the date when the term of the mortgage-deed of August 1904 came to an end, the Court was entitled to award reasonable interest by way of compensation or damages for at least six years after the expiry of the term of the mortgage.

Where a cross-objection was filed to the effect that the decree should have been in the form set forth in Appendix D of the 1st Schedule to the Civil Procedure Code, No. 4, the object in view being not so much to have the decree put in a proper form as to obtain a right to claim interest not merely up to the date of the judgment of the lower Court but up to the date of realisation:

Held, that the relief claimed in this indirect way could not be allowed, and that the respondents should have either applied to the lower Court to amend the decree or appealed in respect of any additional interest that they claimed. **P MUHAMMAD ISMAIL v. GAURI PARSHAD**, 24 P. R. 1916 **916**

— Ss. 34, 38, 45, 47, 50

432

GUARDIANSHIP. See MUHAMMADAN LAW.

GUJARAT TALUQDARS' ACT (BOM. ACT VI of 1886), S. 23 **198**

HIGH COURT, power of, to report erroneous conviction to Government where remedy by appeal or revision barred by Statute **647**

HINDU LAW—ADOPTION—Adopted son, position of—*Talukdari* or non-*talukdari* property, effect of **496**

— — — — —, effect of, on rights vested before adoption *Mitakshara*.

An adoption under the *Mitakshara* has the effect of divesting the adopted son of all rights to the property of his natural father, even where the property had become exclusively vested in him before the adoption.

Per *Shah, J.*—There is nothing repugnant to Hindu Law in insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property which may have devolved upon him in the family of his birth. The divesting of vested estates is by no means an uncommon incident of adoption under certain circumstances, and seems to be quite consistent with Hindu Law. **B DATTATRAYA SAKHARAM DEVI v. GOVIND SAMHAJI KULKARNI**, 18 BOM. L. R. 258 **423**

— — — — — Essential portion of the ceremony—*Khatris of Lahore—Adoption of daughter's son, whether valid.*

In the Punjab the strict Hindu Law ceremonies are rarely observed in their entirety, and the giving and accepting of a child in adoption is all the ceremony that is essential.

A rule of custom exists among the *Khatris* of Lahore by which the adoption of a daughter's son is valid. **P NIKKI v. GUJAR MAL** **478**

— — — — — ALIENATION—Gift by widow—Transfer of life-interest—Donee allowed to alienate property, effect of—Burden of proof—Document, construction of.

A gift by a Hindu widow of property in which she has only a life-interest passes nothing to the donee beyond her limited interest, and a provision in the document empowering the donee to alienate the property by gift or sale exhausts its force on the widow's death.

The onus of proving that an absolute estate passed by the gift of a Hindu widow lies on those asserting it.

Per *Coults Trotter, J.*—A Judge should not be guided in construing a document by evidence as to what the parties meant, though he can look at the surrounding circumstances to find out the matters with reference to which they were contracting.

Per *Seshagiri Aiyar, J.*—The absence of words in a deed of gift by a widow that the estate was to be enjoyed from 'son to grandson', is an indication that the donor parted only with a limited interest.

Quere.—Whether the principle of Hindu Law that an alienation by a widow can be validated by the consent of the reversioners can be applied to gifts by life-estate owners? **M VEERAKKAL v. THIRUMAKKAL** **596**

— — — — — by widow—*Mitakshara*—Debt incurred for daughter's daughter's marriage, whether chargeable on husband's estate—Daughter's daughter, residence with maternal grandmother before marriage—

HINDU LAW—contd.

Moral duty—Right to maintenance from maternal grandfather's property—Construction of document—Mortgage of widow's 'right and interest', meaning of.

A daughter's daughter, in a Mitakshara Hindu family, has no legal claim for maintenance from the estate left by her maternal grandfather.

The marriage of a daughter is a religious act and a widow should charge her husband's estate with the costs of the marriage of the daughter and the daughter has also a right to be maintained by the estate.

As, after marriage, the daughter enters into the family of her husband, her daughter has no claim to have her marriage performed out of her maternal grandfather's estate. The fact that she was always living with her maternal grandfather and was an orphan at date of her marriage casts a moral duty on the grandmother to have her properly married, but will not be a legal necessity of such a nature as to bind the estate.

A mortgage by a widow of her 'right and interest' in her husband's estate does not indicate necessarily that she mortgaged only her life-interest.

Per *Roe, J.*—A widow's estate cannot be made liable for expenses incurred in discharging a moral obligation, though it was brought on the widow's family by reason of pressure of local Hindu opinion. When the moral obligation is brought about by the widow's voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations, and not legal obligations for which her husband's estate could be encumbered. **PAT NARAINBATI KUNWARI v. RAMDHARI SINGH**, 20 C. W. N. 734; 1 P. L. J. 81 277

— **ALIENATION** by widow of proprietor—*Reversioners, whether can contest alienation in presence of daughter.*

Reversioners of a deceased Hindu can, despite the existence of a daughter, sue for a declaration that an alienation made by the widow of the deceased shall not affect their reversionary rights. **P. TEK CHAND v. SOMAN SINGH**, 27 P. R. 1916 831

— **APOSTACY**—Guardianship of fatherless infants, mother's right to, when she wishes to become Christian—Guardian of Hindu infants, duties of.

When the widowed mother of Hindu infants becomes a Christian, that will not of itself be a ground for removing her from the guardianship of the infants, provided that she be in a position to satisfy the Court that she will be able to carry out the obligations which the law imposes upon her of bringing up her children in the faith of her husband.

The fact that a false charge of immorality was made against the mother of infants by the brother of her deceased husband in his application for guardianship of the infants, must necessarily be taken into consideration in any order which might be made by Court in regard to the guardianship, for the mother cannot be expected to live with the family who have made such a charge against her. **C. DWIJAPADA KARMAKAR v. MISS BAILEAU**, 20 C. W. N. 608 632

— **DEBT**—Debt of father—Liability of son—Absence of son's consent to loan—Family necessity—Application of money for immoral purpose—Proof.

HINDU LAW—contd.

Under Hindu Law, the liability of a son to pay his father's debt arises from a moral and religious duty, and is not affected by the absence of the son's consent, the son being an adult at the time, or by family necessity.

A son is, however, exempt from liability if he can establish that the father was guilty of applying the money borrowed for an immoral purpose. The connection between the raising of the money and its expenditure for a specific immoral purpose must be shown, though direct proof is not necessary that it was spent on any particular person. **PAT BHAGAT MAL SAHU v. ABDUL KARIM**, 1 P. L. J. 56 23

— **DEBT**—Father—Mortgage of joint ancestral property—Sons, suit against—Legal necessity, want of, pleaded—Burden of proof—Proof, nature of—Mortgagee, what to prove—Immoral purpose of debt also pleaded—Sale of mortgaged property sought—Simple money-decree, prayer in appeal for, whether can be allowed.

Where in a suit against the sons of a Hindu father upon a mortgage of joint ancestral property executed by the father, the defence set up is that there was no legal necessity for the mortgage so as to bind them, it lies upon the mortgagee to prove either that the debt was borrowed for a legal necessity and is accordingly binding upon the joint family property or to show, at any rate, that he made some enquiries with the object of satisfying himself that the money was being taken for purposes which are considered legally binding.

And, if in such a case there is a further defence that the debt, if incurred, was contracted for immoral purposes, but the mortgagee prays only for a decree for sale of the mortgaged property and the case is decided on the basis that there was no legal necessity for the mortgage, he cannot subsequently be allowed in appeal to ask in the alternative for a simple money-decree, inasmuch as the defendants would otherwise be put to a disadvantage for no issue as to the question of immorality had been raised and decided. **O. BUDHAN LAL v. JAGAN NATH**, 3 O. L. J. 214 757

— **GIFT** to daughter and son-in-law, whether creates joint tenancy—Devolution of estate on daughter's death—Transfer of Property Act (IV of 1882), s. 53—Transfer in favour of children—Fraudulent transfer.

Where a Hindu male owner gives his property to his daughter and son-in-law during their marriage to be enjoyed by them in common, they take the property as tenants-in-common and not as joint tenants with right of survivorship.

On the death of the daughter her moiety of the gift would descend in accordance with the rules governing *stridhanam* property to her son, unless she has effected a valid transfer of it during her life.

A transfer of all the properties of a person in favour of his children by his first wife, at a time when he was about to marry a second wife and in consideration of his being permitted to do so by the relations of his first wife, is not a transfer in fraud of creditors and is not voidable under section 53 of the Transfer of Property Act, 1882, even though the transferor was heavily indebted at the time. **M. KAPINI GOUNDAN v. SARANGAPANI**, 8 L. W. 287; (1916) 1 M. W. N. 288 744

HINDU LAW—contd.

— **JOINT FAMILY**—Alienation by father—
Sue by son contesting it—Alienation and alienor's
death prior to 1900—Limitation—Punjab Limitation
(Ancestral Land Alienation) Act (I of 1900) 253
— *Debt by manager—Liability of co-par-*
ceners—Family necessity—Burden of proof—Duty of
lender.

A lender of money, when advancing money to a manager of a joint Hindu family, is bound to satisfy himself by due enquiry, honestly made, that the advance is required by the manager, as borrower, for a valid family necessity and for the benefit of the estate. The debt binds the other co-parceners, whether they be adults or minors.

Per *Atkinson, J.*—If the lender acts honestly and makes due enquiry, then, even though the necessity may not in fact exist, he has satisfied the onus imposed on him by law. **PAT MANDIL DAS v. MEGH NARAIN DUBEY**, 1 P. L. J. 39 742

— *Deed executed by adult member and*
ladies belonging to family, validity of—Karta—Legal
necessity—Minor member, when bound by deed exe-
cuted by major member.

The mortgagee rights belonging to a joint Hindu family, consisting of two brothers one of whom was major and the other minor, could not, in view of the circumstances of the family, but be assigned and were assigned for the best sum then available. All the consideration-money was found to have been expended for purposes which were for the benefit of the joint family. The deed of assignment was executed by the major brother, who did not therein purport to act as family manager on behalf of his minor brother, and by two ladies belonging to the family, who described themselves to be owners of portions of the mortgagee rights which were being transferred:

Held, that it must under the circumstances be taken, that the major brother in executing the deed had been acting as karta on behalf of the joint family.

Held, further, that the assignment, being justified by a legal necessity, was binding upon the minor brother, although he had been no party to the deed. **O RUKMIN KUAR v. ASHIQ HUSAIN**, 3 O. L. J. 32 3

— *of father and son—Alienation by*
father of all family property—After-born son, right
of, to set aside alienation—Alienation, whether ope-
rates as division in status—Failure of son to impeach
alienation on behalf of his after-born brother also,
effect of—Suit by after-born son to recover his share
—Limitation—Limitation Act (IX of 1908), Sch. I,
Art. 126.

Where a Hindu father alienates the whole of the family property belonging to himself and his son, a son born subsequently acquires no right to a share in the property and cannot sue to set aside the alienation and recover his share, as there is no property held jointly.

Such a claim, assuming it to be tenable, is governed by Article 126, Schedule I, of the Limitation Act.

Per *Sadasiva Aiyar, J.*—The alienation by a co-parcener of his interest in all the family properties without exception operates as a division in status and the alienor ceases to be a member of the joint Hindu family. If there is only one other co-parcener at the time, the family ceases to exist.

Per *Moore, J. (contra)*—Where a father alienates his share in the whole of the family properties he conti-

HINDU LAW—contd.

nues to be a member of the joint family even with sons subsequently born, but the latter can claim no share, no property being in existence at the dates of their birth. **M SOUNDARARAJAN v. SARAVANA PILLAI**, 30 M. L. J. 592 794

— **JOINT FAMILY**—Grant, ancient, in name of one member—Presumption—Ejectment, suit for—Title—Burden of proof—Waiver, proof of title by, whether binding on third party.

An ancient grant made to a member of a joint Hindu family must be presumed to be a grant to the family and not to the individual.

In a suit for ejectment the plaintiff must prove his own title. No title can be acquired against a third party by a waiver not binding on that party, the more so when such waiver is, to the knowledge of the Court, false.

Plaintiff sued to eject defendant from property which, she alleged, was acquired by her father who was a member of a joint Hindu family:

Held, that it was plaintiff's duty to prove that the property was her father's separate acquisition and the fact that the other members of the family did not contest that position, could not dispense with such proof as against the defendant who was a stranger. **PAT DURGA BAI v. SOBHA SINGH** 827

— *comprising minor members—Man-*
ager, power of—Ancestral estate, property acquired at
expense of—Minor members, whether bound by trans-
fer made by manager—Benefit, enjoyment of, effect of
—Transfer by manager, whether holds good—Pro-
perty, ancestral, and property acquired by it; both
mortgaged—Mortgagee, position of—Equity—Court,
discretion of.

There is nothing in the Hindu Law to prevent the head and manager of a joint family, comprising minor members, from doing anything in the interests of the family which any other prudent manager may have done under similar circumstances, e.g., advantageous acquisition of some property at the expense of the ancestral estate. And a transfer of such estate made in the interests of the family, that is, to enlarge the means of its subsistence, may thus be binding on the minor members as one made to pay antecedent debts or to meet an immediate necessity; and they cannot, on attaining majority, impeach the transfer of which the benefit has been enjoyed.

Where the ancestral property of a joint Hindu family and some other property acquired at the expense of the former property are both mortgaged, the Court may in equity not allow the mortgagee to proceed against the former property so long as the latter is not exhausted, if the latter property is available and adequate to satisfy his debt. **MUNESHAR BAKHSI SINGH v. ARJUN SINGH**, 3 O. L. J. 237 738

— **Mitakshara**—Alienation by father—
Son's right to impeach only when purpose illegal or
immoral—Inadequacy of consideration, whether ground
for setting aside alienation—Manager, powers of.

Under the Mitakshara School of Hindu Law, the powers of a father are greater than those of the manager of a joint family, and one of those powers is to alienate the family property for the purpose of satisfying an antecedent debt contracted by himself, provided only that the debt is not tainted with illegality or immorality.

HINDU LAW—contd.

The property alienated out of the family can be recovered by the sons only on proof of the illegal or immoral purpose of such debt.

Inadequacy of consideration may be a ground for setting aside an alienation by the manager of a family, but it will not invalidate an alienation by a father, although he is manager of a joint family, or entitle the sons to sue for the recovery of the property alienated. ○ **JUGUL KISHORE v. RAGHUBAR SINGH** 89

— — — **JOINT FAMILY — property — Alienation, invalid—Member born after alienation, when competent to attack it—Ratification by sons in existence, when binding on after-born son.**

The alienation of joint family property, which the Hindu Law declares to be binding upon a member of the family born after the date of the alienation is a valid and not an invalid alienation. A member of a joint Hindu family is, therefore, entitled to attack an alienation of the joint family property made before his birth, if invalid.

Ratification of such alienation by the members in existence at its date will not bind the after-born member, if made after his birth. ○ **MURARI LAL v. JALIPA SAHAI**, 3 O. L. J. 180 447

— — — — — **Survivor, if successor — Decision of Revenue Court—Appeal to District Judge, maintainability of—Court, duty of** 26
— — — — — **trade—Mitakshara — Debt incurred by manager — Property acquired to detriment of family property, liability of—Special education of co-parcener, funds for—Presumption, initial—Evidence Act (I of 1872), s. 44—Cessor of commensality, whether amounts to separation—Division Bench—Difference of opinion—Reference to Full Bench, competency of—Punjab Courts Act (III of 1914), s. 10—Civil Procedure Code (Act V of 1908), s. 98 (2), O. XLI, rr. 4, 23—Non-appealing parties, right of, to be heard in support of appeal.**

Per *Rattigan and LeRossignol, JJ.* (*Shah Din, J.*, dissenting).—A member of a joint Hindu family which admittedly possesses joint property, must be presumed in the ordinary course of things to have received his education, whether special or ordinary, at the expense of his family and his family property and the burden of proving the contrary would rest upon him.

Per *LeRossignol and Shah Din, JJ.*—Property acquired by a member of a joint Hindu family to the detriment of the family and as the result of a special education or training received with the help of the joint property is liable for a debt contracted by the manager in the course of a joint family business.

Order XII, rules 4 and 33, Civil Procedure Code, do not apply to parties who do not exercise the right of appeal and are made *pro forma* respondents by the parties who have appealed from the decree which was passed against them. The non-appealing parties cannot claim the right to be heard in support of the appeal.

Per *LeRossignol, J.*—Mere cessor of commensality is not conclusive proof of disruption of a joint Hindu family, especially when the cessor was a mere accident and was forced upon some of the members by the circumstances of their professions.

HINDU LAW—contd.

A minor co-parcener in a joint Hindu family carrying on an ancestral business is liable during his minority only to the extent of his interest in the joint family property. On reaching majority, however, he may sever his connection with the joint family and partition his net share, i. e., his share after deduction of the joint family debts incurred during jointness and thereafter be free from all liability in respect of the family he has quitted. Should, however, he elect to remain in the family, he impliedly undertakes responsibility for future family debts, but, except in cases when he is an actual contracting party, his liability is confined to his share in the joint estate. Unlike a contractual partner, he will incur no personal liability.

The credit which the manager of a joint family is entitled to pledge is the credit, not of the several members, but of the family as a quasi-corporate body.

As accretions to joint property due to the employment of joint property are joint property, property acquired by members with the help of the family property till partition and disruption is liable for the debts of the joint family business.

Where a member of a joint Hindu family has received a special education or training, the presumption is that it was acquired with the assistance of the family funds. The presumption may, however, be rebutted by any person asserting the contrary.

Per *Shah Din, J.*—There is no initial presumption that a special education or training received by a member of a joint family was to the detriment of the family estate and the onus is on the creditor, seeking to make the separate or acquired properties of such member liable for a family debt, to prove that the acquisition was made with the assistance of the joint funds.

Per *Curiam.*—A Divisional Bench of the Punjab Chief Court cannot make a reference under section 10 (2) (b) of the Punjab Courts Act when the members of that Bench have differed on a point of law, as that section comes into operation only when any given contingency is not provided for by any other enactment in force. The proper course is to refer the point of law under the proviso to section 98, Civil Procedure Code. **P GOKAL CHAND v. HUKAM CHAND-NATHU MAL**, 109 P. W. R. 1916 714

— — — **MINOR — Testamentary appointment of guardian by father—Joint and trust properties, right of appointing guardian to—Will, genuineness of—Burden of proof—Thirumaligai, whether private property** 766

— — — **PARTITION — Family temple, mode of partition of—Right of family members to perform ordinary worship in such temple.**

Under Hindu Law a place of worship, such as a private temple of a family, cannot be divided by metes and bounds so long as some of the family members desire its continuance.

The holders of such property are in the same position as the holders of an hereditary office and the only way of subjecting such property to partition is by means of a system of management by each member in rotation.

Even where the property is being enjoyed by rotation all members of the family are entitled to perform ordinary worship in the temple at any time, though it may not be their turn of management. **S SAKHAWATRAI v. PARTABRAI**, 9 S. L. R. 209 909

HINDU LAW—contd.

—PARTITION, *partial*—Suit for partition of properties reserved—Nature of proof—Burden of proof—Possession within 12 years prior to suit—Limitation—Findings to be arrived at on pleadings.]

In a suit for partition, if it is clear that there has been a partial partition, the burden of proof is on the plaintiff to show that there has been no partition of the properties of which partition is claimed.

It is also necessary that the plaintiff should show that he was either in possession at the date of suit or within 12 years prior to it. Adverse possession by defendants for 12 years prior to the institution of the suit bars the claim.

When the plaintiff makes a definite case of possession by himself in the plaint, he cannot be allowed to make in appeal an entirely new case of possession through co-sharers in order to save the bar of limitation.

It is extremely dangerous for a Court to arrive at a conclusion which is not in accordance with the case of either side, and each case must be fought upon the pleadings. **PAT SINGHESWAR MISSIR v. RAMESHWAR JHA** 456

—REVERSIONER—Loan raised by mortgage utilised in payment of widow's debts—Reversioner not found entitled to property mortgaged—Real owner, if bound by mortgage 673

—SALE—Mitakshara—Mortgage-decree against father—Execution sale—Right of sons to redeem—Avoidance of sale before redemption—Limitation Act (IX of 1908), Sch. I, Art. 12.

A decree on a mortgage against a Hindu father governed by the Mitakshara binds the sons' interest in the joint estate, even though the sons were not joined as parties to the suit.

Where, in execution of the decree, the property has been sold, the sons cannot exercise their right to redeem, if any, without first setting aside the sale within the time prescribed by Article 12 of Schedule I of the Limitation Act.

Quere.—Whether a Mitakshara son can sue to redeem, if he has been, deliberately and with notice of his existence, omitted from a suit upon a mortgage made by his father **PAT BHOLA JHA v. KALI PRASAD**, 1 P. L. J. 180

—SUCCESSION—Mitakshara—Adopted son, rights of, as compared with natural son—Interpretation of special texts of Hindu Law, rules for—Stridhan of widow, right of an adoptive step-son to inherit.

Under the Mitakshara Law adoptive and natural step-sons of a Hindu widow have equal rights of succession to her stridhan property as sapindas of her husband.

The text of Manu which says that "if among the wives of the same man one becomes mother of a son, by that son all of them become mothers of male children", does not operate to make the son of the husband by one wife the issue of the rival wife for the purpose of succession to her.

Obiter dictum.—Under the Hindu Law the rights of an adopted son in the family of the adopter, unless curtailed by express texts, are in every respect similar to those of a natural son.

Per *Mookerjee, J.*—The text of Vasistha which says that if after an adoption, a legitimate son be

HINDU LAW—contd.

born, then the adopted son shall obtain a fourth share, should not be extended to a son not comprised strictly within its letter and spirit.

A special text of Hindu Law forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it. **C GUNGADHAR BOGLA v. HIRA LAL BOGLA**, 20 C. W. N. 489; 23 C. L. J. 372 10

—SUCCESSION—Mitakshara—Bandhu—Grandfather's daughter's son's son, whether heir. A grandfather's daughter's son's son is a legal heir under the Mitakshara School of Hindu Law.

Per *Roe, J.*—Although the position of a bandhu in Mitakshara Law is based on consanguinity, it must still be supported by the right to offer oblations to a common ancestor. **PAT HARIHAR CHARAN v. JANG BAHADUR** 183

—Mitakshara—Daughter of uncle of last male owner, whether entitled to succeed

According to the Mitakshara system of Hindu Law, a daughter of the uncle of the last male owner is not entitled to inherit the property, even though there are no other heirs. **P BIBI SODHAN v. HARSA SINGH**, 51 P. R. 1916

—Mitakshara—Maternal uncle's son, if preferential heir to mother's sister's son.

A maternal uncle's son is a preferential heir as compared with the mother's sister's son. **A RAM CHARAN LAL v. RAHIM BAKHSH**, 14 A. L. J. 538 108

—Mitakshara—Reversioner—Burden of proof—Samanodakas, meaning of—Relationship, how far extends—Gotraja and Bandhu, contest between—Rule of preference—Appeal, second—Burden of proof, wrong view of—Remand.

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward as well as to satisfy the Court that to the best of his knowledge there are no nearer heirs. But he cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship.

The relationship of *samanodakas* extends only to the fourteenth degree and on authority well known for reasons of expediency it is not desirable to extend the meaning of the term to persons beyond the fourteenth degree of relationship to the deceased. A gotraja will not be preferred to a bandhu unless he is able to trace his descent from a common ancestor.

The decision of an appeal on a wrong view as to the burden of proof will entail a remand in second appeal. **M RAMA ROW v. KUTTIYA GOUNDEN**, 3 L. W. 331; 19 M. L. T. 275; 30 M. L. J. 514 294

—WIDOW—Co-widow's right to partition property—One co-widow, whether can alienate her share 675

—Rent-decree against widow—Execution after widow's death—Tenure in hands of reversioners, liability of, for sale—Bengal Tenancy Act (VIII B. C. of 1885), s. 65.

A tenure or holding in the hands of the reversionary heirs after the death of a Hindu widow remains liable in respect of decrees for its arrears of rent

HINDU LAW—contd.

obtained against the widow when she held it as heiress to her husband. ■ **ASHUTOSH MOOKERJEE v. AKHOY KUMARI DEBI** 581

— **WIDOW** — Settlement decree in favour of widow—Reversioners' right in property decreed in favour of Hindu widow at Settlement—Adverse possession against widow—Confiscation of proprietary rights in Oudh, effect of.

One G. and his ancestors were in possession of a village which they had obtained under a birt-deed from a taluqdar. After the annexation of Oudh, the first summary settlement was made with G. Thereafter G died and his interest devolved on his nephew S and on the death of the latter the entire family property devolved on his widows, R and M. R and M jointly with the widow of G claimed the village at the Regular Settlement on the strength of its having been granted to the ancestors of their husbands by the taluqdar. The Settlement Court granted them a decree subject to the rights of their co-sharers:

Held, that as all the three ladies lived jointly and the widow of G never set up any title adverse to R and M, her joint enjoyment of the property with them was not prejudicial to their interests:

Held, further, that the widows were given the village as representing ■ certain stock or body of proprietors with the details or particulars of which the Government did not care to concern itself, that the Settlement decree did not confer on them greater rights than they had before the confiscation, that their possession even after the decree was only as Hindu widows, and that the rights of reversioners were not prejudicially affected by the decree. ○ **GANESHA v. NAGESHAR BAKHSI SINGH**, 19 O. C. 1 257

— **WILL**—Dayabhaga School—Construction—Executory gift over—Period of distribution—Succession Act (X of 1865), s. 111.

Under the Dayabhaga School of Hindu Law ■ testator can attach, to an authority given by his Will to his widow to adopt a son to him, a direction that her estate should not be interfered with or divested during her life.

Section 111 of the Indian Succession Act (X of 1865) embodies the rule of construction of Wills enunciated in *Edwards v. Edwards*, (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 464. The rule has been considerably modified by later English decisions, and although the said Act has given it statutory force, the rule should be applied only to cases strictly coming within its scope and does not apply to ■ case where the testator mentions in his Will the event on the occurrence of which the distribution is to take place.

The Will of ■ Hindu governed by the Dayabhaga School of Hindu Law, after revoking all prior testamentary writings and appointing his wife as the sole executrix thereof, proceeded as follows: "I hereby authorise my said wife to adopt Dattaka Putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of

HINDU LAW—concl'd.

my sister Srimati Benodini Dassi who may be living at the time of my death."

There were two sons of the testator's sister living at his death. His widow, who had obtained Probate of the Will, adopted ■ son who predeceased her unmarried, and she herself died shortly thereafter:

Held, that the testator's estate vested in his widow ■ his legal representative and remained in her possession until her death; that the estate, which vested in the widow during her life, could pass only to the adopted son who survived her or in ■ of his death during her lifetime to his male issue if he left any; and that on her death the gift over (which was expressly declared to take effect after her death) to the testator's nephews took effect and his estate passed to them.

Held, also, that the event on the occurrence of which the distribution was to take place ■ distinctly mentioned as being the death of the widow and the gift over to the nephews was not affected by section 111 of the Indian Succession Act. P C **BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY**, 19 M. L. T. 97; 20 C. W. N. 169; 30 M. L. J. 110; 23 C. L. J. 169; 14 A. L. J. 167; 3 L. W. 252; (1916) 1 M. W. N. 73; 18 Bom. L. R. 347; 43 C. 432 892

— **WILL**, construction of—Gift to woman—Nature of interest conveyed—Presumption—Restraint on alienation void—Alienation by woman—Discharge of debts incurred in business—Estoppel—Representation which does not mislead—Evidence Act (I of 1872), s. 115.

In the absence of words of limitation, gifts to women in Hindu Law, with the exception of a widow, must be presumed to convey an absolute interest, unless there is something repugnant in the context.

There is no presumption that a Hindu woman, other than a widow, is incapable of taking anything more than a life-interest.

Where the main purpose of ■ Will is to bequeath an absolute estate of inheritance to a Hindu woman, terms which purport to create a perpetuity ■ to impose restraints on alienation repugnant to the estate created are inoperative and the Will is otherwise valid.

Under section 115 of the Evidence Act an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such ■ case the resulting conduct is in no sense the effect of his preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.

Per *Mullick, J.*—A bequest only of the income of a property creating something in the nature of a perpetuity must be, and is, void under the Hindu Law.

A Hindu widow can alienate property for the payment of debts incurred in the management of a business which forms part of the family estate. **PAT JAGANNATH PRASAD v. JAIKISHUN PRASAD**, 1 P. L. J. 16 375

HINDU WIDOW—Transfer of life-interest for value exceeding Rs. 100—Registration 748

HUNDI drawn at one place and accepted and dishonoured at another—Drawer and acceptor, arrangements between, effect of—Holder, position of—Acceptor and drawer both, suit against—Cause of action—Jurisdiction Civil Procedure Code (Act V of 1908), s. 20.

A hundi was drawn at Lucknow and was payable at Bombay, where it was accepted and then dishonoured. The holder instituted a suit against both the acceptor and the drawer at Lucknow. The acceptor's defence was that there was an understanding between himself and the drawer that the former was not to be liable on the acceptance unless the latter kept him supplied with funds and further, that the cause of action having accrued at Bombay where the hundi was accepted and dishonoured, the suit was not cognizable at Lucknow:

Held, that whatever arrangements there might have been between the drawer and the acceptor they did not affect the position of the holder, unless he had knowledge of that arrangement.

Held, further, that the suit having been brought not only against the acceptor, who after his acceptance became the principal debtor of the holder, but also against the drawer, who stood towards the holder in the relation of a surety, and a part of the cause of action for the suit against both of them having arisen out of the original contract of the hundi which was drawn at Lucknow, the Courts at Lucknow had jurisdiction under section 20, Civil Procedure Code, to try the suit. **O. JIWAN LAL DEOSAY v. OUDH COMMERCIAL BANK, LTD., LUCKNOW, 3 O. L. J. 132** 190

IMPROVEMENTS. See LEASE.

INCOME TAX ACT (II OF 1884) 198

INJUNCTION—Trade-mark, infringement of—Nature of relief 529

INSOLVENCY—Appointment of Receiver to realise assets and distribute among creditors—Suit by Receiver for recovery of debt due to insolvent, whether maintainable.

Where the managing partner of a firm which had suspended payments entered into an agreement with the creditors, in pursuance of which both parties executed a deed appointing eight persons as Receivers to realise the assets of the firm and distribute them among the creditors *pro rata*, and the Receivers so appointed sued to recover a debt due to the firm:

Held, that the tenor of the document and the purpose for which it was executed pointed to the conclusion that the property vested in the Receivers and that the insolvent had nothing whatever to do with it thereafter;

that, therefore, the Receivers had *locus standi* to maintain the suit. **P. PANNA LAL v. DHUMI MAL** 156

INTEREST—Demonstrative legacies, payment of interest on—From what time payable Rate of interest 157

—Penalty, stipulation by way of—Mortgage—Mortgagors ignorant cultivators—Interest at 75 per cent. per annum—Oral agreement making mortgagors individually liable, admissibility of 609

INTERPRETATION OF DECREE 344

INTERPRETATION OF STATUTE 48, 581

—Preamble of an Act, reference to, in interpreting enactment 450

—Technical matter 231

JALKAR—Fishery right, suit for recovery of—Limitation Act (IX of 1908), Sch. I, Art. 142.

Article 142 of the Limitation Act applies to a suit for recovery of possession of a *jalkar* on declaration of plaintiff's title thereto, where the question is whether the *jalkar* belongs to the plaintiff or the defendant as persons claiming to receive rent in respect thereof and which of them is entitled to collect the rent. **C. MADHAB CHANDRA MANDAL v. NAGENDRA NATH SEN** 841

JOINT FAMILY. See HINDU LAW.

JUDGMENT, written and signed by retired Judge, if good judgment 584

JUDICIAL DECISION Settlement Court decree—Admission of claim 755

JURISDICTION. See AGRA TENANCY ACT, s. 164; CIVIL PROCEDURE CODE, ss. 20, 21; CRIMINAL PROCEDURE CODE, s. 145; MADRAS ESTATES LAND ACT, s. 189.

—Civil Court—Distrain proceedings—Payment by *ryot* in possession under protest—Suit for recovery of amount thus paid against landlord and defaulting *ryot* 480

—Civil or Revenue Court—Suit for injunction restraining defendant from building on occupancy land—Punjab Tenancy Act (XVI of 1887), s. 77 (3).

A suit falling within the purview of section 77 (3) of the Punjab Tenancy Act must be heard by a Revenue Court whether or not, so far as the form of the suit or the particular remedy prayed for is concerned, the suit also falls within the purview of the Specific Relief Act.

Therefore a suit for a perpetual injunction that the defendants, being plaintiff's occupancy tenants, be prohibited from building houses on land forming part of the occupancy tenancy is cognizable by a Revenue Court only. **P. IBRAHIM v. AKBAR** 209

—Civil or Revenue Court—Suit for rent by zemindar as *ryotwari* owner—Permanent Settlement—Partible estate—Whether may be diminished or increased by agreement between zemindar and Government—*Ryotwari* assessment—Inam—Personal or private services—Government's right to resume inam—Relinquishment by inamdar—Resumption by zemindar—Effect of zemindar's ideas about his rights—Immaterial.

The area of a permanently settled partible estate may be diminished or increased by agreement between a zemindar and the Government, when the rights of third persons are not affected thereby.

There is nothing in law to prevent a zemindar from consenting to the Government imposing *ryotwari* assessment on the whole or portions of his *zemindari* lands, provided the existing rights of others in such lands are not affected thereby.

A suit by a zemindar as *ryotwari* owner for recovery of rent from his tenants is cognisable by the Civil Courts and not by the Revenue Courts. Per *Sadasiva Aiyar, J.*—Where the nature of the services to be performed by an inamdar are only personal or private to the zemindar, the burden of proving that the income therefrom was not included

JURISDICTION—concl'd.

when fixing the *jama* at the Permanent Settlement is on the person who sets up the Government's right to resume the *inam*, and in the absence of proof to the contrary, it must be held that the *inam* lands were not *lakhiraj*.

Where the *zemindar* himself resumes the lands when an *inamdar* executes the relinquishment deed expressing his inability to perform the services thereafter, the lands become ordinary *ryoti* lands of the *zemindari* estate. The *zemindar's* ideas about his rights cannot, however, alter the nature of the lands or his legal rights therein. **M. VARADARAJA APPA RAO v. GONEPALLE PUNNAYYA**, 30 M. L. J. 545; 19 M. L. T. 338 626

— Declaration, suit for, that defendant not under-proprietor 304

— Order of refusal to register document, whether amounts to refusal to register—Suit in Civil Court, maintainability of 769

— Pre-emption decree—Extension of time for payment 88

— Settlement Officer, powers of 385

— Suit by landlord to recover land let out for pasturing purposes 730

KARNATAK. See MALABAR LAW.

KARTA. See HINDU LAW.

KIDNAPPING. See PENAL CODE, s. 363.

LAND ACQUISITION ACT (I OF 1894), S. 53 263

LANDLORD AND TENANT—Claim for mesne profits by party succeeding in appeal—Set-off for rent due for period prior to decree and for period of landlord's possession, whether allowable 2

— Commutation of rent 935

— Co-sharer, lease from—Suit for rent—Tenant, if estopped from disputing right of co-sharer to receive rent 71

— Decree for rent and ejectment on default of payment of decree amount within specified time—Accrual of right to eject—Suit for subsequent rent—Acceptance of part-payment—Acknowledgment of tenancy—Waiver of right to eject—Estoppel—Evidence Act (I of 1872), s. 115.

Defendants obtained a decree against plaintiff on 8th April 1911 for rent of the years 1314 to 1317 *Aml* which directed that, in default of payment within a month, the plaintiff shall be ejected. The decree was executed and defendants were put into possession on 13th July 1911. On 30th April 1911 defendants instituted a second suit against plaintiff for rent for the year 1318 which became due in March 1911, and obtained a decree. Prior to the institution of this suit the plaintiff had made a part deposit of the latter claim in Court, which defendants accepted. Plaintiff instituted the present suit on 20th January 1912 for possession, on the ground that the defendants had waived their right to eject him by the proceedings in the second rent suit by which they acknowledged him as their tenant to the end of the year 1318.

LANDLORD AND TENANT—contd.

Held, that the defendants should be deemed to have waived the right to eject plaintiff, even though the right to eject did not actually accrue at the institution of their second suit and that it estopped the defendants from subsequently proceeding in ejectment in execution of the first rent decree.

Dubitante.—Whether having failed to plead waiver in the proceedings in execution of the ejectment decree the plaintiff could be permitted to plead it subsequently in a separate suit? **PAT MIDNAPORE ZEMINDARI CO. LTD., v. JOYRAM SANTAL**, 1 P. L. J. 185 918

— Diluvion—Claim for reduction of rent—Lease, construction of 464

— Easement, right of way—Acquisition of right on landlords' other lands 450

— Ejectment—Jurisdiction of Civil Court 803

— Ejectment of tenant for breach of condition—Bengal Tenancy Act (VIII of 1885), s. 155 (b), scope and applicability of—Bengal Tenancy Act (VIII of 1885), ss. 178, 179—Compensation to be ordered, whether breach capable of remedy or not.

In a suit under section 155 (b) of the Bengal Tenancy Act for ejectment of a tenant, if the breach complained of is capable of remedy, it must be remedied by the tenant; but whether it is capable of remedy or not, a sum is to be specified by the Court which will be reasonable compensation for the breach, and it is only if the tenant fails to deposit that sum within the time given, that the landlord can have his decree for ejectment.

Section 155 applies with full force, even where the suit for ejectment is brought by the landlord for breach of condition in a contract made before the passing of the Bengal Tenancy Act and even if there is a provision for re-entry by the landlord.

In a suit by a landlord for ejectment of his tenant, a declaration ought not to be given to the transferee of the tenant that he is to be regarded as the tenant.

Section 155 allows the deposit of compensation specified by the Court to be made not only by the original tenant, but by any person who is impleaded as a defendant in the landlord's suit in ejectment. **C. AFILADDI v. SATISH CHANDRA BANERJI** 497

— Landlord's purchase of occupancy holding—Co-sharer landlords—Purchasing landlord, when can preserve non-occupancy rights 75

— Landlord's refusal to grant rent receipts—Summary enquiry by Collector on tenant's application, whether prosecution of landlord—Discharge without award of compensation—Claim for compensation in Civil Court 149

— Lease—Covenant against alienation, voluntary or involuntary—Forfeiture for breach and re-entry by lessor Ejectment, suit for, of lessee's alienee—Alienee in possession under involuntary sale, whether tenant—Right to claim notice to quit under Transfer of Property Act or equitable provisions of section 155, Bengal Tenancy Act—Suit for ejectment by fractional landlord, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 142 836

LANDLORD AND TENANT—concl'd.

— Lease, unregistered—Admissibility in evidence to prove tenancy or terms—Payment of rent—Tenancy from year to year, inference as to—Holding over—Use and occupation, compensation for—Liability to pay on holding over—Transferability—Transfer of Property Act (IV of 1882), s. 6—Assent to tenant's continuance, if inferable from passive failure to eject—Intention to hold adversely, if necessarily follows holding over—Tenancy by sufferance, fiction of, if obtains in India 6

— Misuse of land by tenant—Breach of covenant—Notice demanding unconditional surrender—Ejectment, suit for 537

— Purchase of portion of tenant's non-transferable holding in execution sale—Deposit by purchaser of amount of subsequent rent-decree—Withdrawal by landlord—Acknowledgment of purchaser's interest, whether amounts to 337

— Sub-lease created by occupancy tenant—Ejectment of sub-tenant, suit by landlord for—Improvements, tenant's claim for—Award of compensation in decree or by executing Court—Planting trees, whether 'improvement' 248

— Thekadar, position of—Oudh Rent Act (XXII of 1886), s. 3 (10), (11).

As between a landlord and his *thekadar*, the latter is a tenant under section 3 (10) of the Oudh Rent Act; but as between the *thekadar* and the cultivating tenants, the former is a landlord under section 3 (11) of the Act, and the latter are his tenants, and not sub-tenants. **U P B R MATHURA PRASAD v. GANGA**, 3 O. L. J. 125 861

— Waste lands—Lease for pasturage—Lessee, whether 'ryot'—Right of occupancy—Burden of proof—Suit for ejectment—Jurisdiction of Court—Madras Estates Land Act (I of 1908), ss. 3 (16), 6 (4), 189.

Where waste lands in an estate have not been cultivated for years but have been used for pasturing cattle, the presumption is that they belong to the *zemindar*, and the onus of proving either that they are cultivable or that occupancy rights have been acquired therein lies on the party asserting it.

A lessee of waste land let out for pasturing or grazing purposes is not a 'ryot' within the meaning of clause 6 (4) of the Madras Estates Land Act and a suit to eject him is cognizable, not by a Revenue Court under section 189 of the Madras Estates Land Act, but only by a Civil Court. **M MAHARAJA OF VENKATAGIRI v. VELIKANTI RAMI REDDI**, (1916) 2 M. W. N. 21; 31 M. L. J. 211 607

LEASE. See CONSTRUCTION OF LEASE; LANDLORD AND TENANT.

— Agreement to trade in particular place—Public policy—Kabuliat registered—Rent reserved, action for—Limitation Act (IX of 1908), Sch. I, Arts. 110, 116 754

— Agricultural lease—Lease for planting casuarina trees—Registration 539

—, construction of—Lessees to enjoy *phal phul* of trees—Reservation of lessor's right to ownership in

LEASE—cont'd.

trees—License, whether includes right to grow shellac—Circumstances at date of lease, enquiry into.

A lease executed by plaintiffs to defendants provided *inter alia* that the lessees were to enjoy the *phal phul* of the trees, and the lessors were to have *khas* possession of the same. It was proved that, from before the date of the lease, the lessees grew shellac upon the trees and enjoyed the results thereof. In a suit by plaintiffs for restraining defendants from interfering with their right to cultivate shellac:

Held, that the license to enjoy *phal phul* included the growing of shellac on the trees and that plaintiffs were not entitled to the injunction.

Per Sanderson, C. J.—The expression '*phal phul*' (fruits and flowers) of the trees would, in the ordinary meaning of the words, include the natural products of the trees only, and *prima facie* the artificial cultivation of lac would not be included in the terms of the license. The circumstances, however, existing at the date of the lease should be looked at for the purpose of construing the words, and, so viewed, the words may have been intended to have a wider meaning than the English words 'fruits and flowers.'

Per Woodroffe, J.—On the construction of the lease itself, the expression *phal phul* would include produce of the trees other than the particular flowers and fruits of the trees itself. And the plaintiff is not entitled to the injunction as the lease did not reserve to the landlord the right of cultivation claimed, and the reservation of the trees is not a reservation of such right to cultivation. **C RAI CHARAN v. KANAI KAMAR**, 24 C. L. J. 21 72

—, covenant against transfer in—Proviso for re-entry after notice on breach of covenant—Transfer by lessee of major portion of property—Ejectment, suit for, without notice to quit—Maintainability—Transfer of Property Act (IV of 1882), ss. 10, 12, 106, 110 (g).

A covenant in a lease forbidding transfer by the lessee is valid and enforceable even when the lessee has not transferred the whole of the property leased but reserved a fraction for himself. But if the lessor has undertaken to determine the lease on breach of the covenant by the lessee only after giving him notice in accordance with law, the lease cannot be determined without a notice under section 106 of the Transfer of Property Act. **C UMESH CHANDRA GHOSE v. KALA CHAND GUHA** 516

— Circular No. 16 of 1874—Heritable lease—Ejectment by notice.

Leases granted under Circular No. 16 of 1874 are heritable leases, and a tenant holding under such a lease cannot be ejected by notice. **U P B R MAHADEO PRASAD v. AJODHYA PRASAD**, 31 O. L. J. 218 760

— Improvements—Lease invalid—Compensation for improvements—Transfer of Property Act (IV of 1882), s. 108 (b)—Fraud, averments of—Pleadings—Practice.

Per Seshagiri Aiyar, J.—A lessee coming upon a property under a lease which is found to be invalid is only entitled to have any superstructure erected by him removed and not to compensation, by virtue of the principle of section 108, Transfer of Property Act.

LEASE—concl'd.

Per *Coutts Trotter, J.*—No claim for compensation can be made, except in the case of fraud, namely, if the persons really entitled knew that they were entitled and the persons in actual possession were not, and stood by and allowed them to spend money in building on the land.

An allegation of fraud must be made definitely and categorically in the pleadings, and must, in no circumstances, be allowed to be made at a subsequent stage of the suit. ■ **GOVINDASAMI NAIDU v. ETHIRAJAMMAL**, (1916) 1 M. W. N. 180 1

— to mortgagor—Stipulation for rent—Sale to third party—Possession with vendor-mortgagor—Suit for account against mortgagor and purchaser, whether maintainable 701

— Notice to quit, issue of, on behalf of some of joint owners—Tacit assent of other co-owners—Notice, whether sufficient 56

— Tenancy, character of, as shown by lease, if conclusive against sub-tenant—Renewal of lease, option of—Terms undefined, unenforceability of 92

— Unregistered lease of coal mine reciting conveyance of moveable property also for Rs. 12,500—Admissibility in evidence with regard to moveable property—Document admissible for collateral purpose, whether can be used to establish title 542

LEGAL NECESSITY. See HINDU LAW.

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 6 360

— S. 13—Pleader—Misconduct—Instructions from unauthorized person without enquiry.

A Pleader, who receives instructions from an unauthorized person, who is neither the recognized agent of the party for whom he is retained, nor the guardian, servant, relative or friend of such party authorized to give instructions on his behalf, without making proper enquiry, is guilty of misconduct under section 13 of the Legal Practitioners Act. **PAT JUGAL CHANDRA**, *In the matter of*, 20 C. W. N. 1016. 17 Cr. L. J. 229 645

LETTERS OF ADMINISTRATION, grant of, to Administrator-General without his application or that of party—Illegality 99

LICENSE—Lessees to enjoy *phul phul* of trees—Right, if includes right to grow shellac 72

— coupled with a void grant—Licensee, whether trespasser—Revocation of license, when valid—Adverse possession, nature of 471

LIMITATION—Declaratory suit—Revenue Registers, entry in, adverse to plaintiff's title 775

— Fraud pleaded in defence to an action 37

— Suit for breach of contract included in a *zarpeshgi* lease—Civil Procedure Code (Act V of 1908), O. II, r. 2 (2)—Limitation Act (IX of 1908), Sch. I, Art. 116.

The plaintiff executed a *zarpeshgi* of a lease-hold at a rental of Rs. 241 in favour of the defendant for a term of 9 years, which provided that the defendant was to pay the rent payable to the superior landlord and to apply the balance of the rental fixed

LIMITATION—concl'd.

in liquidation of the mortgage-debt and on the expiry of the 9 years there was to be a mutual adjustment of accounts, upon which the plaintiff would pay any amount which might be due to the defendant under the *zarpeshgi* (mortgage). The defendant failing to pay the rent to the superior landlord, the latter obtained a decree for rent against the plaintiff and in execution sold the property on 23rd November 1904. The term of the *zarpeshgi* expired on the 13th April 1905, and on the 11th April 1908 the plaintiff brought a suit for adjustment of accounts against the defendant which was decreed in part. The present suit for damages for the loss occasioned by the execution-sale in consequence of non-payment of rent by the defendant was brought ■ the 11th April 1911:

Held, that the suit was barred: if treated as founded on the mortgage, it was barred by Order II, rule 2 (2), Civil Procedure Code, the present claim not having been included in the previous suit for adjustment of accounts; if treated as ■ suit for compensation for breach of contract, it was barred by limitation as the contract to pay the head-rent must be taken to have been broken on the date of the execution-sale, if not earlier.

A statement made in a previous suit by ■ party that he reserved the right of bringing another suit for damages, cannot prevent the operation of the rule of limitation or of Order II, rule 2, Civil Procedure Code. **C. TARAN KRISHNA BHOWMIK v. SAMIRUDDIN** 51

LIMITATION ACT (XV OF 1877), Sch. II, Art. 120—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900)—Joint Hindu family—Alienation by father—Suit by son contesting it—Alienation and alienor's death prior to 1900—Limitation.

A suit by a Hindu to declare that ■ sale of ancestral land by his father does not bind him, is governed by Article 120 of the Limitation Act, 1877, where both the alienation and the alienor's death occurred before the passing of the Punjab Limitation (Ancestral Land Alienation) Act, I of 1900. **P. MANGAL SINGH v. MANGAL SINGH**, 15 P. W. R. 1916 253

LIMITATION ACT (IX OF 1908), S. 5 556

— Ss. 5, 12, Sch. I, Art. 156—Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal from decree—Decree prepared after judgment—Judgment deferring preparation of decree till payment of penalty—Limitation, starting point for.

Where a Court gives a judgment but refuses to give a decree till the successful party complies with a certain condition, the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment, which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which limitation runs.

Where, therefore, a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid and the decree was actually signed three months after the judgment on the day when the penalty was paid:

LIMITATION ACT—(1908)—contd.

Held, that time commenced to run, for the purpose of appeal, from the date of the decree. **S KHUDADAD v. MORIOKHAN**, 9 S. L. R. 193 **867**

— S. 5—*Appeal presented after time—'Sufficient cause'—Review of judgment, deduction of time occupied in—Practice.*

It is not always a 'sufficient cause' for presenting an appeal after time that the appellant was unsuccessfully prosecuting an application for review of the judgment appealed against.

Whether the time occupied in proceedings for review may be deducted for admitting a belated appeal depends on the circumstances of each particular case.

It is common practice to file an appeal as well as an application for review. Where the application for review related to a small matter, the acceptance of which would not have rendered unnecessary an appeal, or where it must have been obvious to the appellant that the review petition could not be disposed of within the time limited for appeal, Courts will be slow to excuse the delay in filing the appeal. **PAT DWARKA SINGH v. LAYAKAT ALI KHAN** **44**

— S. 10—*'Legal representatives or assigns'—Successor in office of trustee, whether legal representative of former trustee—Adverse possession—Trust property—Acts of ownership while office of trustee vacant—Appointment of trustee—Suit for possession—Limitation.*

A trustee succeeding to the office of a deceased or retiring trustee is not the 'legal representative or assign' of the latter within the meaning of section 10 of the Limitation Act.

There can be no adverse possession of trust property while the office of trustee is vacant, as there is then no person who is capable of taking proceedings to protect the trust property. And a trustee appointed to the office can maintain a suit for possession at any time within 12 years from the date of his appointment. **M MANIKKAM PILLAI v. THANIKACHALAM PILLAI**, (1916) 2 M. W. N. 87 **945**

— S. 12 **867**

— S. 12 (2)—*Central Provinces Courts Act (II of 1904), s. 8 (1) (c), rule 26 under—Appeal—Limitation, computation of time for—Copyists' rules—Time requisite for obtaining copies—Requisition for appearance to take steps to secure copies—Default, deduction of day of.*

The 'time requisite for obtaining a copy of the decree' in section 12 (2) of the Limitation Act does not include the day or days on which, under the rules regulating the grant of copies, the applicant is required to appear but fails to appear to take steps to secure the copy, and such days cannot be excluded in computing the period of limitation for an appeal. **N LACHMAN v. KALYA**, 12 N. L. R. 66 **458**

— S. 19 **205, 606**

— S. 19—*Application for execution, when a continuation of a prior application* **27**

— S. 20 **606**

— S. 28—*Unenfranchised inam attached to village office—Adverse possession—Prescriptive title, acquisition of.*

LIMITATION ACT—(1908)—contd.

If an inam granted for service is trespassed upon by a stranger before its enfranchisement and held adversely for the statutory period, the holder acquires a title to it by prescription under section 28 of the Limitation Act. **M DINVAHI LAKSHMIPATI v. PINGALI NARASIMHAN**, (1916) 1 M. W. N. 473; 3 L. W. 590 **898**

— S. 31 **475**

— SCH. I, ART. 12 **288**

— SCH. I, ARTS. 14, 120—*Application for partition of shamilat rejected—Subsequent suit for declaration of title to proportionate share in shamilat—Limitation.*

The ancestors of the defendants sold a part of their estate to the plaintiffs' ancestors in 1863 and put them in possession. Having sold the remaining estate to other persons in 1884-85 they left the village.

In 1908 the plaintiffs applied for partition of the shamilat but the Revenue Officer rejected the application in 1909. Thereupon they brought the present action in 1912 for a declaration of their title to a proportionate share of the shamilat area:

Held, that the suit was governed by Article 120 and not Article 14 of the Limitation Act **P KALU KHAN v. UMDA**, 47 P. R. 1916 **546**

— SCH. I, ARTS. 30, 31 **130**

— SCH. I, ART. 44 **85**

— SCH. I, ART. 44—*Guardian and minor—Fraudulent sale by guardian, only voidable—Minor's right to possession, extinction of, after bar of right to avoid sale.*

A sale of a minor's property by his guardian in fraud of his rights is only voidable. It is valid until avoided by the minor within 3 years on attaining majority under Article 44 of the Limitation Act. When his right to avoid the sale has become barred by limitation, his right to recover possession of the property is gone. **C KRISHNA DHONE v. BHAGABAN CHANDRA** **188**

— SCH. I, ART. 48 **751**

— SCH. I, ARTS. 49, 115, 145—*Suit to recover gold delivered to goldsmith to make ornaments—Limitation.*

The limitation of 30 years from the date of deposit under Article 145 of the Limitation Act is applicable to a suit against a depository to recover moveable property even when the property is not recoverable in specie.

Where the plaintiff made over to a goldsmith gold ornaments to be melted and made into new ornaments, without fixing the time within which the work was to be finished, and failing to get the ornaments on repeated demands, instituted a suit for the return of the gold or its price:

Held, that the suit was governed by Article 145 of the Limitation Act, that even if Article 145 did not apply, Article 49 or Article 115 applied and that limitation began to run from the date on which the goldsmith wrongfully refused to do the work. **C GANGAHABI CHAKRABARTI v. NABIN CHANDRA BANIKYA**, 20 C. W. N. 232; 23 C. L. J. 145 **959**

— SCH. I, ART. 58 **250**

LIMITATION ACT—(1908)—contd.

— — — SCH. I, ART. 60

347

— — — SCH. I, ARTS. 62, 116—*Mortgage—Mortgagor receiving rents—Suit by mortgagee to recover rents received by mortgagor, nature of—Money had and received—Breach of contract—Damages—Mesne profits—Practice*

The defendant mortgaged certain holdings to the plaintiff. The plaintiff lived some distance away and the rents were collected by a relation of his. After the death of the relation the defendant collected the rents and thereby became possessed of the property. The plaintiff sued for possession and claimed rents received by the defendant from the mortgaged property from time to time during the last three years immediately preceding the suit. The defendant contended that the action for rent wrongfully received by him was barred because the rents had been received for more than six years:

Held, that Article 62 of Schedule I to the Limitation Act, 1908, applied to the case and the suit was not barred, inasmuch as each time the defendant received rent he committed a breach of contract.

Held, also, that the plaintiff might have claimed in several distinct causes of action, although combined in one suit, all the rents received within six years of the suit inasmuch as each receipt was a separate breach of the mortgage contract or money received to his use.

Semle.—Where a mortgagor having no shadow of right to take the rents of the mortgaged property realizes such rents he commits not only tort but also a breach of contract.

Damages for a wrong can only be claimed once, and the cause of action accrues at the date of the wrong. But if another person receives money which rightly belongs to a third person, that third person has a right to sue him each time it occurs as it is not damages at all but money had and received within the meaning of Article 62 of the Limitation Act.

In such cases the practice of framing claims for general damages for the original breach of the contract by dispossession is attended with serious risks to the litigant and Pleders would be well advised to frame their claims for what they are in substance, namely, money wrongfully received from time to time as defined by Article 62 of the Limitation Act or as successive breaches of contract under Article 116 of the Act. **A HARPAL v. RAM SARUP** 173

— — — SCH. I, ART. 110

754

— — — SCH. I, ART. 115

130, 959

— — — SCH. I, ART. 116

51, 173, 754

— — — SCH. I, ART. 120

546

— — — SCH. I, ART. 120, *non-applicability of, where consequential relief is asked for—Limitation, running of, against person in possession affected by adverse entry in Record of Rights.*

Article 120 of the Limitation Act is applicable to suits for declaratory reliefs but not to suits for declaration of title in which consequential reliefs are also prayed for.

In a suit for declaration of title to land a prayer for injunction upon the defendant is a prayer for

LIMITATION ACT—(1908)—contd.

consequential relief quite as much as a prayer for confirmation of possession.

In regard to a suit for declaration of title to land in the possession of the plaintiff against whom an adverse entry has been made in the Record of Rights, time does not begin to run against him under Article 120 of the Limitation Act unless an actual claim is made by the defendant upon the strength of the entry. **C DINA NATH DAS v. RAM NATH DAS**, 23 C. L. J. 561 702

— — — SCH. I, ARTS. 120, 144 — *Suit by landlord to dispossess alienee of occupancy rights—Period of limitation.*

A suit by a landlord to dispossess a person to whom occupancy rights in the land in suit have been sold is governed by Article 120 and not Article 144 of the Limitation Act, and may be brought within six years from the date of the sale. **P LABHA v. TELSI**, 1 P. R. 1916 REV. 523

— — — SCH. I, ART. 120—*Suit by mortgagee for declaration of his title—Mutation in his favour refused—Starting point of limitation.*

Where on the refusal of the Revenue Authorities to sanction mutation of the land in suit in his name, the mortgagee sued for a declaration of title:

Held, that the period of limitation began to run against him from the date of the denial of his right in mutation proceedings and the fact that the suit was brought in compliance with the requisition made by the Revenue Court under section 98 of the Punjab Tenancy Act, did not affect the question of limitation;

(2) that the suit having been brought more than 6 years after the date of the denial was time-barred. **P KALU v. RAM LAL**, 71 P. L. R. 1916; 91 P. W. R. 1916 958

— — — SCH. I, ART. 126

794

— — — SCH. I, ART. 132

475, 704

— — — SCH. I, ART. 134

244

— — — SCH. I, ART. 135

475

— — — SCH. I, ARTS. 138, 142 — *Mortgage-decree—Execution sale—Purchase by decree-holder—Suit for possession—Decree fraudulent, whether can be pleaded in defence—Claim based on possession and subsequent dispossession—Finding against plaintiff's possession within 12 years of suit—Dismissal of suit under Art. 142—Appeal—Limitation, new point of—No bar from date of confirmation under Art. 138—Estoppel for inconsistent positions, rule of, applicability of.*

When a suit for possession by a purchaser at a sale in execution of a mortgage-decree, based on the allegation that soon after obtaining possession he was dispossessed by the judgment-debtor, is dismissed on the finding that he was never in possession within 12 years of suit and that his claim was barred under Article 142 of the Limitation Act, it is open to the plaintiff to urge in appeal that his suit was within time, computing it from the date of confirmation of sale under Article 138.

The principle of estoppel by reason of inconsistent positions does not apply to such a case. The plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove.

LIMITATION ACT—(1908)—contd.

The point of limitation can be taken at any stage.

The judgment-debtor can resist such a suit on the ground that the decree in execution of which the plaintiff became the purchaser was fraudulent, where the decree-holder himself purchased the property, and the Court is bound to go into that question.

PAT BANKEY BEHARY LAL v. BHAGWAN DAS MARWARI 897

— — SCH. I, ART. 142 833, 841, 897

— — SCH. I, ART. 144 244, 523

— — SCH. I, ART. 145 959

— — SCH. I, ART. 148 244

— — SCH. I, ART. 156 867

— — SCH. I, ARTS. 165, 181—"Person" in Art. 165, whether includes judgment-debtor—Execution of decree—Judgment-debtor dispossessed of land outside decree—Remedy of judgment-debtor—Application for restoration of possession—Period of limitation—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 100—Interpretation of Statute—Technical matter.

An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights under the decree is a question arising between the parties to the suit within the meaning of section 47 of the Civil Procedure Code.

Therefore, if in execution of a decree for possession of land, a judgment-debtor is dispossessed of land which is outside the decree, his only remedy is an application for restoration of possession under section 47 and if he does not avail of this remedy he loses his land, inasmuch as he cannot bring a separate suit.

The period of limitation for such an application by the judgment-debtor is 3 years under Article 181 and not 30 days under Article 165 of the Limitation Act, inasmuch as the word "person" in the latter Article is not used in any other sense than that of a person who can make an application under Order XXI, rule 100, Civil Procedure Code, and, therefore, does not include a judgment-debtor.

In a technical matter, when the language relied upon does not cover the case, it is of the highest importance to realise the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation, unless it is driven to do so by the irresistible force of language. **A ABDUL KARIM v. ISLAMUNNISSA BIBI**, 14 A. L. J. 40 ; 38 A. 339 231

— — SCH. I, ART. 166 774

— — SCH. I, ART. 181 231

— — SCH. I, ART. 182—Civil Procedure Code (Act V of 1908), s. 37—Execution of decree—Decree passed against two defendants and affirmed in appeal preferred by only one defendant—Execution against non-appealing defendant—Limitation—Transfer of decree, non-recognition of, by Court—Right of decree-holder to execute.

Where a single decree is passed against two defendants, and is affirmed on appeal by one of

LIMITATION ACT—(1908)—concl'd.

them, time commences to run, even as against the non-appealing defendant, from the date of the appellate decree.

Quære.—Whether, when the decree of the first Court consists of two definitely independent decrees, an appeal against one of them would prevent time from running as against the other?

Till the transfer of a decree is recognized by Court, the decree-holder on record has the right to apply for its execution. **M ARI CHETTY v. THEERTHAMALAI CHETTY**, 3 L. W. 521 791

— — SCH. I, ART. 182—Decree—Execution, application for—Appointment of Commissioner to take accounts and help in preparing decree—Decree signed after Commissioner's report—Starting point—Limitation.

A decree for redemption was passed on 27th July 1909. The District Judge appointed a Commissioner to find out the exact sum to be paid in redemption, though that was only a matter of official routine. He actually signed the decree on 23rd February 1910. The defendant applied on 29th January 1913 to execute that portion of the decree which awarded to him costs payable by the plaintiff.

Held, that time commenced to run from the date when the decree was pronounced on 27th July 1909 and that the application was barred. **PAT SURAJ DEO NARAYAN SINGH v. MUSHAHROO RATT**, 20 C. W. N. 950 504

— — SCH. I, ART. 182—Transfer of Property Act (IV of 1882), s. 58—Mortgage-decree—Execution—Decree absolute, prayer for, absent in application—Prayer for sale, if implies prayer for making decree absolute.

A mortgage-decree was passed on 6th July 1901. The first application for execution was made on 6th July 1904, but this did not contain a prayer for making the decree absolute. The next two applications were made on 22nd March 1907 and 23rd September 1909 and these contained a prayer for a decree absolute. The next application was on 5th July 1910, but this contained only a prayer for sale. Every one of the above applications was returned for amendment and not re-presented. The last application was made on 5th July 1913 and this too did not contain a prayer for making the decree absolute.

Held, that a prayer for sale implied also a prayer for making the decree absolute and that the application was not barred by limitation. **M NATESA UDAYAN v. ANNASAMI UDAYAN**, 3 L. W. 468 756

— — SCH. I, ART. 182 (5) 625

LUNACY ACT (XXXV OF 1858) 428

LUNATIC—No guardian *ad litem* appointed—Decree passed—Sale of lunatic's property in execution of such decree—Sale, validity of—Lunatic's right to resist purchaser's suit for possession—Lunacy Act (XXXV of 1858) 428

LUNATIC'S PROPERTY—Certificated guardian, sale by—District Court, previous permission of, not obtained—Sale-money applied in extinguishing previous mortgage by lunatic—Recovery of property, suit for, by sons—Sons bound to pay sale-money—Equity.

LUNATIC'S PROPERTY—concl'd.

The plaintiffs sued to recover their share of the property belonging to their lunatic father, which had been sold by his certificated guardian without the previous permission of the District Court. It appeared that the sale-money was applied to extinguish a mortgage on the property formerly made by the father:

Held, that the plaintiffs were entitled to recover the share in suit, but were at the same time bound in equity to pay a proportionate share of the sale-money applied to extinguish the previous mortgage.

○ MATA GHULAM v. RAJPAL SINGH, 3 O. L. J. 173

422

MADRAS ABKARI ACT (I of 1886), S. 3 (1)—'Abkari' includes ganja—Abkari license, general conditions of, whether applicable to ganja—Contract Act (IX of 1872), s. 23—Transfer and sub-letting of ganja license—Illegality.

The term 'abkari' in the Abkari Act includes ganja and the conditions of an abkari license apply to ganja also, even though they do not specifically and in terms refer to the latter.

Where one of the conditions of an abkari license prohibits vending, transferring or sub-letting of the license, an agreement sub-letting the right to vend ganja is illegal and unenforceable. M NAMASIVAYA KURUKKAL v. SUBRAMANIA AYYAN

927

MADRAS CITY MUNICIPAL ACT (III of 1904) S. 247—Erection of fence in private street—Obstruction—Power of Corporation to order removal—Acquisition of portion of private street by Corporation—Connection with public street—Statutory powers of Corporation.

The Madras Corporation acquired a house at the end of a private street, demolished it and connected it with the public street close by. The plaintiff, the owner of the private street, put up demarcation stones to prevent access by the public to the unacquired portion of the private street. The Corporation, in the exercise of its powers under section 247 of the Madras Municipal Act, ordered the plaintiff to remove the stones. The plaintiff instituted the present suit for a declaration of his right to keep the stones and for an injunction restraining the Corporation from directing their removal:

Held, that the plaintiff's action contravened section 247 of the City of Madras Municipal Act and the Corporation acted within its powers in ordering the plaintiff to remove the stones put up by him.

Per Phillips, J.—The powers given by section 247 of the Madras Municipal Act are for the purpose of promoting the health, safety and convenience of the public and should be strictly construed. The plaintiff, by putting up the stones, erected an obstruction on his private street within the meaning of the section.

Per Wallis, C. J., *dubitante*.—The putting up of stones by the plaintiff is not an obstruction as they do not obstruct any one's lawful right of passage; they are only a boundary fence, but under the express language of section 247, the Corporation was justified in directing their removal.

Per Curiam.—The Corporation, by their purchase of the house, did not acquire for the public any

MADRAS CITY MUNICIPAL ACT—concl'd.

further right than that of access to the house as an easement of necessity as had been previously enjoyed and the plaintiff was entitled to restrain the public from trespassing to the same extent to which he was before entitled. M RUDRAPPA ACHARY v. CORPORATION OF MADRAS, (1916) 1 M. W. N. 394

735

MADRAS ESTATES LAND ACT (I of 1898), S. 3 (1), (15), (16)—'Agriculture,' meaning of—'Rent,' whether includes pasturage dues—Tenant holding land merely for pasturing purposes, whether a ryot—'Cultivable' land, meaning of—'Jeroyati,' meaning of—Suit by landlord to recover land let out for pasturing purposes—Jurisdiction.

The ordinary meaning of 'agriculture' is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc.

Although an extended meaning is sometimes given to the word by special definitions, yet there is a clear intention on the part of the Legislature not to include 'pasture' in the definition of the term 'agriculture' as used in section 3 (1) of the Madras Estates Land Act.

A tenant holding land merely for pasturing purposes does not become a ryot within the meaning of section (3), clause (15), of the Estates Land Act, although the use of the land solely for pasture does not deprive him of his claim to be called ryot provided that he has the right to use it for agriculture.

Unless the land is of such a nature that it is ordinarily cultivable or cultivable at intervals of not unusual length, it is not 'cultivable' land within the meaning of section 3, clause (16), of the Act and, therefore, not ryoti land, and the tenant of such land is not a ryot.

'Rent' under the definition in clause (1) of section (3) of the Estates Land Act is what is payable for the use of land for purposes of agriculture and does not include pasturage dues; consequently a suit therefor is not exempted from the cognizance of Civil Courts.

The term *jeroyati*, as used in some parts of the Telugu country, means merely 'non-inam'.

Where, therefore, land (not being the zemindar's private land) was let out to a tenant for pasturing purposes, and the landlord sued to recover the land:

Held, that the suit was cognizable by a Civil and not a Revenue Court. M RAYU SESHAYA GARU v. RAJAH OF PITTAPUR, 3 L. W. 485; (1916) 1 M. W. N. 396; 31 M. L. J. 214

730

— S. 3, sub-s. (2), cls. (c), (d)—'Jagir' and 'inam,' distinction between—Grant of revenue of lands for subsistence by Nawab of Carnatic, whether inam—Kudivaram and melvaram vested in inamdar—Landlord and tenant—Suit in ejectment—Jurisdiction of Civil Court.

Jagirs, unlike inams, were usually granted for life, though, in course of time, they also became permanent and heritable. An inam was a present or gift either to an individual or for a public purpose, while jagirs generally implied conditions of service or a reward for service.

A grant of land revenue made by the Nawab of the Carnatic to a member of his family for subsistence is not a 'jagir,' though termed such

MADRAS ESTATES LAND ACT—contd.

in the deed of grant, but is only **inam** within the meaning of section 3, sub-section (2), clause (d), of the Madras Estates Land Act.

Where in such **inam**, the **kudivaram** and **melvaram** interests became subsequently vested in the **inamdar** and the tenants who were admitted into possession before the passing of the Estates Land Act did not acquire occupancy rights:

Held, in an action to eject the tenants, that the **inam** fell within the exception to section 8 of the Act and ceased to form part of an 'estate' and the suit was cognisable by **Civil Court**.

Per *Srinivasa Aiyangar, J.*—The word 'recognised' in section 3 of the Madras Estates Land Act implies something more than mere acquiescence; it means something done by the Government, as, for instance, by acceptance of service, *jodi*, &c. **M. SAM v. RAMALINGA MUDALIAR**, 30 M. L. J. 600 **803**

— — — Ss. **■** (16), 6 (4) **607**

— — — Ss. 6 (6), EXPL. **■** (1), scope of—Government land in occupation of zemindar in exchange for zemindari land acquired under Land Acquisition Act—Whether held as ryot or as landholder.

The general provisions of section 8 (1) of the Madras Estates Land Act must yield to the special provisions of the explanation to clause (6) of section 6 of the Act, on the principle *generalia specialibus non derogant*.

Where, therefore, a **zemindar**, who as **■** Government **ryot** had a right of occupancy in the suit, lands got those lands in exchange for his own **zemindari** lands acquired by the Government under the Land Acquisition Act:

Held, that he did not lose his occupancy right by becoming interested in the lands as **■** land holder. **M. ZAMINDAR OF SANIVARAPPET v. ZAMINDAR OF SOUTH VALLURU** **444**

— — — S. 8 (1), **444**

— — — Ss. 15, 16 **730**

— — — S. 40—Landlord and tenant—Commutation of rent, principles applicable to—Discretion of Court.

Section 40 of the Madras Estates Land Act gives **■** right to an occupancy tenant to sue for commutation of rent. It is not a matter resting within the option of the landlord, but is in the discretion of the Court to allow or refuse.

A landlord cannot insist on the continuance of paddy rent because he requires periodically a certain quantity of paddy for home consumption. If it is to the convenience of both parties, the commutation of grain into money rent will be sanctioned, especially when the tenant will be thereby enabled to grow any crops of any quality that he chooses. **MAD B R GOPALA KRISHNA AIYAR v. SRINIVASA ROW SAHIB** **935**

— — — Ss. 122, 128, 189, 213, SCH. A, ART. 21—

Distrain proceedings—Arrears of rent—Sale of holding not belonging to defaulting ryot—Payment by ryot in possession under protest—Suit for recovery of amount thus paid against landlord and defaulting ryot—Jurisdiction of Civil Court—Scope of ss. 128, 213—Contract Act (IX of 1872), ss. 69, 72.

Per *Seshagiri Aiyar, J.*—A **ryot** whose land has been sold for arrears of rent due by another **ryot** and who has paid the amount to avoid the sale, can

MADRAS ESTATES LAND ACT—concl'd.

recover it by suit both from the landlord and the defaulting **ryot**. The action is not one for damages but for money had and received under section 69 of the Contract Act and is cognizable only by a Civil Court. The restrictive language of section 213 of the Madras Estates Land Act does not take away this right.

Section 128 of the Madras Estates Land Act permits a third party, whose property has been attached, to protect that property by paying the arrears due on it, and applies both to derivative owners, as mortgagees, and independent owners who can institute other proceedings under clause (2) of the section.

The object of section 213 of the Madras Estates Land Act is to give a summary remedy to those against whom irregularities in procedure have been committed. The section does not cover cases where there is no power in the landlord to invoke the aid of the Act against an individual.

Per *Bakewell, J.*, (dissenting).—The only other remedy, besides the charge reserved by section 128 of the Madras Estates Land Act to a tenant who pays money under protest to avoid a wrongful sale of his holding, is a suit for repayment of money paid under coercion under section 72 of the Contract Act as damages. Such **■** suit is cognizable only by a Revenue Court either under section 189 and Article 21 of Schedule A or under section 213 of the Madras Estates Land Act. **M. RAJA OF VIZAYANAGARAM v. POOSAPATI APPALA**, 3 L. W. 517; 19 M. L. J. 374; (1916) 1 M. W. N. 391 **480**

— — — S. 128 **480**

— — — S. 189 **354, 480, 607**

— — — Ss. 189 (2), 205—Civil Procedure Code (Act V of 1908), s. 2 (2)—Commutation of rent, proceedings for—Collector's note expressing opinion as to commutation—Appeal—Board of Revenue, powers of.

A mere expression of opinion in **■** Collector's note that the question of commutation of rent need not be considered as it was already settled, is not an order under section 40 appealable under section 189 (2) of the Madras Estates Lands Act.

Where, however, the District Collector wrongly entertains an appeal, it is open to the Board of Revenue, even in the absence of **■** second appeal, to pass appropriate orders under section 205 of the Act. **MAD B R ANDI THEVAN v. Zemindar of SIVAGIRI** **460**

— — — S. 205 **460**

— — — S. 213 **480**

— — — SCH. A, ART. 21 **480**

MADRAS TOWNS NUISANCES ACT (MAD. III OF 1889), Ss. 6, 7—Gambling in common gaming house, conviction for—Appeal—Appellate Court finding of—Not common gaming house—Re-trial, propriety of order for—Criminal Procedure Code (Act V of 1898), s. 423 (1).

The accused were convicted of the offence of gambling in a common gaming house under sections 6 and 7 of the Madras Towns Nuisances Act. On appeal, however, the Sub-Divisional Magistrate found that there was no evidence that the house where the gaming was carried on was a common gaming house

MADRAS TOWNS-NUISANCES ACT—concl'd.

but ordered a re-trial in the interests of justice. On revision by the High Court:

Held, that in the absence of evidence on record or of an assurance by the prosecution, that evidence would be forthcoming that the house was a common gaming house, the Appellate Court acted irregularly in ordering a new trial. **M. MOGAMBARA PATTAN, In re**, 28 M. L. J. 379; 17 Or. L. J. 193 **305**

— S. 7

305

MADRAS VILLAGE COURTS ACT (I OF 1889), S. 73—Review of order passed under s. 73—Civil Procedure Code (Act V of 1908), s. 115—Charter Act (24 & 25 Vic., c. 104), (1861), s. 15—Revision—Appeal.

An order passed by a District Munsif under section 73 of the Village Courts Act can be revised only under section 15 of the Charter Act. Where, however, such an order was revised by a Judge of the High Court under section 115, Civil Procedure Code, the High Court declined to interfere with it on Letters Patent Appeal.

Dubitante.—Such an order can be revised by the High Court under section 115, Civil Procedure Code.

Obiter dictum.—An inferior Court has no power of review except when it is granted by Statute. **M. PARAMASIVAM PILLAI v. PERIYANAYAGATH AMMAL** **533**

MAINTENANCE—Right to future maintenance, whether liable to attachment—Appointment of Receiver **381**

MALABAR LAW—Kanom, subsisting — Melkanom, grant of—Whether void or voidable—Kanom term, expiry of—Tenant, whether can plead that he should hold on.

A melkanom granted during the subsistence of a previous kanom is not altogether void, but is only voidable at the instance of the members of the tarwad who were not parties thereto.

A tenant whose kanom has expired is not entitled to plead that he should hold on even after such expiry. **M. PILAKKATAN CHETTIOTAN v. VAZHAKARAM-BATH MOIDIN**, 3 L. W. 467 **755**

—Karnavan, power of, to grant melcharth before expiry of kanom—Justification—Family necessity or advantage.

A karnavan of a Malabar tarwad has not an uncontrolled discretion in the renewal of kanoms or in the grant of melcharths prior to the expiry of the former but must justify his grants by family necessity or advantage. **M. VENKITAMMAL v. ALANGAT RAMAN NAIR** **931**

—Tarwad—Partition, right to—Family settlement or karar, right of minor members to impeach—Custom, decision on question of.

A Malabar tarwad can be validly partitioned only with the consent of all its members, and it is not open to any member to sue for partition of the family property. This, however, leaves unaffected the right of junior members to question alienations or acts of mismanagement by the karnavan, in order to preserve the integrity of the family property.

Per *Seshagiri Aiyar, J.*—The minor members of a tarwad can question the acts of the karnavan for the purpose of preserving the tarwad property for their benefit and ask for the karnavan's removal,

MALABAR LAW—concl'd.

They can also sue to set aside a karar or family arrangement arrived at by the adult members if their rights are prejudiced thereby.

Per *Sankaran Nair and Coutts Trotter, JJ.*—The minor members are not entitled to interfere in a family arrangement in so far as it affects the adult parties thereto, but can show that their interests were not properly represented or that the karar was in fraud of their rights and ask for relief for themselves on that footing.

Per *Sankaran Nair, J.*—In deciding questions as to Customary Law, if there are texts or series of decisions, the Court should follow them. Otherwise the question should be decided on evidence. **M. PARUKUTTI v. KELAPPAN NAIR** **818**

MALICIOUS PROSECUTION, suit for, requisites of **401**

MANAGER. See HINDU LAW.

MARRIAGE. See BUDDHIST LAW.

MARSHALLING. See TRANSFER OF PROPERTY ACT, s. 81.

MATH—Custom—Succession—Civil Procedure Code (Act V of 1908), s. 92—Mahant—Suit for declaration, if maintainable.

In the case of a math the succession to a gaddi is governed by the custom and rules of the sect to which the math belongs, which the plaintiff has to prove in each case unless the custom is admitted.

A suit for declaration that the plaintiff is a duly constituted mahant is not barred by section 92 of the Civil Procedure Code, 1908. **A. GANGA RAM v. RAM SABAN** **502**

MESNE PROFITS—Contract to sell—Breach—Compensation **737**

—enjoyed by decree-holder purchaser, claim for, in restitution **747**

MINOR. See HINDU LAW.

—, benefit to, consideration of, before decree on award **845**

—Minor member, when bound by deed executed by major member **3**

MISCONDUCT. See LEGAL PRACTITIONERS ACT, s. 13.

MORTGAGE. See EQUITABLE MORTGAGE; HINDU LAW.

—Accounts, settlement of, between mortgagor and mortgagee—Mortgagee in possession—Rests.

Where in a mortgage transaction there was an express agreement between the parties set forth in the mortgage-bond that the principal would be paid in a lump sum after the expiry of the term of the mortgage and the mortgagee had to pay a certain sum of money annually to the mortgagor, but the mortgagee never paid that sum:

Held, that, according to the nature and spirit of the agreement entered into between the parties, the effect of keeping the money, which should have been paid by the mortgagee to the mortgagor, was that that money must go in, an adjustment of accounts between the parties, to discharge the principal due at the time. **C. BRIJ KUMAR LAL v. MUNSHI SAHAI** **899**

MORTGAGE—contd.

— Advance, recital of—Covenant for possession and discharge of debt by profits of usufruct Document inoperative in law—Personal covenant—Charge 900

—, assignment of—Suit by assignee—Set-off as against assignor, whether provable—Equitable set-off 859

— by conditional sale—Redemption, suit for—Plea of transfer of equity of redemption to mortgagee—Finding against defendant—Appeal, second—Change of defence—Foreclosure by consent of parties plea of, whether can be urged—Delivery of possession to mortgagee—Oral agreement for enjoyment of profits in lieu of interest, admissibility of—Evidence Act (I of 1872), s. 92.

Where, in a redemption suit, the defendant pleaded that the mortgagor had transferred the equity of redemption to the mortgagee, but, it having been found that no such transfer had been made, he pleaded in second appeal that there had been a foreclosure under the terms of the mortgage to which the parties had assented:

Held, that it was not open to the defendant to take up such a plea and change his ground of defence at that stage.

A finding of fact based on admissible evidence cannot be impugned in second appeal.

Where a period is fixed for redemption or foreclosure, in cases in which the mortgagor does not redeem and the mortgagee does not foreclose, interest continues to run after that period at the former rate until the mortgage is actually terminated.

Therefore, an oral arrangement between the parties to a mortgage, by which the mortgagee is put in possession of the mortgaged property in order that he may enjoy the profits and devote them towards the satisfaction of the interest due, is perfectly legal, although under the terms of the mortgage-deed there is no provision enabling the mortgagee to be put in possession and the mortgagor is entitled to redeem on a certain date and in default of his redeeming the mortgagee is entitled to foreclosure and from that date the interest is to cease, inasmuch as such an arrangement does not vary, contradict, or add to the terms of the deed but provides for the satisfaction of one of its conditions.

Where a mortgagee obtains possession under the above circumstances, he cannot set up adverse proprietary possession in spite of his assertion to that effect. *O. JAGAT PAL SINGH v. HARNAM SINGH*, 3 O. L. J. 244 745

— Deposit of consideration with mortgagee—Agreement to pay mortgagor piecemeal, when required—Suit for recovery of deposit—Whether enforcement of a contract to lend—Maintainability of suit.

Where a mortgagor allows the whole or part of the amount of his loan to remain with the mortgagee, on the understanding that it is to be taken by the mortgagor from time to time, the transaction is in the nature of a deposit with a banker or agent repayable on demand without interest. A suit lies for the recovery of the amount, which is not for enforcement of a contract to lend. *O. Musammatt RANJITA v. Musammatt RUKMIN* 387

MORTGAGE—contd.

— Deposit in Court—Computation of interest—Inclusion of interest for day of deposit—Payment of *batta*—Tender insufficient, effect of—Cessation of interest—Mortgagor's right to mesne profits—Day, fraction of, when to be considered full day 825

— English mortgage—Lease by mortgagor, validity of 24

— Equitable mortgage—Deposit of title-deeds, whether creates valid mortgage in Punjab—Deposit of copies of title-deeds, when enough—Subsequent registered deed of mortgage, effect of—Earlier mortgage, whether kept alive—Presumption—Priority—Registration Act (XVI of 1908), s. 48.

In the Punjab and in other places where the Transfer of Property Act does not obtain a mortgage by deposit of title-deeds is a valid legal mortgage and has the same legal effect as a mortgage created by any other means recognized by law.

A mortgage can be created by a deposit of copies of title-deeds when the originals are not forthcoming.

The English doctrine of the legal estate prevailing over the equitable estate does not obtain in a country where there is no distinction between legal and equitable estates; and consequently a mortgagee who holds a registered deed of mortgage cannot claim priority over an earlier mortgage created by deposit of title-deeds.

Where in a suit by the plaintiff Bank to enforce their rights as mortgagees against the mortgagors, defendants Nos. 1 and 2, and the mortgaged property itself, defendant No. 3 claimed to have a prior mortgage on the property effected by a deposit of copies of the title-deeds:

Held (1) that the plaintiffs could not raise the plea for the first time in appeal that a mortgage effected by depositing copies of title-deeds was invalid, especially when they had been accepted as regular by the original mortgagees;

(2) that the title-deeds were deposited with defendant No. 3 with the intention of creating a mortgage charge in her favour over the property in suit;

(3) that there was nothing on the record to show that defendant No. 3 had any intention to give up valuable rights accruing to her under this transaction, by accepting a later registered deed of mortgage, but that the ordinary presumption was that she intended to keep the first mortgage alive for all purposes beneficial to herself;

(4) that section 48 of the Registration Act did not apply and the subsequently registered deed of mortgage did not take precedence over the earlier transaction. *P. MRS. STEWART v. BANK OF UPPER INDIA, LTD.*, 31 P. R. 19.6 937

— Foreclosure decree—Redemption by one of the parties—Contribution, claim for, against part transferee of mortgaged property—Non-joinder in foreclosure suit—Party impleaded as owner found to be trespasser—Action misconceived—Maintainability of suit 367

— 'Gross negligence', what is—Notice, constructive—Registration, if notice in Bengal—Unsuccessful search at registration office—Presumption—Neglect to secure title-deed by mortgagee from mortgagor, effect of 115

MORTGAGE—contd.

—Hypothec of moveable property made orally, whether valid in Punjab—Priority, subsequent unregistered mortgage, whether obtains.

In the Punjab a hypothec of moveable property is not required to be by deed in writing, and is, if made orally, as effectual for all purposes (except in cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing, provided always that its existence can be proved.

Where, therefore, plaintiff sued to recover a certain sum of money on the basis of an unregistered mortgage-deed in respect of moveable property which had been previously hypothecated orally to another person:

Held, that the hypothec created over the property in suit gave the hypothecatee as much right to that property, as the unregistered deed of mortgage subsequently executed gave to the plaintiff, and that, quite irrespective of all questions of notice, his rights being prior in time must prevail over the rights of the latter. **P. MRS. STEWART v. BANK OF UPPER INDIA, LTD., 32 P. R. 1916 932**

—Interest, periodical payment of—Right of suit for whole amount on default of payment of one instalment 411

—by manager—Joint Hindu family—Property ancestral and property acquired by it both mortgaged—Mortgagee, position of—Equity—Court, discretion of 738

—Mortgagor receiving rents—Suit by mortgagee to recover rents received by mortgagor, nature of—Money had and received—Breach of contract—Damages—Mesne profits—Practice 173

—Mortgage-deed executed before the Transfer of Property Act—Condition to relinquish property in case of default of payment—Construction—Remedies given by the Act, whether available—Suit for foreclosure 475

—Mortgage-deed not executed in attesting witnesses' presence—Evidence Act (I of 1872), s. 71—Amendment of plaint at late stage—Court, power of—Simple mortgage-deed treated as money-bond—Consideration of mortgage, payment of, proof as to—Simple money-deed—Debt contracted by Hindu father, suit on—Immoral purpose, plea as to—Court, duty of 397

—by person personating real owner—Transfer of mortgagee rights by mortgagee—Covenant for good title—Rescission of contract—Right of transferee to refund of consideration—Caveat emptor, rule of, whether applies 515

—Preliminary mortgage decree—Final decree—Court dealing with application for final decree, jurisdiction of—Mortgage, prior, not included in preliminary decree, if can be included in final decree—Courts, power of 76

—Property subject to several mortgages—Suit for sale by prior mortgagee—Puisne mortgagee not made party—Decree and Court sale—Purchaser, rights and liabilities of—Puisne mortgagee, whether can sue for sale subject to prior encumbrance.

A certain property was subject to three simple mortgages. The 3rd mortgagee sued for sale subject to the prior mortgages. It appeared that the 2nd

MORTGAGE—contd.

mortgagee had already obtained a decree for sale on the footing of his mortgage and had sold the property and that the purchaser at the Court sale had redeemed the 1st mortgage:

Held, that the plaintiff was entitled to a decree for sale of the property subject to the prior mortgages and could not be obliged to redeem the prior mortgages before bringing the property to sale.

Per *Coutts Trotter, J.*—What passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of his mortgage, subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances.

Of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent.

Per *Srinivas Aiyangar, J.*—A puisne mortgagee who is not made a party to a suit for sale by a prior encumbrancer, is entitled to insist on a decree for sale subject to the previous mortgage.

Case-law on the subject discussed. **M. CHINNU PILLAI v. VENKATASAMY CHETTIAR, 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217 507**

—Sale of property subject to mortgage—Consideration reserved with mortgagee for payment to prior mortgagee, return of, to mortgagor, after sale of property—Redemption, suit for, by vendee—Accounts—Vendee, whether entitled to credit of amount returned by mortgagee to mortgagor—Notice of purchase to mortgagee, whether necessary 266

—usufructuary—Lease to mortgagor—Stipulation for rent—Sale to third party—Possession with vendor-mortgagor—Suit for account against mortgagor and purchaser, whether maintainable.

A usufructuary mortgagee who leases the property back to the mortgagor for a specified rent is entitled to file a suit for accounts on his mortgage notwithstanding the lease, as the relation of mortgagor and mortgagee co-exists with that of landlord and tenant and the right to rent is supplementary to, and not in substitution of, the right to interest.

The claim is alike enforceable against a purchaser of the property subsequent to the mortgage, and accounts will be taken at his instance also as if the mortgagor alone were interested. **M. VEPA KAMESAM v. VARIGONDA NARASIMHAM 701**

—validity of, whether can be questioned—Landlord, position of—Relinquishment by mortgagor in favour of landlord—Mortgagee, position of—Ejectment 764

—DECREE—Decree-holder, right of, to recover balance due on mortgage without bringing mortgaged property to sale—Interpretation of Statutes 48

—Execution—Decree absolute, prayer for, absent in application—Prayer for sale, if implies prayer for making decree absolute 756

—Execution sale—Purchase by decree-holder—Suit for possession—Decree fraudulent, whether can be pleaded in defence—Claim based on possession and subsequent dispossession—Finding against plaintiff's possession within 12 years of suit—Dismissal of suit under Art. 142, Limitation Act 897

MORTGAGE—contd.

— — — DECREE passed before enactment of Act V of 1908—Application for execution after 12 years—Acknowledgment, whether saves bar under s. 48, Civil Procedure Code 27

— — — REDEMPTION by one co-owner—Transfer of Property Act (IV of '882), s. 95 Sale by owner who redeemed property—Adverse claim set up—Suit for redemption by another co-owner—Limitation Act (IX of 1908), Sch. I, Arts. 144, 144, 148.

One A made a usufructuary mortgage to D on the 13th of August 1860. He left several sons, of whom J made a mortgage to B's father and paid off D. J's mortgagee remained in possession till May 1898, when J sold the property to B who remained in possession, till the present suit for redemption of the mortgage of 1860 was brought by K, son of J, one of the sons of A. It being assumed that J was separate though the family property had not been divided:

Held, that under the circumstances the suit was barred by Article 144 of Schedule I of the Limitation Act, inasmuch as when J redeemed D's mortgage, J became only a charge-holder and not a mortgagee, and asserted a title in himself adversely to the true owners and sold the property to B, and that Article 134 or 145 of the Limitation Act did not apply. A JAI KISHEN JOSHI v. BUDHANAND JOSHI, 14 A. L. J. 41; 38 A. 138 244

— — — — — Decree nisi obtained under Transfer of Property Act (IV of 1882) and before enactment of Civil Procedure Code (Act V of 1908)—Order absolute not passed—Extension of time limited by decree not obtained—Mortgagor's right to deposit money—General Clauses Act (X of 1897), s. 6.

A mortgagor who obtains a decree for redemption, passed under the Transfer of Property Act and before the enactment of the Civil Procedure Code of 1908, is entitled to deposit the money due under the decree nisi at any time before the passing of a decree absolute, without obtaining an extension of the time limited by the decree, although the said Code is in force at the time he applies for the deposit. O BISHESHAR SINGH v. BIKRAMJIT SINGH, 8 O. L. J. 189; 19 O. C. 30 349

— — — — — Entries in khewat, attestation of, value of—Estoppel—Admission—Burden of proof—Inherent power.

Entries in a khewat as to certain persons being in possession of certain land as mortgagees, verification of which is attested by those persons, amount to an admission by those persons that they are in possession of mortgagees.

The plaintiff alleged that he mortgaged certain lands to the defendant in 1859. In the khewat of 1877 the defendant was shown as mortgagee and the entry was attested by the defendant. The defendant was entered as mortgagee. In a suit for redemption the mortgagee denied the mortgage:

Held, that the onus was on the defendant to show that there was any change in the circumstances between the years 1877 and 1913 and that the defendant having failed to discharge the onus, the Court had inherent power of drawing inferences of fact from such evidence as was undisputed. A PAKARIA v. RANJITA 165

MORTGAGE—concl'd.

— — — REDEMPTION—Right to redeem, proof of—Prima facie evidence, sufficiency of—Suit, maintainability of.

In a suit for possession of land by redemption of mortgage, the plaintiff must produce at least *prima facie* evidence of his right to redeem, and what is sufficient *prima facie* evidence is a question to be decided in accordance with the facts of each case in which it arises.

Where, therefore, in a suit for redemption of a mortgage the plaintiff produced no evidence at all, nor did she nor her predecessor in the suit ever make any offer to redeem the mortgage set up by the defendants, although the plaintiff had notice of some of the mortgages long before the suit and where the case set up by the plaintiff amounted to a denial of the mortgages:

Held, that under the circumstances the suit was not maintainable. A SAHDEO OJHA v. LACHHMINA KUAR 207

— — — — —, suit for—No offer of payment before institution of suit, effect of—Suit, maintainability of—Cause of action—Usufructuary agricultural mortgage 183

MUHAMMADAN LAW—ALIENATION by some of the heirs of deceased, whether binds co-heirs—Alienation by administrators and some of the heirs, effect of 128

— — — — — GUARDIANSHIP—Alienation of minor son's property by mother, validity of—Right of sons to deal with property alienated—Limitation Act (IX of 1908), Sch. I, Art. 44.

Under Muhammadan Law the mother is not the natural guardian of her minor sons. Therefore, in the absence of an order of Court appointing her their guardian she cannot alienate their property; if she does, the alienation is void and Article 44 of Schedule I of the Limitation Act will not operate to defeat the sons' rights to dispose of their interest in the property PAT RAJAB ALI v. WAZIR ALI, 1 P. L. J. 188 85

— — — — — Unequal marriage contracted by paternal guardian for ward—Power of Court to control—Profligacy of guardian—Presumption of continuance—Evidence Act (I of 1872), s. 114.

A Muhammadan father married his minor daughter aged 10 years to an infant of 12 months. The father was known to be a profligate. In a suit by the mother of the girl to declare the marriage invalid:

Held, (1) that the Court had power to control such an abuse of the parental authority and that the marriage was invalid;

(2) that proof of the general profligacy of the father raised the presumption under section 114 of the Evidence Act that it continued during his lifetime and that he was, therefore, a profligate when he contracted the marriage, and unfit to act as guardian for marriage. S SHAHUL v. ALLA BACHAYO, 9 S. L. R. 196 504

— — — — — HUSBAND AND WIFE—Ante-nuptial agreement by husband to live with his wife at her father's house, validity of—Public policy.

An ante-nuptial agreement by a husband that he would live with his wife at her father's house, virtually amounts to providing for a future separation

MUHAMMADAN LAW—contd.

on a certain contingency and as such is contrary to public policy and cannot be enforced. There is nothing in Muhammadan Law definitely permitting such an agreement, which is invalid as between Mahomedans, just as it would be in any other community. **S CHUTO v. KHUDA BUX**, 9 S. L. R. 199

470

PRE-EMPTION—Performance of two talabs

210

—, right of, if extinguishable by subsequent events—Right, existence of, till decree—Partition during pendency of pre-emption suit, effect of, on co-sharer's right of pre-emption—Plea raised for first time in final Court of Appeal, when can be entertained—Suit, circumstances after institution of, when to be taken into consideration by Court.

A plaintiff in a suit for pre-emption is bound to establish not only that the pre-emptive right claimed by him existed at the date of the sale and at the date of the institution of the suit, but also that it existed up to and at the date of the decree of the primary Court.

Therefore, where before the date of the decree in a suit for pre-emption instituted by a co-sharer in a joint property, the property is partitioned in partition proceedings which were pending, the suit cannot be decreed in favour of the plaintiff.

Per *Moorkjee, J.* When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application. Where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made.

The right of pre-emption, which arises from the moment the sale is effected by a co-sharer, is not always enforceable as it stands at the time of its origin, it is liable to be extinguished by events subsequent.

In order that a right of pre-emption may be enforced by a suit, the right must exist and retain its enforceable character when the decree is made by the primary Court. **C NURI MIAH v. AMRICA SINGH**, 20 C. W. N. 1099

869

WAKF—Mutwalli—Lease for over three years, whether void or voidable—Sub-lease—Sub-tenants, whether can question their lessor's title—Estoppel.

The mutwalli of a wakf has, ordinarily and in the absence of a prohibition in the deed of endowment, the right to lease the wakf property for three years and, with the consent of the kazi, for a longer period.

Where, however, the lease is granted for more than three years without the kazi's consent and is

MUHAMMADAN LAW—concl'd.

not to the advantage of the wakf, it is not absolutely void but voidable and even the mutwalli can set it aside.

Sub-tenants under a lessee of wakf property cannot, in a claim for rent, question their lessor's title on the ground that he came into possession under an invalid lease. **M BALU MUDALI v. DURVASALU PILLAI**, 4 L. W. 74

570

MURDER. See PENAL CODE, s. 302.

MUTATION—Possession with Receiver—Revenue Court, duty of—Title to possession—Summary inquiry—Hindu Law—Adopted son, position of—Talukdari or non-talukdari property, effect of.

Where in mutation cases possession is admittedly with a Receiver, the Revenue Courts have simply to decide, and that by summary inquiry, who is the person best entitled to possession.

In Hindu Law an adopted son takes exactly the same position as a natural son.

An adopted son is entitled to mutation of his name in respect of the property of his adoptive father's uncle, whether the property be talukdari or non-talukdari. **UPBR NAGESHAR SAHAI v. MATA PERSHAD**, 3 O. L. J. 78

496

MUTT. See MATH; RELIGIOUS ENDOWMENT.

—, headship of Right of nomination—Ceremonies—Custom, proof of, where instances occur rarely—Dwandwa Mutts in South Canara—Ordination as sanyasi and appointment to office to be contemporaneous—Evidence Act (I of 1872), ss. 32, 33—Facts in issue, whether relevant facts—Statements of deceased persons as to facts in issue, admissibility of—Depositions of deceased witnesses in prior litigation, when admissible.

There is no rule of law pertaining to succession to headships of mutts generally. The rule must be made out in the case of each particular mutt by proof of custom.

As to the nature or quantum of proof required in any case, the Court would not insist on the same proof when the custom or usage set up is not at variance with any law as in a case where the custom is completely opposed to existing law. Again, proof of numerous instances of the custom or the exercise of the alleged right will not be required when such instances, in the nature of things, are of rare occurrence. Even if the right alleged was exercised on one solitary occasion it will be presumed, in the absence of suggestions of other methods, that that particular method of exercising the right was the customary one. The existence of the custom is also rendered probable by the adoption of similar methods in neighbouring mutts.

In the case of Dwandwa Mutts in South Canara, i.e., the two mutts affiliated to each other, the Swami of one has the right to appoint a successor to the Swami of the sister mutt, when the latter dies without making the appointment himself.

The conditions requisite for a valid appointment, in such contingency are (1) the person to be appointed Swami must be a sanyasi, that is, one who has renounced all worldly ties and has been initiated into the brotherhood by a person competent to make the nomination, (2) he must be initiated into the sanyasam when he is a bala brahmachari, i. e., a bachelor below

MUTT—concl'd.

the age of 16, (3) the initiation into the *sanyasam* and the ordination to the *mutt* must be contemporaneous. The initiation at the time of an appointment which afterwards turns out to be invalid, will not enure to validate a subsequent appointment where the ceremonial was not gone through.

Facts in issue are relevant facts within the meaning of section 32 of the Evidence Act, and statements made by deceased persons about facts in issue are admissible under the section.

Depositions of deceased witnesses in a prior litigation are admissible under section 33 of the Evidence Act only when not only the questions in issue are substantially the same in the two proceedings, but the proceedings have been between the same parties or their representatives-in-interest.

Per *Abdur Rahim, J.*—Under section 32, clause (4), of the Evidence Act, the inconvenience and expense to be taken into account must be with respect to individual witnesses and not arising merely from the number of witnesses which a party wishes to call.

A fact in issue is always a relevant fact, and there is no reason for excluding from the operation of clause (4) of section 32 statements relating to facts in issue. If they are to be excluded, much valuable evidence would be unavailable as will be apparent from the illustrations to section 32 and also from the definitions of facts in issue and relevant facts.

Ordinarily, the Court requires proof of at least more than one instance in which an alleged customary right has been exercised, but there is no hard and fast rule to that effect.

Per *Phillips, J.*—Facts in issue are facts about which there is a question in issue between the parties, and although all relevant facts are not necessarily facts in issue, the facts that are in issue cannot be other than relevant to the determination of the suit. Facts must be either relevant or irrelevant and there is no separate third class of facts in issue.

It is impossible to frame a definite rule of the nature or class of evidence requisite to prove a custom which will cover all cases, for as in other cases in which the exact amount of evidence necessary to prove a particular fact cannot be laid down with certainty, so in proving a custom it is impossible to say that a certain defined amount of evidence is requisite. In appreciating evidence each case must be dealt with by itself, and in appreciating evidence of custom no general rule applicable to all cases can be laid down other than that the custom must be proved by clear and cogent evidence. **M RAGHUBHUSHANA v. VIDIAVARIDHI** 875

NEGLIGENCE—Sale of goods—Specification of wrong quantity in label—Warranty—Damages, action for—Business reputation of vendor—Purchaser's omission to make enquiry whether contributory negligence—Appellate Court—Appreciation of evidence.

The plaintiffs placed an order with the defendants, a firm of good business reputation, for a certain quantity of arsenite of soda, for making 'dip' for cattle. The defendants delivered 56 lbs., but the drums containing the soda were wrongly labelled as containing 2½ lbs. only. The label contained instructions as to the quantity of water to be used for mixing up with the soda. The plaintiffs' servant acted up to the instructions,

NEGLIGENCE—concl'd.

with the result that a strong 'dip' was prepared and the cattle were injured. In an action to recover damages, the defendants pleaded *inter alia* that plaintiffs were guilty of contributory negligence in not making enquiries and detecting the mistake:

Held, that plaintiffs were justified in relying on the specification as to quantity on the label and that no duty was cast on them to make enquiries to ascertain the exact quantity delivered, and hence, there was no contributory negligence on their part.

There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an Appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. **P C BRITISH SOUTH AFRICA COMPANY v. LENNON, LIM.** 273

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 20 315

— S. 118 617

NOTICE. See **BENGAL TENANCY ACT, s. 49; CIVIL PROCEDURE CODE, s. 80.**

NUNCUPATIVE WILL. 921

OCCUPANCY HOLDING, non-transferable, purchaser of—Landlord's withdrawal of decretal amount for rent deposited by purchaser, if recognition of transfer—Decrees, execution of, under Civil Procedure Code and Bengal Tenancy Act, difference between.

After the plaintiff's purchase in execution of a money-decree of a non-transferable occupancy holding, when a co-sharer-landlord in execution of a decree for rent against the original tenant proceeded under the Civil Procedure Code to sell the holding, the plaintiff deposited the decretal amount in the executing Court by an application, with a proviso that he was reserving his right to realise the amount so deposited by him from the tenant or his heirs, as he did not admit that the amount so deposited was payable by him, and the amount was then withdrawn by the landlord. In a suit by the plaintiff to establish his title to the occupancy holding:

Held, that the withdrawal of the money did not operate as a recognition of the plaintiff's right as a purchaser and he was not entitled to the holding as against the landlord.

There is a clear difference in the mode of executing decrees under the Civil Procedure Code and under the Bengal Tenancy Act. Under the latter Act if any person other than the judgment-debtor having an interest in any holding wishes to pay the landlord's dues he may make a deposit before the date of sale, by inviting a decision about his interest in the property to be sold. Under the Civil Procedure Code there is no objection to the decretal amount being paid into Court by any person before the sale, and the Court is not required to decide any question about his interest in the property, as provided in the Bengal Tenancy Act. **C SURENDRA NARAIN v. JAGAT KISHORE GHOSE** 76

OPIUM ACT (I of 1878), S. 9 (c), (e)—*Illicit possession of opium, proof of—Servant's possession, whether on behalf of master when master and servant in each other's company—Presumption—Burden of proof—Possession with intention of exporting opium, whether amounts to offence of exporting—Appeal against acquittal—Grounds for Chief Court's interference.*

An unlawful possession of opium with the intention of eventually exporting it does not amount to the offence of 'exporting' opium within the meaning of section 9 (e) of the Opium Act.

Unlawful possession of opium by a servant will not amount to possession by his master even when they are found in each other's company at the time, so as to render the master liable for conviction under section 9 (c) of the Act.

It is for the prosecution to prove affirmatively and clearly that the possession of the servant was on his master's behalf and with his master's authority.

Nature of the evidence required in proof of a case under section 9 (c) discussed.

The Chief Court will not set aside a judgment of acquittal unless it is clearly and palpably wrong on the evidence. **P** **EMPEROR v. NAWAB**, 15 P. R. 1916 CR.; 17 CR. L. J. 194 **306**

ODDH CIVIL DIGEST, PARA. 267, CL. (8) **360**

ODDH LAWS ACT (XVIII of 1876), S. 9 (c)—*Under-proprietor in mahal of village—Proprietor of another mahal of village—Village community, members of—Pre-emption, right of—Lots, determination by.*

An under-proprietor of certain specified plots in a mahal of a village and the proprietor of another mahal in the same village, are both members of the village community within the meaning of the third clause of section 9 of the Ouddh Laws Act, and neither has a right of pre-emption superior to that of the other. Lots ought to be drawn to determine who as between them is entitled to pre-empt. **O** **GAJODHAR v. UDAY NARAIN SINGH**, 3 O. L. J. 193 **682**

ODDH RENT ACT (XXII of 1886)—Ordinary tenant
—*Rights not transferable.*

The rights of an ordinary tenant in Ouddh are not transferable.

The rights and liabilities of an ordinary tenant in Ouddh are the creation of Act XXII of 1886 and they can only be ascertained from a study of that Act itself. **O** **TIKA v. SHEO NARAIN**, 3 O. L. J. 175 **426**

— **S. 3 (10), (11)** **861**

— **S. 60** **693**

— **S. 107B (b)—Judicial decision—Settlement Court decree—Admission of claim**

A decree of the Settlement Court, passed at the time of the first Regular Settlement and on the then talukdar's admitting the claim, and directing a land to be entered in the Settlement papers as muafi of the claimant, is a judicial decision within the meaning of section 107B (b) of the Ouddh Rent Act. **U P B R** **KANDHAI PRASAD v. SURAJ BALI DAS**, 3 O. L. J. 213 **755**

— **S. 107K** **702**

— **S. 135** **706**

PARDANASHIN WOMAN, dealings with—Family settlement—Consent of pardanashin lady—Matters to be considered—Burden of proof—Fraud, condonation of—Fraud pleaded in defence to an action—Limitation.

Where a family settlement or the award of a panchayat is impeached by a pardanashin lady on the ground that her consent to the arrangement was obtained by fraud on the part of her kinsmen whose interests conflicted with hers and who, therefore, misled her, and it is shown that the woman is illiterate and lacking in business capacity, the question which the Court has to consider is, not whether she knew what she was doing, had done or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf.

Fraud cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length.

There is no limitation under the Indian Statute which will bar a defence of fraud to an action. **P C** **SRI KISHAN LAL v. KASHMIRO**, 20 C. W. N. 957; (1916) 1 M. W. N. 433; 1 L. W. 528; 31 M. L. J. 362 **37**

PARTITION. See HINDU LAW; MALABAR LAW; PRE-EMPTION.

—, registered deed of, purporting to divide moveables—Evidence that some moveables were left undivided, whether admissible **712**

— *Under-proprietor or lessee, person holding as, subsequently becoming co-proprietor but ceasing to be so in course of partition—Status, decision as to, ineffectual*

A person holding some land in a village, either as under-proprietor or as heritable non transferable lessee, acquired a certain proprietary share in the village. The village was subsequently partitioned among the co-proprietors and his holding fell into the different mahals created by the partition. He ceased to be a co-proprietor just before or just after the confirmation of the partition proceedings, and the Court then decided the question of his status as under-proprietor or permanent lessee:

Held, that the status of the said person as under-proprietor or permanent lessee being entirely apart from his status as proprietor, it was quite unnecessary to decide for the purpose of the partition proceedings precisely what his status was, and that, therefore, no adjudication in the course of the partition proceedings or any entry in any kura would be held to decide the question of his status as under-proprietor or permanent lessee, which must be settled by law in the usual way. **U P B R** **UMED ALI v. ANWAR HUSAIN**, 3 O. L. J. 232 **733**

— **CASE—Minors parties to case—Certificated guardian of minors ultimately made party—Objection by guardian as to proprietary title dismissed as time-barred—Order of dismissal, whether justifiable—Appeal to Deputy Commissioner—Revision, third appeal treated as—U. P. Land Revenue Act (III of 1901), ss. 110, 111—Board's Circulars, 21-II, r. 9.**

In a partition case certain minors were parties. On the last day of the time allowed by the proclamation issued under section 110, U. P. Land Revenue

PARTITION—concl'd.

Act, their certificated guardian applied stating that she, as guardian, should have been made a party to the case and raising some objections to the partition which did not concern the shares of the minors. After several adjournments the Court ultimately agreed to her standing ■ guardian, and within ■ week after this she filed ■ objection under section 110 raising a question of proprietary title concerning the shares of the minors. The Assistant Collector dismissed the objection as time-barred. This order was appealed from to the Deputy Commissioner, who ordered that the appeal was to be returned for presentation to the District Judge and that meanwhile partition proceedings were to be stayed. A further appeal ■ preferred to the Commissioner who rejected it and, finally, the matter was laid before the Board in appeal:

Held, that no third appeal lay to the Board under the partition chapter, but that the appeal could be treated ■ revision under the special circumstances of the ■

Held, further, that the Assistant Collector's order was not passed under section 111, U. P. Land Revenue Act, at all, and was thus appealable to the Deputy Commissioner.

Held, lastly, that the Assistant Collector ought not, in view of rule 9, 21-II, B. C., to have dismissed the objection as time-barred but to have decided it on the merits. **U P B R** AMIRUL RAHMAN v. DHAN KUMAR DAS, ■ O. L. J. 201 **689**

PARTITION ACT (IV of 1893), S. 2—Partition—Order for sale—Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Suit for possession by partition—Decree specifying mode of partition—Appeal—Proper fee.

Plaintiff sued for possession by partition of certain joint land and houses and obtained a preliminary decree settling the respective shares of the parties. The Court, having fixed the price of the joint land, appointed a Commissioner and directed him to auction the separate pieces of immoveable property, the share-holders only being allowed to bid. The Court further ordered that the sum ■ realised should be divided among the parties according to their respective shares. The auction was held a few days afterwards. The defendant appealed objecting to this mode of partition:

Held, (1) that the method of partition suggested by the lower Court was open to objection, as it could quite conveniently be made in the ordinary way by allotting to each sharer houses approximately of the value of his or her share, at the same time respecting actual possession so far as possible, any small excess or deficiency being made good by money payments;

(2) that the fact that the defendant had bid at the auction did not estop him from filing an appeal;

(3) that as it was impossible to assign ■ value to the appellant's claim, section 7 (iv) (b) of the Court Fees Act had no application to the case and a Court-fee of Rs. 10 was sufficient and correct under Article 17 (vi) of the Second Schedule of the Act. **P** FATTEH CHAND v. BILAS RAI, 61 P. L. R. 1916: 89 P. W. R. 1916 **587**

PARTNERSHIP—Sub-partners, rights of—Dissolution of partnership, suit for—Sub-partners, whether necessary parties—Civil Procedure Code (Act V of

PARTNERSHIP—concl'd.

1909), O. I, r. 3—Contract Act (IX of 1872)—Partnership Act (1890) (53 & 54 Vic. c. 39), s. 31.

There is nothing in the Indian Contract Act regarding the relations between sub-partners and partners but the provisions of section 31 of the English Partnership Act may be taken as the law in India.

The assignee of a share in ■ partnership is only entitled to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of profits agreed to by the partners. In case of a dissolution, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled ■ between himself and the other partners, and, for the purpose of ascertaining that share, to an account ■ from the date of the dissolution.

Where in a suit for dissolution of partnership, sub-partners also were made parties and the preliminary decree made them also liable for the losses of the firm:

Held, that neither under Common Law nor under the provisions of Order I, rule 3, of the Code of Civil Procedure, nor on the ground of avoidance of multiplicity of proceedings, were they necessary parties to a suit for dissolution of partnership as between the partners, and the provision in the preliminary decree making them liable for the losses of the firm must be expunged. **M** CHIDAMBARAM CHETTY v. KARUTHAN CHETTY, (1916) 2 M. W. N. 18; 4 L. W. 10; 20 M. L. T. 134 **543**

PARTNERSHIP ACT (1890) (53 & 54 Vic. c. 39), S. 31 **543**

PASTURAGE—Right to graze cattle on village waste, how defined—"Agricultural cattle," meaning of—Suit for recovery of grazing dues, nature of—Appeal, second.

The right of ■ cultivator to graze cattle free on the village waste is limited to a reasonable number of animals kept by the cultivator for the purposes of his holding in the village, and not exceeding the number which would ordinarily be kept for the purposes of good husbandry for, and in connection with, a similar holding.

The term 'agricultural cattle' means and includes animals employed in agriculture and in purposes subservient to agriculture, including the domestic requirements of the tenant, but cannot be extended so as to cover animals kept ■ the stock of ■ trading dairy farm, or bred for sale to cultivators or butchers or for the plying of carts or other conveyances for hire.

Where, therefore, a tenant who kept animals to supply milk for commercial purposes grazed them on the village pasturage and the landlord claimed grazing dues in respect of such animals:

Held, that the tenant could not graze such cattle free and the landlord was entitled to grazing dues in respect of them.

A claim to grazing rights under a village custom is a claim to an interest in immoveable property, and ■ suit for recovery thereof is not of ■ Small Cause nature and admits of ■ second appeal. **N** NANHU v. NARBADA PRASAD, 12 N. L. R. 83 **695**

PENAL CODE (ACT XLV OF 1860), S. 80 315, 992

———— S. 75 1008

———— Ss. 100, 304 (II), 325—*Fatal blow struck on sudden provocation—Right of private defence, when established.*

The deceased went to the accused's house armed with a pitchfork and abused her sister. The deceased's son also turned up and struck a blow on the sister's head with a stick. The accused hearing the cries of her sister came out with a pitchfork in her hand and struck the deceased with its handle, who died within a short time:

Held, (1) that though the deceased and his son acted in a high-handed manner, their action could not be regarded as a sufficient justification for causing the death, and the accused could not avail herself of the benefit of section 100, Indian Penal Code:

(2) that inasmuch as the conduct of the deceased and his son provoked the accused, who in a moment of anger and without any premeditation struck the blow, not knowing that it was likely to cause death, she could not be convicted under section 304 (II), Indian Penal Code, but was guilty of an offence under section 325. **P SIRYAN v. EMPEROR**, 69 P. L. R. 1916; 17 CR. L. J. 270 990

———— S. 114 649

———— S. 143 961

———— S. 153A 974

———— S. 191 235

———— S. 193 235, 307

———— S. 193—*Perjury—Deposition of witness—Innocent mistake, correction of—Contradictory statements—Sanction for prosecution—Dishonest intention—Criminal Procedure Code (Act V of 1898), s. 476.*

A witness should be allowed to correct innocent mistakes in the record of his deposition. Every possible presumption should be made in favour of good faith and it is undesirable that the witness should be afraid to correct the mistakes for fear of rendering himself liable to a prosecution for perjury, as such fear would frustrate the object of cross-examination. It is only when the witness makes a false statement with a dishonest intention and afterwards tries to correct it that his prosecution can be directed by Court.

Quere:—Whether contradictory statements made in one and the same deposition can be the subject of a prosecution under section 193, Indian Penal Code? **■ GIRDHARIMAL v. EMPEROR**, 9 S. L. R. 202; 17 CR. L. J. 240 656

———— S. 302—*Murder—First report not mentioning accused—Eye-witness failing to identify accused at investigation—Circumstantial evidence, value of.*

Where in a trial for murder it appeared that the first report did not name the murderer, that the only eye-witness who professed to have seen the murder could not identify the murderer before the Police and that the only evidence against the accused consisted in the production of a blood-stained kurta from the house where he and his brothers resided and his pointing out a blood-stained knife which was concealed in a bush on the way from the deceased's house to his own:

PENAL CODE—contd.

Held, (1) that in the absence of any direct evidence connecting the accused with the murder the circumstantial evidence that had been produced was altogether insufficient for conviction;

(2) that the mere fact that it had not been shown who else could have committed the murder was no ground for holding that the accused must have committed it and he was, therefore, entitled to an acquittal. **P TAJOO v. EMPEROR**, 22 P. W. R. 1916 CR.; 17 CR. L. J. 279 999

———— Ss. 304 (II), 325 990

———— S. 363—*“Taking” of a minor from lawful custody, when complete—Girl kidnapped by one accused taken out of village by three—Liability of all.*

The question whether the “taking” of a minor girl out of the custody of her lawful guardian is or is not complete at a given moment is a question for determination with reference to the circumstances proved in each particular case.

The relation between the minor and the guardian implied by the word “keeping” is not dissolved so long as the minor can at will take advantage of the guardianship protection and place herself within the sphere of its operation.

Where, therefore, a young girl of 10 years of age was kidnapped from the lawful guardianship of her uncle by one G and taken to his *gural* and subsequently to his threshing floor and was on the following day removed from the village by G and his two co-accused:

Held, that the time that elapsed between her leaving her uncle's house in company with G and her removal from the village by the three accused was so short and the liberty of movement which she enjoyed between these two points of time was so complete that until she left the village, she must be considered to have remained in the custody of her guardian and, therefore, the taking of the girl was not complete until after she had been removed from the village by all the three accused and that consequently they were all liable. **P GURDIT SINGH v. EMPEROR**, 55 P. L. R. 1916; 25 P. W. R. 1916 CR.; 17 CR. L. J. 236 652

———— S. 366 *Abduction—Abducted woman passed from man to man—Liability of all concerned—Charge of rape not made during Police investigation, truth of.*

A woman, in order to avoid living with her deceased husband's brother F, whom she had been forced to marry, asked another brother of his D to take her to her own brother. D took her away. Outside the village they were joined by M and proceeded to a *takiya*, when D left her with M for the night and returned home. The following day D rejoined them and they all proceeded to a village Tibri where the woman was entrusted to one B, who took her to another village and placed her in the charge of one N. Ultimately she escaped and being pursued she put herself under the protection of a Policeman. D, M and B were convicted under section 366, Indian Penal Code, M and B having been sentenced to heavier punishment as the woman stated in cross-examination that they had had intercourse with her:

Held, (1) that under the circumstances of the case, the conviction of all three accused under section 366 was quite justified;

PENAL CODE—contd.

(2) but that inasmuch as the woman did not make any statement about rape during Police investigation, it could not be believed and M and ■ were not liable to a heavier punishment than D. **P BELA SINGH v. EMPEROR**, 54 P. L. R. 1916; 17 Cr. L. J. 284 **1004**

——— **S. 366—Abduction—Special intent or knowledge necessary—Whether it can be presumed in a girl of 13.**

In order to establish an offence under section 366, Indian Penal Code, a special intent or knowledge is necessary and such an intent or knowledge cannot be presumed in a child of immature age.

Where, therefore, the accused, brother and sister, were convicted of abducting ■ certain girl and it appeared that the sister was only 13 years of age:

Held, that she could not be said to have the special intent or knowledge referred to in section 366 and was not, therefore, liable to conviction. **P MEHRAN v. EMPEROR**, 53 P. L. R. 1916; 13 P. R. 1916 Cr.; 28 P. W. R. 1916 Cr.; 17 Cr. L. J. 283 **1003**

——— **S. 379 336**

——— **Ss. 379, 429—Theft of animal—Subsequent destruction—Separate convictions for theft and mischief, whether legal.**

A person cannot be convicted separately under sections 379 and 429, Indian Penal Code, for stealing ■ animal and afterwards killing it. The wrongful loss to complainant is complete with the theft and the subsequent destruction of the animal, though it may benefit the offender, does not amount to mischief. **S JAIRO v. EMPEROR**, 9 S. L. R. 204; 17 Cr. L. J. 239 **655**

——— **S. 380 336**

——— **S. 399—Preparation for committing dacoity, what constitutes—Mere assemblage not enough—Overt act towards commission of dacoity necessary—Prosecution, whether bound to point out part taken by each member.**

In order to constitute the offence of "preparation for committing dacoity" within the purview of section 399, Indian Penal Code, it is not necessary that the accused should have done an overt act towards the commission of dacoity. The law requires that they should have done some act to get ready for ■ dacoity.

A mere assemblage to commit dacoity does not amount to preparation; but where it is found that the members of ■ gang had taken in their possession instruments for house-breaking and arms for the purposes of offence and defence and had actually proceeded to a place near the scene of contemplated dacoity, the Court is justified in holding that there was not a mere assemblage but that the members of the assembly had got ready for the actual commission of ■ dacoity.

It is not necessary that the prosecution should point out the exact part taken by each member of the gang as regards preparation, provided that it is shown that the accused were members of ■ gang which had made in fact preparation for dacoity. **P KARMUN v. EMPEROR**, 6 P. R. 1916 Cr.; 17 Cr. L. J. 280 **1000**

——— **S. 411 650**

——— **S. 417 992**

PENAL CODE—contd.

——— **Ss. 420, 114—Cheating, abetment of—Conspiracy, evidence of—Association with principal offender—Conduct of accused.**

A charge of conspiracy may be established by evidence of the conduct of the accused and the surrounding circumstances both before and after the commission of the offence without proving any overt acts by the accused.

Where ■ person charged with abetment of cheating was proved to have been in the company of the principal offender at the commission of the offence and both before and after, and during trial made a false defence and denied the said association:

Held, that he was liable to conviction for an offence under sections 420 and 114, Indian Penal Code **S JUMO ALLARAKHIO v. EMPEROR**, 9 S. L. R. 223; 17 Cr. L. J. 233 **649**

——— **Ss. 420, 417, 511, 30—Acknowledgment of receipt of insured parcel, whether 'valuable security'—Despatch of registered insured packets with blank sheets to a creditor—Creation of evidence in discharge of debt—Offence—Cheating—Attempt to cheat—Criminal Procedure Code (Act V of 1848), s. 237 (2).**

An acknowledgment of receipt of an insured parcel is not a 'valuable security' within the meaning of section 30 of the Indian Penal Code.

The accused, who owed the complainant Rs. 650, filled a registered envelope with blank sheets of paper and posted it to the complainant after insuring it for Rs. 650, in order to create evidence of discharge of the debt. He was convicted for cheating under section 420, Indian Penal Code:

Held, (1) that, as the acknowledgment of receipt of the insured parcel was not a valuable security, the conviction under section 420, Indian Penal Code, was bad in law;

(2) that, as the offence of attempting to cheat was made out, the accused should have been convicted under sections 417 and 511, Indian Penal Code. **PAT SADHO LAL v. EMPEROR**, 17 Cr. L. J. 272 **992**

——— **S. 429 655**

——— **S. 429 Maiming an animal, what is—Privation of use of limb or member—Permanent injury.**

The word 'maiming' in section 429 of the Indian Penal Code involves the notion of the privation of the use of some limb or member involving ■ permanent injury and not ■ mere disfigurement.

Where nearly one-half of one ear of an animal is cut off without impairing its sense of hearing, the injury does not amount to 'maiming' within the meaning of the section. **S ANNA LAXMAN BHINTADE v. EMPEROR**, 8 Bom. L. R. 289; 17 Cr. L. J. 253 **973**

——— **S. 457 1008**

——— **S. 467 315**

——— **Ss. 474, 467, 30—Forged document—Executant's denial—Handwriting—Expert evidence—Corroboration—Valuable security—Stamp Act (II of 1899), s. 12—Negotiable Instruments Act (XXVI of 1881), s. 20.**

An alleged executant of ■ document denied having made the signature on the document. The testimony of an expert in handwriting was to the effect that the contested signature did not agree with the admitted signature of the executant:

PENAL CODE—concl'd.

Held, that the expert's evidence afforded reliable corroboration of the executant's evidence.

A blank promissory note and a blank receipt contained the forged signatures of the executant but contained no specification of the person in whose favour either document purported to be executed, nor yet of the date or place of execution, nor yet of the money involved. At the top of each of these papers there was an adhesive stamp of one anna, but the signature was not across the stamp nor had the stamp been cancelled:

Held, (1) that the documents were not stamped in accordance with law;

(2) that nevertheless the documents were valuable securities within the meaning of section 30, Indian Penal Code, inasmuch as they created a legal right.

■ JAWAHIR THAKUR v. EMPEROR, 14 A. L. J. 643; 17 CR. L. J. 203 315

— Ss. 499, EXCEPTION (8), 500—*Defamation—Complaint of grievance to person in authority—Privilege—Good faith—Imputation honestly believed though untrue in fact—Absence of unnecessary publication—Seeking redress.*

A person charged with defamation under section 500, Indian Penal Code, who claims the benefit of exception (8) to section 499, must show that the accusation complained of was a *bona fide* complaint of grievance, and not a wanton accusation maliciously made with the object of injuring another person.

If, without express malice, ■ person makes a defamatory charge which he *bona fide* believes to be true, against one whose conduct in the respect defamed has caused him injury, to one whose duty it is to inquire into and redress such injury, the occasion is privileged, because the person making the charge has an interest in its subject-matter and the person to whom the communication is made has, on hearing it, ■ duty to discharge in respect of it.

The accused, who were paddy merchants, sent a telegram to the Traffic Manager of a Railway that a Station Master unduly favoured the charcoal traders in the allotment of waggons and in allowing them to send charcoal in excess of the quantity for which freight was paid and that for this purpose he received a bribe. It was proved that the accused acted in consultation with each other and had no grudge against the Station Master. Certain account-books were tendered in evidence ranging over a long period containing entries of payment of bribes to the Station Master. The Magistrate discredited the evidence, oral and documentary, and convicted the accused, finding that the allegation of payment of bribes to the Station Master was false:

Held, that it could not be said that the accused had no reasonable ground for the telegram, even if it should afterwards appear that their information was untrue in whole or in part, and that, as they complained to the proper authority and did not further publish the imputation of bribery, they were protected by exception (8) to section 499, Indian Penal Code. ■ B NGA POONA v. EMPEROR, 17 CR. L. J. 213 325

— S. 500 325

— S. 511 992 1008

PERJURY. See PENAL CODE, s. 193.

PLAINT, amendment of—Declaration of easement to take water by erection of dam across river, suit for—Proof of permissive user—Conversion of suit into one for title to river-bed, whether can be allowed 541

— Verification, object of—Verified plaint, whether legal evidence 235

PLEADER, authority of—Withdrawal of plea—Client's position in appeal 390

— AND CLIENT—Pleader advancing money to client on mortgage—Interest Void transaction—Public policy—Legal Practitioners Act (XVIII of 1879), s. 6—Oudh Civil Digest, para. 267, cl. (8)—Purchase of actionable claim—Transfer of Property Act (IV of 1882), s. 136 360

— , compromise by, without specific authority—Ratification by client, effect of 928

— , power of, to apply for reference to arbitration 845

PLEADINGS—Fraud, averments of—Practice 1

— Omission in plaint to refer to technical point not misleading defendant—Defendant, whether can object to frame of plaint on appeal 704

— and proof, variance between, effect of—Relief, grant of, on a case not set out in plaint.

Though the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, every variance between pleading and proof is not fatal.

The rule that the allegations and the proof must correspond is intended to serve ■ double purpose, namely, *first*, to apprise the defendant, distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations.

Where in a suit for recovery of possession of land on declaration of title to a certain share in a property, the plaintiff failed to make out the precise title set up in the plaint, but the Court came to the conclusion upon the entire evidence that the plaintiff was entitled only to one-half of what she claimed and gave her a decree accordingly:

Held, that, as the defendants were not taken by surprise and as the allegations made in the plaint with respect to the shares were not essential for the purposes of the pleadings, the objection of the defendants, that relief must be refused to the plaintiff because she had not made out the precise title set up by her in the plaint, should not be given effect to. ■ HIRA LAL v. GIRIBALA DEBI, 23 C. L. J. 420 444

— and proof—Variance, how far material as affecting plaintiff's case.

The plaintiff brought a suit against the defendant for a sum of money due to him as per his account on a pro-note dated 7th November 1907, alleging that the payment was made on that date. The defendant pleaded that he discharged the amount due by a cash payment on the 5th

• PLEADINGS—conold.

November 1907 and that the note and the entry in the account were forgeries. It was found that the note was genuine and was executed for the balance of amount entered in the plaintiff's accounts as having been received in cash only on the 5th November:

Held, (1) that the variance between the pleading and the proof was not one fatal to the plaintiff's suit, the cardinal points to be decided being whether the debt had been paid in cash and whether the note was a forgery;

(2) that the principle "that it would introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded and by joining the issue in the case has undertaken to prove," had been applied by the High Court in an abstract and unsatisfactory way which had misled them in estimating the merits in the controversy before them, and that in applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised, the question being, in ultimate analysis, one of circumstances and not of law. **P C UMAR ABDUL RAHMAN v. GUSTADI MUNCHERJI COOPER**, 3 L. W. 308; 30 M. L. J. 444; 20 C. W. N. 297; (1916) 1 M. W. N. 137 **268**

PLEDGE of jewel entrusted to agent for sale—Suit for return of jewel by owner—Liability of pawnee—Redemption of pledge before decree—Pawnee in good faith—Limitation—Cause of action—Conversion of article—Limitation Act (IX of 1908), Sch. I, Art. 48 **751**

POLICE ACT (V of 1861), Ss. 17, 19—Appointment of special constables, when legal—Parties to dispute, inexpediency of appointment as special constables of—Appointment pending disposal of security cases—Criminal Procedure Code (Act V of 1898), s. 107.

Special constables should be appointed under section 19 of the Police Act only when it is really intended to use them as Police Officers and to strengthen the ordinary Police force, and not otherwise.

It is objectionable to appoint special constables parties to a dispute against whom complaints have been lodged or against whom proceedings are pending under section 107 of the Criminal Procedure Code so as to handicap them in their defence. **C PARDIP SINGH v. EMPEROR**, 43 C. 277; 17 Cr. L. J. 197 **309**

— S. 19 **309**

— S. 34, cl. (6)—"Riotous", meaning of—Quarrelling in a public street—Conviction—Revision—Criminal Procedure Code (Act V of 1898), s. 637.

The word "riotous" in section 34, clause (6), of the Police Act is sufficiently wide to cover the case of a person who creates a row in a thoroughfare.

Where, therefore, the accused had a quarrel in the bazar and was convicted of an offence under section 34 (6) of the Police Act:

Held, that there was not such an error of law as would justify interference in revision. **P JAGAT RAM v. EMPEROR**, 52 P. L. R. 1916; 29 P. W. R. 1916 Cr.; 17 Cr. L. J. 273 **993**

PRACTICE—Breach of contract—Damages **173**

— Interpretation of decree **344**

— Pleadings—Fraud

— Previous convictions put to prisoner, and admitted and taken into consideration in passing sentence—Sentence passed, legal, even without proof of previous convictions—Interference in appeal—Practice—Procedure **1008**

— Receiver, appointment of—Adjudication order—Property vesting in Official Receiver **602**

— Review of judgment, deduction of time occupied in—Appeal presented after time **44**

— Secondary evidence, by oral testimony, without objection, relevancy of, when only secondary evidence admissible is a certified copy—Findings of fact, first Appellate Court's duty in regard to—Appeal, second. Where no objection was taken in the primary Court to the oral evidence of the contents of a document at the time it was given, the High Court in appeal did not discard it, although strictly speaking the only secondary evidence of the contents of the document was a certified copy.

Obiter.—It is very essential that the Judge in the first Appellate Court should give his findings of fact (which are conclusive in second appeals) clearly and decisively on each material point, otherwise its decision is liable to be set aside in second appeal and the case sent back for re-hearing, even though the litigation may have gone on for a long time and the amount involved is a small one. **C HASMATULLAH v. HARI MOHAN SARMA** **942**

— Sessions case—Duty of prosecution to produce all eye-witnesses before Committing Magistrate—Presumption—Death sentence on more than one accused for murder of one man, legality of.

All persons said to have witnessed a murder should be produced before the Committing Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness who, he may have reason to believe, will give false evidence.

Where an eye-witness is not produced before the Committing Magistrate, the natural presumption is that he would not support the case for the prosecution.

From the legal point of view, more than one person may be sentenced to death for the murder of one man where the death sentence is fully merited in the case of each, though in such cases the Crown may exercise its prerogative of mercy. **P KAIMI v. EMPEROR**, 12 P. R. 1916 Cr.; 17 Cr. L. J. 267 **987**

— Taking up big original suits after 5-30 p. m.—Prejudice—Appeal, second **547**

PRE-EMPTION. See MUHAMMADAN LAW; OUDH LAWS ACT, s. 9.

— , accrual of right of—Sale, when complete for purposes of pre-emption—Registration of sale-deed—Pre-emptor's knowledge of sale—Performance of two talabs—Muhammadan Law—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 37—Justice, equity and good conscience, application of rules of.

The right of pre-emption cannot be exercised unless the pre-emptor has performed the ceremony of talab-i-mowasabat immediately on hearing of the sale.

PRE-EMPTION—concl'd.

Per *Mullick, J.*—The two ceremonies of *talab-i-mowasabat* and *talab-i-istishhad* can be combined, but it is essential that the *talab-i-istishhad* should refer expressly to the *talab-i-mowasabat* as having been duly made.

A petition to the Registrar asking for stay of registration is not a sufficient compliance with Muhammadan Law in the matter of the performance of the two *talabs*.

A sale is not complete for the purposes of pre-emption till legal ownership passes from the vendor to the vendee. Whether or not there has been payment and delivery, the pre-emptor's title in the case of property worth more than Rs. 100 does not accrue till after registration.

It is against equity, justice and good conscience to apply to a pre-emption case the Muhammadan Law of sale, which is no longer in force and to attach to a mere contract for sale an incident which Muhammadan lawyers intended to attach only to an actual sale.

Per *Roe, J.*—The test to determine when right to pre-emption accrues is (1) has there been a real sale, (2) at what date had the pre-emptor knowledge that the sale was complete. If the sale is in the eyes of the contracting parties and the pre-emptor complete, it is not necessary for the pre-emptor to wait till registration before performing the ceremony of *mowasabat*. **PAT KHEVALI PRASAD v. NAZARUL ALAM**, 20 C. W. N. 1048; 1 P. L. J. 174
210

—Decree—Extension of time for payment—Jurisdiction 88

PRESIDENCY TOWNS INSOLVENCY ACT (III of 1909), S. 57—Bona fide purchaser for value from benamidar of owner adjudicated insolvent, rights of—Official assignee—Equitable estoppel.

A person purchasing property from a benamidar of the owner, subsequent to his adjudication in insolvency under Act III of 1909, does not acquire any title to the property as against the Official Assignee, even though the purchase was made *bona fide* for value and without notice.

Per *Mookerjee, J.*—Such a purchaser may establish a good title by estoppel against the owner, but he cannot do so against the Official Assignee unless the conduct of the Official Assignee himself was such as would have made the equitable doctrine of estoppel applicable against him. **C LAKHI PRIYA DASSI v. RAI KISSORI DASSI**, 23 C. L. J. 463; 20 C. W. N. 554
435

PRESUMPTION. See HINDU LAW; WILL.

—Adverse possession 952
—Eye-witness not produced, effect of 987
—Neglect to secure title-deed by mortgagee from mortgagor, effect of 115
—Possession, illicit, of opium, proof of—Servant's possession, whether on behalf of master when master and servant in each other's company 306
—Record of Rights, entry in, as to occupancy right of tenant 506
—Transaction, whether amounts to loan or deposit, doubt as to 347

PRINCIPAL AND AGENT—Compromise of suit by, agent—Power-of-attorney, construction of 394

—Decree against principal acquiesced in—Agent, whether can appeal.

Plaintiff sued the Municipal Committee, Delhi, for certain reliefs ■ account of their refusal to sanction the proposed erection by the plaintiff of a building on a site, the lease of which had been sold by auction by the Committee to the predecessor-in-title of the plaintiff. The Committee justified their refusal on the ground that they had sold the lease as trustees of the Crown and that no permanent building could be erected on *nazul* land. The Secretary of State then applied to be made ■ party and the application was sanctioned, on the ground that the Committee was merely a kind of agent or trustee for the management of the land of which the Secretary of State was the beneficial owner.

The first Court decreed the plaintiff's suit and from this decree the Committee alone appealed. This appeal having been accepted by the Divisional Judge, the plaintiff preferred ■ further appeal.

Held, that the Committee, who were merely agents, were not competent to appeal to the Divisional Judge when the principal had withdrawn from the contest and that, therefore, the first Court's decree must be restored. **P ABDUL SAMAD v. MUNICIPAL COMMITTEE, DELHI**, 26 P. R. 1916
866

—Principal, liability of, for fraud of agent—Attachment, illegal—Damages

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act.

Where the agent of ■ decree-holder, on account of the ill-feeling which he bore towards the judgment-debtors, got illegally attached and sold their moveable property and the judgment-debtors claimed damages from the decree-holder for the illegal attachment and sale:

Held, that the decree-holder was liable for the fraudulent conduct of the agent and bound to pay the damages.

Per *Roe, J.*—The sole test in such cases is the scope of the agent's authority. **C SHER JAN KHAN v. ALIMUDDI**, 20 C. W. N. 268; 23 C. L. J. 225; 43 C. 511
598

—Unauthorized purchase by agent—Agent acting for himself—Ratification, whether possible—Contract Act (IX of 1872), ss. 196, 216—"Good faith", meaning of—Bona fide purchase at Court sale—Restitution—Civil Procedure Code (Act V of 1908), s. 144.

The right of a principal to ratify an unauthorized act of his agent, under section 196 of the Contract Act, is confined to cases where the agent purports to act on the principal's behalf. No ratification is possible where the agent acts on his own account, and, though without authority, not on behalf of the principal.

Where property was purchased in Court auction by the decree-holder's agent acting on his own account and contrary to the principal's directions,

PRINCIPAL AND AGENT—concl'd.

the principal cannot ratify the act so ■ to give himself the benefit of the purchase, ■ it was not an act either done on behalf of the principal under section 196 or in the course of the agency under section 216 of the Contract Act.

Restitution cannot be demanded, under section 144, Civil Procedure Code, as against a *bona fide* purchaser at a Court sale, who was not a party to the decree, on the ground that, subsequent to the sale, the decree was reversed by the Appellate Court.

The operation of the rule is not affected by the purchaser's knowledge of the pendency of an appeal on the day of sale.

Restitution can, however, be claimed ■ against the sale-proceeds paid to the decree-holder.

The expression 'good faith' explained. **M** RAGHAVACHARI v. PAKKIRI MAHOMMED, 30 M. L. J. 497; 19 M. L. T. 381; (1916) 2 M. W. N. 73 **760**

PROBATE. See WILL.

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 50 (5)—*Inaccurate inventory, submission of—Revocation of Probate.*

The power of revocation conferred by section 50 of Act V of 1881 being a discretionary one, a Court is not bound to revoke ■ Probate on the ground of an inaccurate inventory, especially where the value of assets left by a testator is almost ■ matter of conjecture and perfect accuracy can hardly be expected. **M** MADDALI VENKATASWAMY v. VELAMPALLI SUBARAYUDU **435**

———— S. 55 **227**
 ——— S. 52 **128**

———— Ss. 90, 82—*Alienation, administrator's powers of—Sanction of Court, strict compliance with terms of—Muhammadan Law—Alienation by some of the heirs of deceased, whether binds co-heirs—Alienation by administrators and some of the heirs, effect of.*

An administrator appointed under the Probate and Administration Act has no power to make an alienation without first obtaining the permission of the Court under section 80 of the Act, and when such permission has been obtained, he is strictly bound by its terms. A permission to sell does not include ■ permission to mortgage; and where, after obtaining an order for sale, the administrator mortgages the property, the transaction is voidable under section 90 of the Act.

The powers of an executor under ■ Will are far wider and the executor can do whatever is not expressly forbidden by the Will.

The statutory provisions of the Probate and Administration Act apply to Muhammadan estates, overriding any rules of Muhammadan Law that are inconsistent with them.

An administrator, appointed to manage the estate of a deceased Muhammadan, is the only person who has authority to act as a representative of the estate and who can charge the estate for the debts of the deceased so ■ to bind the heirs, but this cannot be done unless he complies with the provisions of section 90 of the Probate and Administration Act.

Quære.—Whether some of the heirs of a deceased Muhammadan who are in possession of his estate, can alienate it for the debts of the deceased so as to bind the other co-heirs; and whether such an alien

PROBATE AND ADMINISTRATION ACT—1881—concl'd.

ation will bind even the proportionate shares of the alienors when it is made in contravention of sections 82 and 90 of the Probate and Administration Act? **C** RAM DHON DHOR v. SHARF-UD-DIN **128**

PROCEDURE—Accused, when can be discharged in complainant's absence **305**

PROMISSORY NOTE, suit on—*Chit* acknowledging liability—Pro-note—Instrument evidencing antecedent debt, if discharges liability on original debt—Part-payment after security has matured, whether payment in respect of such debt—Contemporaneous debt, note given on, effect of—Parol evidence, use of, to prove identity of debt acknowledged in writing—'Ullittoor', addition of, to maker's name—Liability of maker **417**

PROPRIETARY RIGHT, *proof of—Settlement, summary, first.*

In Oudh, no inference as to a person's proprietary right can be drawn from the mere fact that the first Summary Settlement was made with him. **O** BISHESHAR SINGH v. TIRBHAWAN BAHADUR SINGH, 3 O. L. J. 222 **768**

PROVINCIAL INSOLVENCY ACT III OF 1907), Ss. 4 (a), 18, 19, 36—*Trust in favour of creditors for pro rata distribution, validity of—'Valuable consideration', meaning of—Trustees appointed, whether 'third persons' under section 4 (a)—'Void,' meaning of, in s. 36—Receiver, appointment of, under s. 18—Practice.*

A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata*, made more than three months before the presentation by him of a petition in insolvency, is a transfer for valuable consideration within the meaning of section 36 and section 38 (c) of the Provincial Insolvency Act, and is not void as against the Official Receiver. The undertaking by trustees to distribute the assets is sufficient consideration for the conveyance.

Such properties do not vest in the Official Receiver on the adjudication in insolvency.

The word 'void' in section 36 of the Provincial Insolvency Act means 'voidable'

The words 'third person' in section 4 (a) of the Act do not exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors.

The word 'purchaser' in section 36 is used in the general sense of a person who has given valuable consideration.

Before properties can vest in the Official Receiver, the Court should formally pass an order appointing a Receiver under section 18 of the Act. The practice of treating the properties as vesting in the Official Receiver after the passing of the adjudication order is illegal. **M** OFFICIAL RECEIVER OF TRICHINOPOLY v. SOMASUNDARAM CHETTIAR, 30 M. L. J. 415 **602**

———— S. 12 (2)—*Notice to creditors—Private notice, if sufficient.*

An order of adjudication passed without a general notice to creditors is wholly irregular and should be set aside. A private notice is of no avail. **M** NACHIAPPA CHETTY v. THANGAVELU CHETTY, 3 L. W. 495

PROVINCIAL INSOLVENCY ACT—contd.

—— Ss. 18, 19 602

—— Ss. 27, 42—*Adjudication, annulment of—Circumstances justifying.*

An adjudication under section 16 of the Provincial Insolvency Act can be annulled only upon proof by the applicant under section 42 of the existence of one or more of the circumstances specified in sub-section 1 of that section.

The consent of all the creditors is not by itself necessarily sufficient to justify an order for annulment of adjudication.

Quare—Whether under the Indian Law the Court could refuse to make an order of annulment, where one or more of the circumstances specified in sub-section (1) of section 42 of the Provincial Insolvency Act were proved to exist? **C** MOTILAL RADHAKISSEN v. GANPATRAM, 23 C. L. J. 220 792

—— Ss. 34, 35—*Sale in execution of decree—Adjudication of judgment-debtor in insolvency before sale—Sale, effect of Application by Receiver to set aside sale—Order refusing application—Appeal, second—Civil Procedure Code (Act V of 1908), ss. 47, 100, 115, O. XXI, r. 90.*

A sale held in execution of a decree after notice to the Court that the judgment-debtor was adjudged insolvent, is irregular and confers no title on the auction-purchaser, the property being already vested in the Receiver of the insolvent's estate.

The protection afforded by proviso (3) to section 34 of the Provincial Insolvency Act is only to a purchaser of the property of a debtor and not to a purchaser of property which has ceased in law to be the debtor's property. The protection does not apply where the purchaser had knowledge or means of knowledge of the adjudication of the debtor in insolvency prior to the sale.

An application by a Receiver of an insolvent's estate to set aside a sale on the ground of a prior adjudication of the debtor is an application under section 47, Civil Procedure Code, and a second appeal lies to the High Court from an order in appeal.

Whether a second appeal lies or not, the High Court can interfere with the order in revision on the ground of material irregularity in the exercise of jurisdiction by the lower Courts.

Proceedings to set aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge, or satisfaction of a decree and hence fall under both section 47 and Order XXI, rule 90, of the Code of Civil Procedure. Proceedings to set aside auction-sales on any other tenable ground also involve questions relating to execution, etc., and hence fall under section 47 of the Code of Civil Procedure though they may not fall under Order XXI, rule 90, of the Code of Civil Procedure.

An executing Court is entitled to set aside a sale on an application under section 47, Civil Procedure Code, and no separate suit will lie.

It is only where Order XXI, rule 90, applies also besides section 47 to a petition to set aside an auction-sale that no second appeal lies under section 100, Civil Procedure Code. But where section 47, Civil Procedure Code, alone is applicable to the

PROVINCIAL INSOLVENCY ACT—conold.

petition, the order passed thereon is a decree and a second appeal lies. **M** ANANTHARAMA IYER v. VET-TATH KUTTIMALU KOVILAMMAL, 19 M. L. T. 357; 3 L. W. 504; 30 M. L. J. 611 829

—— S. 25 829

—— S. 36 602

—— S. 42 792

—— S. 43, SUB-S. (2), S. 46, SUB-SS. (2), (3)
—*Appeal against an interlocutory order—Receiver, power of, to make inquiry.*

An order calling upon a person who has already been adjudicated an insolvent to show cause why an order should not be made against him under sub-section (2) of section 43 of the Provincial Insolvency Act, is not appealable under sub-section (2) of section 46 of the Act.

Quare.—Whether such an order could be appealed from by obtaining leave under sub-section 3 of section 46?

A Receiver under the Insolvency Act is an officer of the Court and can be authorised by the Court to ascertain facts and report them to it with a view to the adoption of such steps as may be deemed necessary in the interests of justice, such as paying a surprise visit to the insolvent's house to see if he has concealed properties. **C** MONMOHAN ROY v. HEMANTA KUMAR, 23 C. L. J. 553 777

—— S. 46, SUB-SS. (2), (3) 777

—— S. 47—*Petition of insolvency—Court, whether can refer proceedings to arbitrators—Civil Procedure Code (Act V of 1908), Sch. II—Arbitration.*

The provisions of Schedule II of the Civil Procedure Code do not apply to proceedings under the Insolvency Act, and a Court has no power to refer the whole proceedings to arbitrators to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent. **P** LADHA SINGH v. BHAG SINGH, 50 P. R. 1916 549

PROVINCIAL SMALL CAUSE COURTS ACT IX OF 1887), S. 17 113

—— S. 25 113, 527

—— S. 25—*Revision—Interference only discretionary* 6

PUBLIC PROSECUTOR—Appointment of Public Prosecutor—Accused subsequently impleaded—Right of Public Prosecutor to withdraw case against such accused—Accomplice, evidence of—Evidence Act (I of 1872), ss. 133, 114, ill. (b) 976

PUNJAB COURTS ACT (III of 1914), S. 10 714

—— S. 41 (1), (3)—*Point of custom overlooked or neglected by lower Court—Appeal, second, whether competent without certificate—Remand.*

Though under section 41 (1) and (3) of the Punjab Courts Act, the Chief Court has no jurisdiction, in the absence of a certificate, to decide the 'existence or validity' of a custom, it is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected by the lower Court. **P** SONNA MAL v. NANAK CHAND, P. R. 1916 904

PUNJAB EXCISE ACT (I OF 1914), S. 61 (1) (c)—
Conviction, first—Sentence—Imprisonment, propriety of awarding.

In awarding sentences in excise cases the consideration that illicit distillation results in not only loss of excise revenue but also in drunkenness and crime, is of very great importance, but in view of the demoralising influence of a sojourn in jail on the character of a person who is otherwise law-abiding, a heavy sentence of fine is preferable to a sentence of imprisonment in most cases of a first conviction for infraction of an excise law. **P. LEHNA SINGH v. EMPEROR**, 63 P. L. R. 1916; **P. W. R. 1916 Cr.**; 17 Cr. L. J. 282 **1002**

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900) **253**

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 158 **192**

PUNJAB MUNICIPAL ACT (III OF 1911), Ss. 219, 228, EXPL.—*Notice by Committee requiring performance of certain things—Authority given to Darogha Safai by office to prosecute in case of non-compliance—Complaint filed by holder of office, whether legal.*

Where a Municipal Committee directed a notice to be issued to the accused requiring him to do certain specified things and ordered that in case of non-compliance proceedings under section 219 of the Municipal Act should be instituted against him "by the Darogha Safai" in accordance with which the Conservancy Darogha filed on non-compliance a complaint against the accused and obtained a conviction:

Held, that as the complaint was not made by a person duly authorized in accordance with the terms of section 228 of the Municipal Act, all the proceedings were without jurisdiction and bad for want of a proper complaint. **P. EMPEROR v. DHARMA SHAH**, **P. R. 1916 Cr.**; 13 P. W. R. 1916 Cr.; 17 Cr. L. J. **311**

— S. 228, EXPL. **311**

PUNJAB TENANCY ACT (XVI OF 1887), Ss. 58, 74, 77 (3) (b), 60—*Landlord and tenant—Sub-lease created by occupancy tenant—Ejectment of sub-tenant, suit by landlord for—Improvements, tenant's claim for—Award of compensation in decree or by executing Court—Planting trees, whether 'improvement'.*

A sub-letting by an occupancy tenant operates to create a relationship of landlord and tenant between the landlord and the sub-tenant under the terms of section 58 (2) of the Punjab Tenancy Act.

Such a sub-tenant is liable to be ejected by the landlord on the death without heirs of the occupancy tenant who created the sub-lease as a tenant holding under a time-expired contract. The suit is one in ejectment, however the plaint may be worded, and is not a suit under section 77 (3) (b) of the Act.

The Court ordering the sub-tenant's ejectment is bound to award him compensation for improvements effected by him. The award can also be made by the executing Court where it is omitted in the decree.

The planting of trees by a tenant constitutes an 'improvement' within the definition of that term in the Punjab Tenancy Act. **P. WASAWA SINGH v. S. MAHANA SINGH**, 1 P. W. R. 1916 REV. **248**

PUNJAB TENANCY ACT—concl'd.

— Ss. 60, 74, 77 (3) (b) **248**

— S. 77 (3) **209**

QUESTION OF LAW—Malice, reasonable and probable cause, if question of law **149**

RAILWAY—*Goods consigned—Maund rate charged—Consignment note—Waggon rate, if can be charged at station of destination.*

The plaintiff consigned certain bundles of dry hides at A station to be delivered to him at C station both these stations being on the same Railway. The bundles were charged for at maund rates but on arrival at C station the defendant company charged an additional sum at waggon rates. The plaintiff paid under protest and sued for recovery of the said amount by way of damages. The consignment note gave the Company the right of remeasurement, reweighment, reclassification, and recalculation of rates at the place of destination:

Held, that this was not a case of remeasurement, reweighment, reclassification or recalculation and that the plaintiff was entitled to a refund from the Railway Company of the excess charge made. **A. ALLA-UD-DIN HADI v. G. I. P. Ry. Co.** **104**

RAILWAYS ACT (IX OF 1890), Ss. 3 (6), 77, 140—*Notice of claim against State Railway, on whom to be served—Notice to Government—Service on Collector, if sufficient—Consignment of goods—Non-delivery—Suit by consignor for compensation—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115.*

Notice of a claim against a State Railway under section 77 of the Railways Act is effective if served on the Government.

Section 140 of the Railways Act does not mean that the Manager is the only person on whom notice of action against a State Railway can be served, but that, if notice is served on the Manager, the only alternative being service on Government, it must be served on him in the manner provided.

Per D. Chatterjee, J.—In such a case, the notice may be served on the Collector and the same will be treated as notice to Government.

Section 140 of the Railways Act has not the effect of cutting down the connotation of the words 'Railway Administration' as contained in section 3 (6). It only provides for the convenience of the party aggrieved that, if he were to serve the notice on the Manager of the State Railway or the Agent of the Railway Company, he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company, there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble, but it cannot take away his rights.

A suit by the consignor against a Railway for value of goods consigned, which were neither delivered to consignee nor returned to consignor and which the Railway Company denied having received, and for compensation therefor is governed by Article 115 and not by Article 30 or Article 31 of Schedule I of the Limitation Act.

Article 31 seems to contemplate a suit by the party entitled to the delivery, namely, the consignee.

Per Beachcroft, J.—*Quære.*—Whether the Collector is always the proper person to receive notice under

RAILWAYS ACT—concl'd.

section 77 on behalf of Government in the matter of claims against State Railways?

If Article 31 applies to such a suit, it is not barred in the absence of evidence as to when the goods should have been delivered. **C RADHA SHAM BASAK v. SECRETARY OF STATE** 130

— Ss. 77, 140

RECEIVER. See CIVIL PROCEDURE CODE, O. XL, R. 1 (1)

— joint, rights and duties of—One joint Receiver, whether can give notice to quit tenancy on behalf of all—Notice to quit, validity of—Ratification—Contract Act (IX of 1872), s. 200.

A tenancy held under Joint Receivers, if terminable by a notice to quit, can be determined only by a notice given by them jointly.

A notice to quit given by one of two Joint Receivers on behalf of both, without the authority of the other, is invalid and cannot be rendered valid by subsequent ratification by the other Receiver.

The principle applicable to the competency of one joint tenant giving notice on behalf of all does not govern the cases of joint Receivers.

Per *Mookerjee, J.*—When two persons are appointed joint Receivers of an estate, they should, in the absence of a direction or indication to the contrary, meet and discuss together questions which come before them in the course of the management of the estate, and in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation.

C CASSIM AHMAD MOLLA v. EUSUF HAJI AJAM PEPARDI, 23 C. L. J. 453 221

— Maintenance, right to future, if liable to attachment 381

— in a mortgage suit, matters to be considered by Court in appointing—Protection of mortgagee's interests.

Where in a mortgage suit, the mortgagee applies for the appointment of a Receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee.

Where some of the defendants in a mortgage suit, who as presumptive reversioners to an estate mortgaged by a Hindu widow joined in the execution of the mortgage, support the application of the mortgagee for the appointment of a Receiver, the Court should not consider the matter from the point of view of the reversioners as from that of the mortgagee.

C GOBIND RANI DAS v. BRINDA RANI DAS, 23 C. L. J. 440 405

REDEMPTION. See MORTGAGE.

REGISTRATION. See TRANSFER OF PROPERTY ACT, s. 107.

— Hindu widow—Transfer of life-interest for value exceeding Rs. 100 748

REGISTRATION ACT (III of 1877), s. 2 (6) 450

— S. 17 921

REGISTRATION ACT (XVI of 1908), S. 17—Unregistered lease of coal mine reciting conveyance of moveable property also for Rs. 12,500—Admissibility

REGISTRATION ACT—1908—cont'd.

in evidence with regard to moveable property—Document admissible for collateral purpose, whether can be used to establish title.

Defendant No. 2 obtained from Government ■ lease of ■ coal mine for 15 years and then in lieu of an advance of Rs. 12,500 from the plaintiff assigned to him a half share in the lease and also conveyed to him the moveable property including plant, etc., for the same consideration. It was agreed that if the representation of defendant No. 2 concerning the quality of coal, etc., proved incorrect, the assignee could terminate the arrangement and would be entitled to recover his money with interest and that in case of non-payment, he could both sell the moveable property and continue as joint lessee until the advance was recovered and even dispose of his share in the lease of the mine in order to recoup himself. This lease was not registered. Subsequently defendant No. 1, in execution of a decree against defendant No. 2, attached part of the moveable property conveyed to plaintiff, who thereupon sued for a declaration that the property was not liable to attachment or sale:

Held, (1) that the whole document was one and indivisible, there being no separate or distinct transaction concerning the moveable property and being unregistered it was not admissible in evidence even in regard to the moveable property;

(2) that even though an unregistered document may be admissible for ■ collateral purpose it cannot be used to establish directly title in a part of the property conveyed. **P BEVAN PETMAN v. GANESH DAS**, 49 P. R. 1916 542

— Ss. 17, 49—Unregistered lease—Admissibility in evidence to prove tenancy or terms—Landlord and tenant—Payment of rent—Tenancy from year to year, inference as to—Holding over—Use and occupation, compensation for—Liability to pay on holding over—Transferability—Transfer of Property Act (IV of 1882), s. 6—Assent to tenant's continuance, if inferable from passive failure to eject—Intention to hold adversely, if necessarily follows holding over—Tenancy by sufferance, fiction of, if obtains in India—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Interference only discretionary.

An unregistered lease for three years is inadmissible in evidence to prove a tenancy or its terms.

A tenancy from year to year can be inferred from the fact of payment of rent by the tenant to the landlord and its receipt by the latter, the annual rent due under such ■ tenancy being ascertainable from the amount of rent paid and received.

A tenant holding over is liable to pay compensation for use and occupation of the demised premises.

Mere passive failure to take steps to eject ■ tenant whose lease term has expired will not, by itself, constitute an assent on the landlord's part to the tenant's continuing in possession as tenant from year to year.

An intention to hold adversely to the landlord need not necessarily follow from a holding over, though the running of time under Article 139 of the Indian Limitation Act against the landlord will not be interrupted in such a case.

The fiction of a tenancy by sufferance, which is said to arise under the English Law on a tenant's holding over, has no place in the Indian Law

REGISTRATION ACT—1908—contd.

after the enactment of the Transfer of Property Act.

A claim for use and occupation against a person who has ceased to be the lessee owing to the expiry of the lease term and the non-creation of a new relationship of lessor and lessee, not being one based on an express or implied contract but sounding in damages due and payable to the owner by a person without any rightful claim thereto, is a mere right to sue and is not transferable under the provisions of section 6 of the Transfer of Property Act, 1882, whatever may be the English Law as to such rights.

The compensation for use and occupation, which is loosely described in the English cases as 'rent', fair rent, or 'occupation rent', is looked upon by the English Courts as based on an implied contract to pay a fair rent. But it is not advisable to extend to India the whole of the English Law of implied contract, many cases of which are already dealt with in the Indian Contract Act under the head of 'relations resembling those created by contract'.

The interference of the High Court under section 25 of the Provincial Small Cause Courts Act, IX of 1887, is a matter of discretion. **M GOVINDSWAMY PILLAI v. RAMASWAMI AIYAR**, 3 L. W. 408; 30 M. L. J. 492; (1916) 2 M. W. N. 79 **6**

— S. 17 (2) (v)—*Compromise of suit embodying an agreement to exchange lands, whether compulsorily registrable—Suit framed on title—Plaintiff, whether can amend plaint by asking for specific performance.*

Where a suit for possession of lands was based on a compromise filed in a previous suit and it appeared that the compromise was neither registered nor embodied in the decree but merely remained among the records of the Court:

Held, 1) that the compromise was in effect merely an agreement for the exchange of lands and the parties contemplated that it would be effectuated by a decree of the Court and that, therefore, it was admissible in evidence without registration;

(2) that though the suit had been framed upon title and not for specific performance, the Court could allow the plaintiff to amend the plaint by asking for specific performance of the agreement filed in the previous suit, subject to any objection as to limitation. **M PALAVALASA APPALASWAMY v. DANTAI URI NARAYANA**, (1916) 1 M. W. N. 276 **446**

— Ss. 25, 34, 72, 76, 77—*Delay in presentation of document—Application to excuse delay—Communication by Sub-Registrar to party of Registrar's order refusing to excuse delay—Appeal to Registrar—Order of refusal, whether amounts to refusal to register—Suit in Civil Court, maintainability of—Jurisdiction.*

Per Seshagiri Aiyar, J.—An order refusing to excuse delay in the presentation of a document for registration under section 25 (1) of the Registration Act is an order refusing to register the document, which furnishes ground for a civil suit under section 77 of the Act. And it makes no difference whether the order was passed on an application direct to the Registrar under section 76 or on a reference by the Sub-Registrar with whom it was, in the first instance, lodged.

REGISTRATION ACT—1903—contd.

Where a Sub-Registrar simply communicates to the party the Registrar's order refusing to excuse the delay with his own endorsement that 'registration is refused,' the order of the Sub-Registrar is practically one refusing to admit a document to registration, from which an appeal lies to the Registrar.

The appeal to the Registrar may also be regarded as an original application to him under section 76, and his dismissal of the appeal is, in effect, a refusal to direct the Sub-Registrar to register the document, which will furnish a cause of action under section 77.

Per Bakewell, J., dissenting.—A refusal to excuse delay in the presentation of a document is not a refusal to register it.

There is no remedy given by the Registration Act in cases where a Registrar refuses to enlarge the time for presentation or enquiry under section 25 or section 34. The discretion is expressly conferred on the Registrar and the Act gives no jurisdiction to the Civil Court to control or revise it.

Section 77 of the Registration Act is expressly limited to orders of refusal under section 72 or section 76 and when there is no such order, a suit will not lie thereunder.

Section 77 provides, in effect, for a new trial of the question of admissibility of a document to registration after the inquiry directed by sections 34 and 35. **M GANGADARA MUDALI v. SAMBASIVA, MUDALI**, 19 M. L. T. 397; (1916) 2 M. W. N. 38 **769**

— S. 34 **769**

— S. 48 **937**

— S. 48—*Oral gift of land without possession—Subsequent transfer by registered deed—Priority.*

Where a proprietor made an oral gift of his land to his sons and subsequently executed and registered a deed of mortgage in favour of the plaintiff, who sued for possession on the sons' contesting his right:

Held, that section 48 of the Registration Act operated to give plaintiff's mortgage-deed preference over the oral gift which was not accompanied by delivery of possession, even though the gift preceded the mortgage. **P DOST MUHAMMAD KHAN v. DOST MUHAMMAD KHAN**, 30 P. R. 1916 **920**

— S. 49

— S. 49—*Equitable mortgage, document purporting to create—Recital of terms—Registration—Evidence.*

A document which purports to create an equitable mortgage is admissible in evidence though not registered, if it is only a memorandum or narrative of the facts constituting the mortgage. Where something is to be done by the parties to complete the transaction, it will only be an agreement to mortgage.

Where, however, a document sets forth the terms of a contract in such a way that the terms can be said to have been reduced to the form of a document, it is compulsorily registrable and inadmissible in evidence if not registered.

Plaintiffs executed two promissory notes to defendant for re-payment of certain sums of money. Simultaneously they executed two documents setting forth the conditions of the pro-notes and asking the

REGISTRATION ACT—1908—conold.

defendant to redeem a prior equitable mortgage in favour of a third party and retain the title-deeds as security for the amount due under the pro-notes. The documents modified the terms of the pro-notes by a stipulation for compound interest, but were not registered:

Held, that they were inadmissible in evidence for want of registration even as regards the stipulation for compound interest. **M SWAMY CHETTY v. ETHIRAJULU NAIDU**, 3 L. W. 585; (1916) 2 M. W. N. 84 **853**

— Ss. 49, 17—*Transfer of Property Act (IV of 1882), s. 54—Evidence—Unregistered sale-deed for less than hundred rupees—Admissibility to prove contract of sale.*

An unregistered deed of sale of immovable property for less than one hundred rupees, though inoperative under section 54 of the Transfer of Property Act where delivery has not been made to the vendee, is admissible in evidence to prove the contract of sale.

The rule is unaffected by the provision in section 49 (c) of the Registration Act which relates only to documents compulsorily registrable under section 17 of the Act. **M POOMALAI v. KARUPPA**, (1916) 2 M. W. N. 136 **921**

— S. 60 **281**
— Ss. 72, 76, 77 **769**

RELIGIOUS ENDOWMENTS — Mutt — Succession, mode of— Junior Pandarasannadhi, position of— Removal from office, causes of—Office held at pleasure, incidents of—Consent decree, how far binding—Suit by legal representative, to establish his position as such—Plaintiff, what must prove—Civil Procedure Code (Act V of 1908), O. XXII, r. 3 (1), 5.

The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts like that of Dharmapuram. The Pandarasannadhi has not got any power of arbitrary dismissal, but he may dismiss for good cause.

The position of a junior Pandarasannadhi during the life time of the elder appears to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for good cause, and dismissal without notice would be wholly void and inoperative. Where, however, an office is held at pleasure, the incumbent may be removed even on charges of misconduct without any opportunity of being heard, because he is removable at pleasure without any misconduct at all, but in all other cases "the objection for want of notice" can never be got over.

Where, therefore, the Matadhipati of the Dharmapuram Mutt having ordained and appointed a junior Pandarasannadhi cancelled the appointment without giving the junior any opportunity to answer the charges against him, and nominated another successor:

Held, that the dismissal was illegal and the subsequent nomination invalid and inoperative.

A consent decree is binding on the parties to the suit until it is set aside, just as much as if it had been passed after contest.

RELIGIOUS ENDOWMENTS—conold.

The mere fact that a clause in a compromise decree purports to restrain the Pandarasannadhi from removing the junior in case of future misconduct, is no ground for setting aside the decree altogether in a suit by the former for that purpose, for it does not affect the consideration obtained by the former for entering into the compromise.

Per *Seshagiri Aiyar, J.*—The head of a Mutt is entitled to appoint a junior Pandarasannadhi, who has a recognised status and is entitled to succeed to the headship if he survives the appointer. He can be removed for good cause shown, but the tenure of his office is not dependent upon the good will of the appointer, who cannot dismiss him arbitrarily.

Where the Matadhapati of a certain Mutt sues for a declaration that the defendant is not the lawful Pandarasannadhi, and on his death a person appointed by him as his successor applies for leave to continue the suit and he is directed to bring a separate suit to establish his character as the legal representative of the deceased, it is not enough for him in such subsequent suit only to show that he acquired all the rights which the deceased was capable of conferring on him, but he must prove that he has stepped into the shoes of the deceased with all the attributes that he claimed and it is open to the defendant to prove that the deceased had no rights to transmit. **M THIRUVAMBALA DESIKAR v. CHINNA PANDARAM**, 30 M. L. J. 274; (1916) 2 M. W. N. 43 **57**

REMAND, power of, if restricted by Order XLI, rules 23, 25 of Civil Procedure Code **235**

RENT, share of revenue payable by putnidars to credit and account of their landlords, if is—Apportionment of rent, when could be made **409**

RES JUDICATA. See **CIVIL PROCEDURE CODE**, s. 11.

— *Recovery of occupancy, suit for.*

Where a tenant's suit to contest a notice of ejectment is dismissed owing to his failure to adduce evidence in support of his allegations, the decision in that suit operates as *res judicata* in a subsequent suit brought by him for recovery of occupancy based on the same allegations, although he is now ready to prove them. **U P B R HAR BAKHSI SINGH v. LALLA**, 3 O. L. J. 236 **640**

— *Suit for occupancy holding in Revenue Court—Suit for holding and grove in Civil Court—Decision of Revenue Court, how far bars civil suit—Jurisdiction—Agra Tenancy Act (II of 1901), s. 202.*

The plaintiff's suit in the Revenue Court against the defendant for possession of an occupancy holding was dismissed on the ground that the defendant was the adopted son of the original tenant and had succeeded to the holding. The plaintiff thereafter sued in the Civil Court for possession of the holding and a grove:

Held, that the decision of the Revenue Court in respect of the holding could not operate as *res judicata* in the civil suit relating to the grove, inasmuch as the Revenue Court could not have decided the suit brought in respect of the grove.

Held, also, that section 202 of the Agra Tenancy Act had no application inasmuch as the suit, so far as the grove was concerned, was not a suit relating to an agricultural holding. **A. MIZAJI LAL v. HORI LAL** **162**

RESTITUTION. See CIVIL PROCEDURE CODE, s. 144.

RESTITUTION OF CONJUGAL RIGHTS—*Discretion of Court—Plaintiff's neglect in asserting his marital rights, effect of.*

The grant of a decree for restitution of conjugal rights is discretionary with the Court.

Where, therefore, the girl was a minor at the time of the marriage and consummation had not taken place and moreover the plaintiff had neglected to assert his marital rights for a long time:

Held, that the plaintiff was not entitled to restitution of conjugal rights. **P. ZIADA v. JOWAI**, 46 P. R. 1916 **538**

RESTRAINT ON ALIENATION. See ALIENATION.

RESUMPTION—Service grant, suit, non-maintainability of. **713**

REVENUE SALE, purchasers at, rights of—*Ejectment, suit in—Burden of proof—Adverse possession of part of an estate sold at revenue sale, effect of.*

The purchasers of an estate at a revenue sale are entitled to all lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date.

The plaintiff in an action in ejectment must succeed on the strength of his own title and, therefore, the purchaser of an estate at a revenue sale cannot by suit oust the defendants from lands which, though not included in the estates claimed by them, are equally outside the estate purchased. **C. BAIKUNTHA NATH RAI v. BASANTA KUMARI DAS**, 23 C. L. J. 151 **946**

REVISION. See APPEAL, SECOND; BOMBAY DISTRICT MUNICIPAL ACT, s. 160 (3); CIVIL PROCEDURE CODE, s. 115, O. XLVII; CRIMINAL PROCEDURE CODE, s. 145; PROVINCIAL SMALL CAUSE COURTS ACT, s. 25.

—*Courts, inferior and superior—District Magistrate—Sessions Judge.*

The Court of a District Magistrate is for the purposes of revision a Court inferior to that of the Sessions Judge. **O. HARKARAN SINGH v. HARNAM SINGH**, 3 O. L. J. 38; 17 Cr. L. J. 223 **335**

—*Magistrate's refusal to examine witnesses—Failure to record finding as to possession at date of preliminary order—Declining jurisdiction—Irregularity—High Court* **329**

RIGHT OF PRIVATE DEFENCE. See PENAL CODE, s. 100.

RULE AGAINST PERPETUITIES—Covenant to grant land to a society when needed for construction of *dharamsala*—Right of grantee **482**

SALE. See TRANSFER OF PROPERTY ACT, s. 54.

—*in execution of decree—Adjudication of judgment-debtor in insolvency before sale—Sale, effect of—Application by Receiver to set aside sale—Order refusing application—Appeal, second—Civil Procedure Code (Act V of 1908), ss. 47, 100, 115, O. XXI, r. 90* **829**

—*in execution of decree—Issue of sale certificate to purchaser—Possession, suit for—Plea of fraud and irregularity in conduct of sale—Burden of proof.*

Plaintiff, the assignee of a decree, brought the judgment-debtor's property to sale in execution and purchased it himself. After obtaining the sale

SALE—*concl'd.*

certificate he instituted the present suit for possession against the judgment-debtor. The defendant pleaded that the decree was obtained by fraud and that the sale was held without service of the usual notice on him:

Held, that as the plaintiff had obtained a sale certificate from Court, the onus lay on the defendant of proving his allegation. **PAT JIWACH RAUT v. SUMRAN MANWAR** **911**

—*in execution of rent-decree—Purchaser of tenure, liability of, for past arrears of rent.*

The purchaser of a tenure at a sale held in execution of a decree other than a decree for rent must, in the absence of anything to denote the contrary, be taken to have purchased it charged with the rent which might be due in respect of it at the time of his purchase.

But where a tenure or holding is sold in execution of a decree for its own arrears of rent, in the absence of anything to denote the contrary, it passes to the purchaser free from all liabilities for its previous arrears, and the purchaser is not liable for the arrears of rent for the period prior to the date of confirmation of sale at which he purchased. **C. MATHURA MOHAN SAHA v. NABIN CHANDRA DUTT**, 20 C. W. N. 749; 24 C. L. J. 34 **180**

—*Statement by vendor as to ownership of lands mentioned as boundaries—Admissibility—Statement against interest—Evidence, failure to object to relevancy of, effect of, in appeal* **534**

SANCTION TO PROSECUTE. See CRIMINAL PROCEDURE CODE, s. 195

SENTENCE—*One week's rigorous imprisonment altered to fine of Rs. 50 or in default one week's rigorous imprisonment—Enhancement, illegality of.*

Where petitioners were sentenced to undergo one week's rigorous imprisonment in respect of an offence under section 323, Indian Penal Code, and on appeal the District Magistrate "reduced" the sentence to one of Rs. 50 or in default one week's rigorous imprisonment, irrespective of the fact that they had already undergone several days' imprisonment:

Held, that the order of the District Magistrate amounted to one enhancing the sentence and was illegal. **P. MAM CHAND v. EMPEROR**, 5 P. W. R. 1916 Cr.; 17 Cr. L. J. 212 **324**

SHEBAIT, power of, to maintain suit in respect of dedicated property without making idol a party.

The right to bring whatever suits are necessary for the protection of property dedicated to an idol is vested in the *shebait* and not in the idol. Hence, the *shebait* is entitled to sue for the rent of the dedicated property without adding the idol as a party. **C. DINABANDHU NANDI v. CHAMIRADDI MIJI** **548**

SOCIETIES REGISTRATION ACT (XXI OF 1860) **263**

SOCIETY or institution maintained by public subscriptions—*Managing Committee, right of, to refuse subscriptions of individuals—'Right to subscribe'—Suit, whether lies to enforce the right—Societies Registration Act (XXI of 1860).*

The managing committee of a society or institution which is maintained by public subscriptions, are

SOCIETY—concl'd.

under no obligation to the public to accept whatever subscription is offered to them.

No suit, therefore, lies by any member of the public to enforce the right to subscribe and to compel the committee to admit him to the privileges of membership in virtue of his offer of subscription. **O** ABHOY PADO BOSE v. MANAGING COMMITTEE, ETC., 19 O. C. 15 **263**

SPECIFIC PERFORMANCE. See CONTRACT.

—, object of—Agreement for purchase of mortgage-decree—Suit to enforce agreement—Decree barred on date of suit—Specific performance, whether should be decreed.

The expression 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed.

A suit for the specific performance of an agreement to purchase a mortgage-decree will not be decreed against the purchaser if, at the date of suit, the decree agreed to be purchased is barred, and, therefore, incapable of assignment. **P C** JATINDRA NATH BASU v. PEYER DEYE DEBI, 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. **69**

SPECIFIC RELIEF ACT (I OF 1877), S. 9 **450**

— Ss. 14, 15 **461**

— S. 27 **488**

— S. 27 (b) **482**

— S. 27 (b)—Contract of sale—Specific performance—Sale disguised as mortgage—Bona fide transfer—Notice.

A mortgage may not be quite in good faith qua a person entitled to pre-empt, if a sale was disguised under its cloak, but it may be a good and a bona fide transfer as against a person who claims specific performance of an earlier contract of sale entered into by him with the mortgagor.

Where in a suit by a prior mortgagee against the mortgagor and the subsequent mortgagee for specific performance of a contract of sale of the mortgaged property, entered into between the prior mortgagee and the mortgagor before the contract of the subsequent mortgage, it was found that the subsequent mortgagee knew of the prior mortgage and also of the sale to the prior mortgagee of the share belonging to the mortgagor's brother, and that the terms of the subsequent mortgage were such as to make that mortgage well nigh irredeemable:

Held, that none of the above circumstances could be regarded as sufficient proof of the fact that the subsequent mortgagee had notice of the contract of sale. **O** RAM BHAJAN v. SHEO DARSHAN SINGH, 3 O. L. J. 162 **396**

S. 27, illus. (3)—Transfer of Property Act (IV of 1882), ss. 3, 40, 54—Vendor and purchaser—Contract for sale of land to mortgagee in possession—Specific performance against subsequent purchaser—Constructive notice of rights and equities of party in possession.

SPECIFIC RELIEF ACT—cont'd.

A constructive notice, under section 3 of the Transfer of Property Act, includes cases of gross negligence in making further enquiry about facts of which a person has actual notice and a wilful abstention from enquiry for the very purpose of avoiding notice.

The fact that a person other than the vendor is in possession of the property is sufficient to put a purchaser on enquiry as to the nature and extent of his interest, and if that enquiry is not pursued, the purchaser will be affected with notice of the title, if any, under which possession is enjoyed or of any contract the person in possession may have entered into for the purchase of the property.

A mortgagee in possession who has entered into an agreement to purchase the mortgaged property can enforce it as against a subsequent purchaser. The purchaser is affected with constructive notice of the contract on the principle above laid down, and cannot, in a suit for specific performance, be heard to say in defence that he was entitled to assume that the mortgagee continued in possession as mortgagee and had not acquired any other title.

A contract for the sale of immoveable property, though it does not create a charge on or interest in the property under the last paragraph of section 54 of the Transfer of Property Act, gives the obligee the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property under paragraph 2 of section 40, and the obligation to execute a conveyance may be enforced against a transferee with notice of that obligation.

PUTHENPURAYIL v. KANDIVAL, (1916) 2 M. W. N. 31; 20 M. L. T. 127 **906**

— S. 42 **125**

STAMP ACT (II OF 1899)—Chit acknowledging liability—Pro-note—Instrument evidencing antecedent debt, if discharges liability on original debt—Part-payment after security has matured, whether payment in respect of such debt—Contemporaneous debt, note given on, effect of—Parol evidence, use of, to prove identity of debt acknowledged in writing—'Ullittoor', addition of, to maker's name—Liability of maker.

A chit containing a promise to pay is a promissory note if the transaction falls within the definition of a promissory note as given in the Stamp Act.

The giving of an instrument in writing in recognition of an antecedent debt does not extinguish but merely suspends the cause of action on the original debt, which revives if the security be not discharged at maturity, unless such instrument can be regarded as a mere collateral security, in which case it will not operate even as a suspension of the original debt.

When a bill or note is given there is only one debt, though there may be different remedies or causes of action.

Payments, therefore, in discharge of a debt evidenced by an unstamped and, therefore, inadmissible pro-note are payments against or acknowledgments of the original debt and not on account of the pro-note.

Thus where a suit was brought on 8th August 1910 on a balance of accounts evidenced by an unstamped chit, executed on 10th August 1905, payable within two years from that date and containing an endorsement on its back of two part-

STAMP ACT—concl'd.

payments, dated 14th May 1907 and 30th August 1907, respectively:

Held, that on failure to discharge the *chit* on its due date, the original debt revived, that the acknowledgments on the *chit* were equally available as acknowledgments of a reduction of and, therefore, of liability upon the original debt, and that consequently the suit brought on 8th August 1910 was not barred.

Obiter dicta.—If a bill or note is given for a contemporaneous debt, the bill merely suspends the remedy and does not operate as a discharge.

The identity of a debt acknowledged in writing can be proved by parol evidence.

Per *Srinivasa Aiyangar, J.*—The maker of a promissory note does not cease to be definite merely because the word 'Ullittoor' is added to his name. Whether such addition binds the members of his family or not, the maker does not cease to be personally liable. **M CHOKKALINGAM CHETTY v. ANNAMALAI CHETTY** 417

— S. 57—*Bundelkhand Alienation of Land Act (II of 1903), s. 17—Mortgage by Collector on behalf of mortgagor, whether exempt from stamp duty.*

A mortgage-deed executed by a Collector under the provisions of section 17 of the Bundelkhand Alienation of Land Act (II of 1903) on behalf of a mortgagor is not exempt from the stamp duty chargeable under Act II of 1899. **A SOMWARPURI v. MATABADAL**, 14 A. L. J. 422; 36 A. 351 280

STATUTES. See INTERPRETATION OF STATUTE.

STAY OF PROCEEDINGS. See EXECUTION.

SUCCESSION. See CUSTOM; HINDU LAW; MATH; RELIGIOUS ENDOWMENTS.

SUCCESSION ACT (X OF 1865), S. 50—*Will—Illiterate testator Mark of testator affixed by one of the attesters, validity of—Attestation.*

An unprivileged Will is not duly 'executed' within the meaning of section 50 of the Succession Act when the testator, who cannot sign his name, simply touches the pen and hands it to some one to affix his mark. The mark should be affixed by the testator himself.

Section 50 of the Succession Act provides only for the testator signing the Will by a substitute and there is no corresponding provision for the testator's mark being affixed by some other person.

The person who signs a Will by direction of testator cannot be one of the two attesting witnesses required by the last paragraph of section 50. A Will, therefore, signed by a person for the testator and attested by himself and another is not duly attested within the meaning of the said paragraph and is inoperative. **M RADHAKRISHNA MUDALIAR v. SUBRAYA MUDALIAR**, 31 M. L. J. 357 849

— S. 57—*Will, revocation of, by tearing—Partial tearing, effect of—Question of fact—Trial Judge, opinion of—Appellate Court, interference by.*

A testator sent for his Will from his solicitor and wrote the word "cancelled" on it and signed his name and dated it and thereafter, according to the instructions of the solicitor, intentionally tore the Will only partially, without ever intending to tear it up altogether:

SUCCESSION ACT—concl'd.

Held, (per Curiam), that the tearing, under the circumstances was effectual under section 57 of the Indian Succession Act for the purpose of revocation.

Per *Sanderson, C. J.*—A tearing (though partial) of a Will, which is such a tearing as to evidence the testator's intention to revoke the Will and is all the tearing that he intends to do, added to the fact that he writes the word "cancelled" on the Will and signs his name, constitutes in law an effective revocation of the Will.

The opinion of a Trial Judge on questions of fact formed after seeing the witnesses and hearing their evidence, ought not to be differed from by a Court of Appeal, except upon very clear grounds.

Per *Mookerjee, J.*—Section 57 of the Indian Succession Act lays down that revocation consists of two elements; intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling, or obliterating are sufficient to constitute a total or partial revocation of a Will must depend to a considerable extent upon the circumstances of each case.

The slightest act of tearing with intent to revoke the whole Will thereby is sufficient to constitute valid revocation. **C JOHUR LALL DEY v. DHIRENDRA NATH DEY**, 20 C. W. N. 304; 23 C. L. J. 314 707

— S. 111 892

— Ss. 311, 312—*Will—Demonstrative legacies, payment of interest on—From what time payable—Rate of interest.*

Interest is payable on demonstrative legacies even though the Will is silent as to it.

A legacy payable at a future day carries interest only from the time fixed for payment. Where, however, no time is fixed for payment, but the amount is payable out of a particular fund, which is not to be got in until after a long interval, section 311 of the Succession Act applies.

The rate allowed on such legacies is 4 per cent. per annum. **C ADMINISTRATOR-GENERAL OF BENGAL v. A. O. CHRISTIANA**, 43 C. 201 157

— S. 312 157

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4 (1), *scope of—Assignee of debt, succession certificate, if required by, to collect debt.*

An assignee of a debt due to the estate of a deceased person can recover the debt without producing a succession certificate.

The Succession Certificate Act purports to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of deceased persons against the contingency which so often occurs, when disputes arise as to whether a claimant is or is not entitled as such personal representative.

Per *Walsh, J.*—Section 4 (1) of the Succession Certificate Act indicates that the claim contemplated by this section is a claim made by a person in the capacity of and as a personal representative of a deceased person.

SUCCESSION CERTIFICATE ACT—concl'd.

Per *Sundar Lal, J.*—An inquiry as to the validity of transfers made by a certificate-holder is foreign to the scope and object of Act VII of 1889. **A RAMAN LALJI MAHARAJ v. HARI DAS, 14 A. L. J. 677 364**

SUIT by legal representative to establish his position as such—Plaintiff, what must prove **57**

— by minor to set aside alienation by guardian—Agreement to pay interest not sanctioned by Court, whether binding on minor—Duty of minor to restore benefit received—Court's power to award compensation—Respondent, whether can claim additional relief by cross-objections **916**

SUMMONS, service of. See CIVIL PROCEDURE CODE, O. V, R. 12.

SURETY for judgment-debtor's filing insolvency application and his production—Party to suit—Failure of judgment-debtor to apply and appear—Forfeiture of security bond, application for—Rejection of application—Revision **247**

SURETY BOND—Presentation of insolvency petition by judgment-debtor, whether discharges surety—Undertaking to produce judgment-debtor—Issue of notice to judgment-debtor—Waiver of notice—Execution petition, dismissal of, effect of, on surety's liability—Construction of surety bond—Statutory obligations of surety **407**

TARWAD. See MALABAR LAW.

TENDER. See TRANSFER OF PROPERTY ACT, s. 83.

— Mortgage—Redemption, suit for—No offer of payment before institution of suit, effect of—Suit, maintainability of—Cause of action—Usufructuary agricultural mortgage.

A mortgagor has no right to institute a suit for redemption unless and until he has tendered to the mortgagee the debt due to the latter or at least the amount which he considers to be due to the latter.

A suit for the redemption of an agricultural usufructuary mortgage, redeemable only in *Jeth* of any year, was brought without any offer of payment having been made before institution of the suit:

Held, that the plaintiff had no cause of action and that, therefore, the suit was not maintainable. **A MUHAMMAD ALI v. BALDEO PANDE, 14 A. L. J. 55; 38 A. 148 183**

TRADE-MARK, infringement of—Trade-mark consisting of number and pictorial design—Dominant characteristic, test to determine—Copying of number on manufacturer's goods—Actual deception not necessary—Nature of relief—Injunction—Damages.

A numeral or a number may be as much a trade-mark as any other design.

A manufacturer can use one device or a combination of devices to denote any particular article manufactured by him. In the latter case, the question as to what is the dominant trade-mark is a question of evidence, depending on which device has caught the attention of the buyers and has come to be associated with the goods of the manufacturer.

It is an infringement of a trade-mark to copy the number assigned by a manufacturer to any article made in his factory, when the article has acquired a reputation in the market and orders

TRADE-MARK—concl'd.

have been placed for it by description of the said number. It makes no difference that the person infringing adopts a different drawing or picture along with the number.

Where goods have acquired, by a particular fancy description, combination or device a reputation in the market, it is immaterial that the customers do not know who the maker is.

The questions for determination, therefore, in a case of an alleged infringement of a trade-mark are (1) whether the defendant has pirated the dominant device of the plaintiff and (2) whether the defendant's conduct is such as to deceive ultimate purchasers. Proof of actual deception is not necessary.

A Court may grant both an injunction and damages to the plaintiff in a suit for infringement of a trade-mark. The injunction should be wide enough to cover all possible channels of approach to ultimate buyers and damages should be awarded on the result of an enquiry as to profits made by the defendant by the unlawful use of plaintiff's number.

Plaintiffs manufactured twill cloth in their mill at Nagpur which was put on the market marked ■ No. 2051 with the device of a serpent. This cloth was sold from 1904. The defendants, who owned a mill in Bombay, also manufactured twill of similar pattern in 1913 and affixed the same number on every piece of their cloth and a label representing the image of the sun. Plaintiffs sued to restrain defendants from affixing No. 2051 to their twill cloth and for damages:

Held, (1) that No. 2051 was plaintiff's trade-mark and that the defendants infringed it by copying the number;

(2) that an injunction restraining the defendants from using the said number on their cloth anywhere in India and award of damages to the plaintiffs on the amount of the profits made by defendants by sale of their twill cloth were appropriate reliefs. **B MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD., 18 Bom. L. R. 206 529**

TRANSFER OF PROPERTY ACT (IV of 1882), ss. 2 (c), 58 (c), 67—Mortgage-deed executed before the Act—Condition to relinquish property in case of default of payment—Construction—Remedies given by the Act, whether available—Suit for foreclosure—Limitation Act (IX of 1908), s. 31, Sch. I, Arts. 132, 135.

The right to relief arising from a certain relation existing between parties is a matter of adjective law, and consequently the parties are entitled, where a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of Law.

Where in a suit for foreclosure of a mortgage it appeared that the mortgage-deed executed in 1879 did not purport to sell the mortgaged property, but contained a provision to the effect that in default of payment of the mortgage-money in the prescribed manner, the property should be relinquished by the mortgagor as if sold to the mortgagee:

TRANSFER OF PROPERTY ACT—contd.

Held, (1) that the mortgage-deed should be construed with reference to the law as it stood before the Transfer of Property Act and so construed it was a mortgage by conditional sale;

(2) that the remedy given by section 67 of the Transfer of Property Act could be availed of by the parties to the document and that there was nothing in section 2, clause (c), of the Act to disentitle the parties from seeking the relief;

(3) that the suit for foreclosure governed not by Article 135 but by Article 132 read with section 31 of the Limitation Act and was not barred by time. **M. BIKKINA RAMAYYA v. ADABALA SESHAYYA**, 30 M. L. J. 338 475

906

S. 3

— Ss. 3, 78—'Gross negligence', what is—Notice, constructive Registration, if notice in Bengal—Unsuccessful search at registration office—Presumption—Neglect to secure title-deed by mortgagee from mortgagor, effect of.

Section 78 of the Transfer of Property Act makes 'fraud' 'misrepresentation' and 'gross negligence' quite disjunctive. One cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. It is not necessary that there should be fraud or something indicating fraud to bring a case within section 78 of the Transfer of Property Act.

A mere omission on the part of a mortgagee to take and keep the title-deeds is not of itself 'gross negligence' which will secure a postponement of his mortgage to that of another subsequent mortgagee who secures them. The existence of gross negligence must be determined according to the circumstances of each case.

Registration by itself does not amount to notice in Bengal.

The making of a search at the registration office for a document does not amount to, nor raise an irrebuttable presumption of notice in every case under section 3 of the Transfer of Property Act. It is open to a party making the search to show why he should not be saddled with notice.

Neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and a suggestion that the purchase-money was required in cash and paid accordingly. **C. NANDA LAL v. ABDUL AZIZ** 115

— Ss. 3, 132—Mortgage, assignment of—Suit by assignee Set-off against assignor, whether provable—Equitable set-off Civil Procedure Code (Act V of 1908), O. VIII, r. 6.

The transfer of a mortgage-debt, being the transfer of an actionable claim under section 132, Transfer of Property Act, the defendant cannot, in a suit by the assignee to enforce the mortgage, set off an in-

TRANSFER OF PROPERTY ACT—contd.

dependent debt due to him by the assignor and not covered by the mortgage.

Even under English Law, the principles applicable to the assignments of choses-in-action do not apply to transfers of mortgages.

No set-off, which is not covered by the provisions of Order VIII, rule 6, Civil Procedure Code, can be pleaded in suits. But it is permissible to plead an equitable set-off where it is confined to unascertained sums and arises out of the same transaction.

In a suit by the assignee of a mortgage for recovery of the mortgage amount, the defendant wanted to set off a judgment-debt due to him by the assignor of the mortgage and bearing date subsequent to the assignment:

Held, that the set-off could not be allowed as the decree was a debt independent of the mortgage.

Quere.—Whether the defendant could prove the state of account in existence at the date of the assignment? **M. SUBRAMANIA AIYAR v. SUBRAMANIA PATTAR**, (1916) 1 M. W. N. 351; 30 M. L. J. 615 859

S. 6

S. 6 (c)

95

— Ss. 6 (c), 54, 123—Easement—Right of way—Landlord and tenant—Acquisition of right on landlord's other lands—Prescription—Grant—Writing, whether necessary to create easement—Registration—'Immovable property', whether includes right of way—Interpretation of Statutes—Preamble of an Act, reference to, in interpreting enactment—Document, construction of—Extrinsic evidence, admissibility of—Second appeal, question of law, whether can be raised, for first time in—Easements Act (V of 1882), ss. 15, 17, 26, Ch. VI—Specific Relief Act I of 1877, s. 9—General Clauses Act X of 1897, s. 3 (25)—Registration Act (III of 1877), s. 2 (6).

The provisions of the Transfer of Property Act have no application to the creation of easements and the Act was not intended to deal with that topic.

The Indian Easements Act is a complete and self-contained Code on the subject of easements. In places where the Act is not in force, Courts should draw upon English sources for their substantive law, on the principle that English Law on the subject is in accordance with justice, equity and good conscience.

The definition of the term 'immovable property' in the General Clauses Act, 1897, may be wide enough to include a right of way. But such right is not always or necessarily included. It is not excluded by section 3 of the Transfer of Property Act.

Under the terms, however, of section 9 of the Specific Relief Act, rights classified as incorporeal rights are taken out of its operation.

In England, a right of way is said to be in deed and not in livery. Sections 54 and 123 of the Transfer of Property Act were not intended to change, and did not change, the pre-existing law so as to require a writing for their creation or imposition, when no writing was previously necessary.

The creation or imposition, therefore, of a right of way, whether as a gift or for consideration, need not be in writing under section 23 or section 54 of the Transfer of Property Act.

Where, however, a right of way is created in writing, the writing may require registration under

TRANSFER OF PROPERTY ACT—contd.

the provisions of the Registration Act, which expressly include 'rights to way' within the definition of 'immovable property' in section 2 (6), but not if the value of the right is less than one hundred rupees.

A right of way cannot be acquired by a tenant over the lands of the landlord not in his occupation by prescription under section 26 of the Easements Act. It can, however, be created by grant.

A tenant relying on the grant of a right of way by the landlord must prove the grant. It is not sufficient for him to show that he used the way by the leave and license of the landlord. Mere leave and license will not invest him with anything in the nature of a right which he can enforce by suit.

Section 6 (c) of the Transfer of Property Act does no more than express the rule that there cannot be an easement in gross. The right which the landlord assigns is not, in his hands, an easement, because he cannot have an easement over his own property. The right becomes an easement in the hands of the grantee and the clause merely says that the grantee cannot transfer his easement apart from the dominant heritage, to which by the nature of the right it is attached.

Extrinsic evidence is admissible to show how the language of a document is related to existing facts or to facts which existed when the document was written.

The preamble of an Act does not control the enactment which follows, but it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved.

The point whether, in the absence of a written and registered document, creating a right of way in plaintiff's favour, his suit for a declaration of a right of way by grant must fail for want of legally sufficient evidence to prove the grant can be opened by the defendants in second appeal though it was not taken in the Courts below. *C. SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY*, 20 C. W. N. 159

450

516

833

— Ss. 10, 12

— S. 12

— Ss. 14, 40, 54—*Specific Relief Act (I of 1877)*, s. 27 (b)—*Iqrarnamah*—Covenant to grant land to a Society when needed for construction of dharmshala—Right of grantee—Contract void for indefiniteness—Rule against perpetuities—Personal contract—Suit for possession, maintainability of—Specific performance, right to—Appeal, second—Conversion of suit into one for specific performance, whether permissible.

The Raja of Palganj executed an *iqarnamah* in 1872 in favour of one G as manager of the Sitambari Jain Society, covenanting to grant land on or below Paraspath Hill to the latter whenever they required it for the purpose of building a mandir or dharmshala, and empowering the grantees to take the land if the grantor or his heirs should refuse to give it. The plaintiff, as manager of the Jain Society, gave notice to the Raja that land was required and took possession of suit

TRANSFER OF PROPERTY ACT—contd.

land in 1907. The defendants, a rival Society, it was alleged, dispossessed the plaintiff. The plaintiff instituted the present suit for possession under the terms of the said *iqarnamah*:

Held, (1) that, if the covenant was to be construed as creating an interest in the land or running with the land, it was bad as offending against the rule against perpetuities and preventing the owner from alienating his estate before the happening of a condition which may never occur, both on general principles and under Hindu Law;

(2) that the covenant was in the nature of a personal contract, and, though as such not obnoxious to the rule against perpetuities, was invalid and inoperative owing to its vague and indefinite nature;

(3) that the grant did not create a religious endowment but only a secular estate and was, therefore, not exempt from the rule against perpetuities;

(4) that section 41 of the Transfer of Property Act did not apply to the covenant which was, therefore, not enforceable against the heirs and assigns of the grantor;

(5) that plaintiff could not be allowed, in second appeal, to convert his suit into one for specific performance.

Per Jwala Prasad, J.—Assuming that plaintiff was entitled to sue for specific performance, it could not be a sound exercise of the Court's discretion to grant specific performance, having regard to the vague, indefinite and uncertain terms of the covenant.

Per Chamiar, C. J.—It would seem to follow from the terms of section 54 of the Transfer of Property Act that a contract to give immovable property does not, of itself, give any interest in the property.

The fact that the plaintiffs have taken possession of the land in pursuance of a contract which could be specifically enforced does not, on the principle of the decision in *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, give them the same rights as if the land had actually been conveyed to them. The principle of that decision has been applied to India with some misgiving and it should not be applied to this case. It is doubtful whether it should be applied to any case in India, except possibly the Presidency towns. *PAT DAYA BHAI v. MAHARAJ BAHADUR SINGH*, 1 P. L. J. 238.

482

— S. 37—Rent share of revenue payable by putnidars to credit and account of their landlords, if is—Apportionment of rent, when could be made.

The putnidars of a share in a revenue-paying estate owned by the plaintiffs and their co-sharers agreed by the document creating the *putni* to pay into the Collectorate the Government revenue payable in respect of their landlords' share in the *zemindari*. Subsequently the plaintiffs, opened a separate account in respect of their share under section 10 of Act XI of 1859:

Held, that the sum payable by the putnidars into the Collectorate to the account and credit of the landlords was rent and that the plaintiffs who had opened separate accounts, collected their share of the *putni* rent separately and made all their co-sharers parties to the suit, were entitled to have the same apportioned and to have an order

TRANSFER OF PROPERTY ACT—contd.

directing the *patnidars* to pay into the Collectorate the share of revenue, payable by the plaintiffs to their separate credit and account. **C GOUR GOPAL SINHA v. GOSTA BEHARI PRAMANIK** 409

— S. 40 482, 488, 906

— S. 41—*Applicability to Court auction-purchasers.*

Although the Transfer of Property Act deals only with transfers by acts of parties, the principle of section 41 of the Act applies in favour of a Court auction-purchaser. **M NARAPRATH KUMMALI v. PARAMBOLI KANDI.** 494

— S. 41—*Ostensible owner, transfer by—Transfer, when good—Reasonable care by transferee.*

The provisions of section 41 of the Transfer of Property Act apply to a case where a transfer is made by a person whose name appears in the *khowat* and the real owner not only expressly consents to allow that person to become an ostensible owner of the property transferred but also takes an active part in settling the terms of the transfer, inasmuch as in such a case the transferee must be regarded as having taken reasonable care. **O RAM SAMAJH PANDE v. RAMJAS,** 3 O. L. J. 224 773

— S. 41—*Transfer by person whose name was registered in Revenue Records against will of real owner—Absence of enquiry by transferee, effect of—Real owner, how far bound by the transfer* 673

— S. 51—*Improvements made by defendant in good faith—Right to compensation.*

Where in a suit for possession it appeared that the property in dispute had been sold *pendente lite* to defendants Nos 2 to 5 who sold it to defendant No. 6 and that the 1st set of vendees, believing in the soundness of their title, had effected certain improvements in the property:

Held. (1) that the plaintiff could not recover the property without payment of compensation to defendant No. 6 for the improvements effected. **P AMIR CHAND v. DURGA DAS,** 70 P. L. R. 1916; 92 P. W. R. 1916 957

— S. 53 744, 778

— S. 54 450, 482, 906, 921

— Ss. 54, 55 (4)—*Contract to sell—Breach—Compensation—Mesne profits.*

On an agreement to convey properties, a person is not entitled to possession or mesne profits as such before the date of the execution of the registered conveyance in his favour, having regard to section 54, paragraph (2), and section 55, sub-section (4), clause (a), of the Transfer of Property Act. He will, however, be entitled to compensation for breach of the contract to convey, in addition to suing for the execution of the conveyance. And the compensation will be the value of the mesne profits which could have been obtained between the date when the breach of contract took place and the date when the conveyance was actually executed. Such claim is not strictly one for mesne profits. **M SUBBAROYAR v. KOTTAYA GOUNDAN,** 1116 I M W. N. 284 737

Ss. 54, 55 (c)—*Easement—Right of way, grant of, for consideration—Verbal grant—Registration,*

TRANSFER OF PROPERTY ACT—contd.

absence of, whether invalidates transaction—Creation and transfer of easements, distinction between.

Section 54 of the Transfer of Property Act relates to the transfer of easements, and not to the creation thereof.

The creation by grant of a right of way in favour of a person over the grantor's land is not a transfer of ownership that is required to be in writing and registered under section 54, because no existing right of easement is transferred but a new easement is imposed on the property of the grantor.

A right of way can, therefore, be created by a verbal agreement. **L B GUM SONE v. CASSIM DALLA** 95

— S. 54—*Hindu widow—Transfer of life-interest for value exceeding Rs. 100—Registration.*

A transfer by a Hindu widow of her life-interest to the reversioners for a price exceeding Rs 100 must be by an instrument in writing and registered. **M BETIREDDI SOMIREDDI v. BETIREDDI TATAYYA** 748

— S. 54 *Sale, oral, of immoveable property under Rs. 100 in value, to mortgagee in possession—Delivery of possession, necessity of.*

Where, on the occasion of the oral sale of an immoveable property of less than Rs 100 in value by the owner to the mortgagee in possession, formal possession was delivered, boundaries were pointed out and the mortgage document was handed over to the mortgagee after endorsing on it, "as I have not been able to pay you the money, I make over the *jamai patta* to you. You have your name registered"; in fact everything was done that could be done to deliver possession:

Held, that such delivery was sufficient for the purpose of section 54 of the Transfer of Property Act and the sale was valid in law. **C SONAI CHUTIA v. SONARAM CHUTIA,** 20 C. W. N. 195 692

— S. 54—*Vendor and purchaser—Sale of mortgaged property—Application of consideration in discharge of mortgage—Purchaser, whether can claim mortgagee's rights as against subsequent registered purchaser—Intention to keep mortgage alive.*

A person who purchases mortgaged property, part consideration whereof is applied in discharge of the mortgage, cannot claim the right of the mortgagee as against a subsequent registered purchaser, unless there was an intention on his part to keep the mortgage alive. **L B MA KYUN v. MYAING SHIN** 47

— S. 55 890

— S. 55 (2)—*Vendor and purchaser—Vendor professing to sell particular quantity or quality of property, whether bound to pay damages for errors of quality or quantity.*

Where a seller professed to transfer by a sale-deed to the buyer particular plots of land burdened only by a yearly tenancy, and the buyer subsequently found that they were burdened by a permanent tenancy:

Held, that there was a clear case of a broken contract or warranty for which the purchaser was entitled to claim damages without rescinding the purchase.

TRANSFER OF PROPERTY ACT—contd.

After the purchaser has taken ■ conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. **B VISHVANATH GANESH JOSHI v. BALA KAKU KAPADI**, 18 Bom. L. R. 292 147

———— S. 55 (4) 737

———— Ss. 58 (a), 66—*Mortgage—English mortgage—Lease by mortgagor, validity of.*

Whatever may be the doctrine of English Law, an English mortgage, under the provisions of section 58, of the Transfer of Property Act, does not transfer the property absolutely to the mortgagee, but the mortgagor remains owner subject to the mortgage. The fictions of English Law in regard to legal and equitable estates have not been continued in India.

A mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession, save that he should not commit any act which will be destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act.

In the case of an "English mortgage," therefore, where the mortgagor is in possession, he can lease the property and his receipt of rent in advance for a certain period will not render the lease invalid unless the security is thereby rendered insufficient. **L B TANA PEENA CHUNA v. MANAKKANTAKATH** 24 24

———— S. 58 (c) 475

———— S. 58 (c), *scope of—Document, construction of—Sale or mortgage.*

A deed of transfer executed by plaintiffs to defendants in 1904 recited that the amount due to the latter in respect of a pre-existing mortgage on plaintiffs' lands was Rs. 13,00 inclusive of interest, and as excessive interest had to be paid and great loss was caused to the plaintiffs' family, the plaintiffs sold some of the lands to defendants for the said sum to extinguish the debt. The deed reserved to the vendors liberty to re-purchase the lands on payment of the sale consideration at any time within 20 years. By an instrument of even date, the vendees leased the land to the vendors plaintiffs for an annual rent of Rs. 412 which, however, was liable to reduction in proportion to any fractional payment of the sale price. The parties agreed that the costs of repurchase by the plaintiffs were to be borne by them in equal shares. In a suit brought by the plaintiffs in 1911 for redemption:

Held, that the transaction was a sale and not a mortgage.

Per *Batchelor, J.*—Section 58 of the Transfer of Property Act defines what a mortgage is and clause (c) of the section describes one method of effecting a mortgage, *viz.* the method of mortgaging by conditional sale. But the words of clause (c) are not to be read in an isolated manner, but in reference to the first paragraph of the section, and when they

TRANSFER OF PROPERTY ACT—contd.

are so read, it is manifest that clause (c) comes into play only when there is a mortgage, as that term has been defined. **B NARAYAN RAMKRISHNA PANDIT v. VIGNESHWAR GANAP HEGDE**, 18 Bom. L. R. 250; 40 B. 378 414

———— ■ 59—*Attestation of mortgage-deed—'Attest', meaning of—Scribe who witnesses execution and subscribes—scribe, whether attesting witness—Presumption as to execution.*

Per *Chamier, C. J.*—A mortgage-deed is duly 'attested' within the meaning of section 59 of the Transfer of Property Act when the attesting witnesses the execution of the deed and subscribes as an attesting witness.

The scribe of a document who was present at its execution and subscribed only as scribe, cannot be deemed to have attested the document.

Where, therefore, ■ mortgage-deed was signed by five persons who described themselves ■ attesting witnesses, but of whom only one witnessed its execution, and the scribe who signed as scribe ■ tendered to prove that he was present from the beginning to the end of the transaction:

Held, that the mortgage was not proved.

Per *Juala Prasad, J.* There is no presumption that a scribe or a person describing himself as the attesting witness of a document witnessed its execution. The fact must be established by evidence. **PAT RAM BAHADUR SINGH v. AJODHYA SINGH**, 20 C W. N. 99; 1 P. L. J. 129 370

———— S. 59—*Attestation, proper—Mortgage-deed not executed in attesting witnesses' presence Evidence Act (1 of 1872), s. 71—Amendment of plaint at late stage—Court, power of—Simple mortgage-deed treated as money-bond—Consideration of mortgage, payment of, proof as to—Simple money-deed Debt contracted by Hindu father, suit on—Immoral purpose, plea as to—Court, duty of.*

Where a mortgagor does not execute the mortgage-deed in the presence of the attesting witnesses, there is no proper attestation of the deed as required by section 59 of the Transfer of Property Act. And in such a case the evidence of some other person is not, under section 71 of the Evidence Act, sufficient to prove the due attestation required by law.

Where in a suit upon a simple mortgage the plaintiffs ask for a decree for sale of the mortgaged property, the Court can even at ■ late stage of the case allow them to amend their plaint by adding ■ alternative prayer for a simple money-deed.

A deed of simple mortgage can be treated as a simple money-bond, if it fails for want of proper attestation to take effect as ■ mortgage-deed.

The recital in ■ mortgage-deed to the effect that the money was paid to the mortgagor, and the statement in the registering officer's endorsement to the effect that the money was paid by the mortgagee to the mortgagor in his presence, does, in the absence of any evidence to the contrary, prove the passing of consideration, although it is found that the money was as a matter of fact paid by the mortgagee's son.

A simple money-deed can be obtained in ■ suit upon ■ simple mortgage-deed, which contains a personal covenant to pay.

Where in ■ suit against the sons of a Hindu father upon a debt incurred by him, they plead that

TRANSFER OF PROPERTY ACT—contd.

they are not liable to pay the debt on the ground that it was contracted for immoral purposes, the plea thus raised should be examined and decided before the decree is passed, and not left to be determined in the execution department. ○ MAHADEO PRASAD v. GAJRAJ SINGH, ■ O. L. J. 164 397

— Ss. 59, 67, 100—Mortgage Advance, recital of—Covenant for possession and discharge of debt by profits of usufruct—Document inoperative in law—Personal covenant—Charge.

A deed of mortgage provided (1) that the mortgagee was to remain in possession of the properties mortgaged for a term of seven years and to repay himself the money advanced on the security by collecting the rents and cesses thereof; (2) that the mortgagor was to be liable for any decrease in the *jumma* of the village with interest and for any collection made by himself or his heirs contrary to the terms of the document. The mortgage-deed was not attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The mortgagees remained in possession for the agreed term and, not being able to satisfy the debt from the profits of the mortgaged properties, they instituted the present suit to recover the balance due from the properties or, in the alternative, for a decree for money against the mortgagor personally:

Held, (1) that the document was a usufructuary mortgage within the meaning of section 67 (a) of the Transfer of Property Act, which could not be enforced as a mortgage by its not conforming to the provisions of section 59 of the Act;

(2) that the document did not create a charge within the meaning of section 100 of the Transfer of Property Act;

(3) that it could not be inferred from the recital of the advance that the parties intended that the mortgagor was to be personally liable and that, except to the extent and in one or other of the events mentioned in the document, the mortgagor was not personally liable for re-payment of the debt. P C RAM NARAYAN SINGH v. ADHINDRA NATH, 20 C. W. N. 989; (1916) 1 M. W. N. 428; 4 L. W. 15; 31 M. L. J. 251; 20 M. L. T. 216 900

— S. 66 24

— S. 67 475, 900

— S. 78 115

— S. 81—Marshalling.

Per *Abdur Rahim, J* In order that a right to marshal may arise, the contending creditors must be creditors of one and the same person and must claim against the same property. Where the defendant had notice of the plaintiff's mortgage when he obtained his security, that would be sufficient to bar his claim under section 81 of the Transfer of Property Act.

Whether the Full Bench decision in *Appayya v. Rangayya*, 31 M. 4 9; 18 M. L. J. 229; 3 M. L. T. 287, applies also to a mortgagee from the purchaser?

Per *Srinivasa Aiyangar, J.*—Section 81 of the Transfer of Property Act does not avail the mortgagees of a purchaser, their right to marshal is in the right of their assignor who is the vendee of the original mortgagor. The right to marshal is

TRANSFER OF PROPERTY ACT—contd.

discretion in the Court, which, however, is not a right of any particular party, to direct the sale of any particular item if that would be sufficient to pay off the mortgage debt. It is a discretion which the Court is entitled to exercise at the time when final execution is ordered. M RAMASWAMY CHETTY v. MADURA MILLS Co., LTD., (1916) 1 M. W. N. 265 338

— Ss. 83, 84—Mortgage—Deposit in Court—Computation of interest—Inclusion of interest for day of deposit Payment of *batta*—Tender insufficient, effect of—Cessation of interest—Mortgagor's right to mesne profits—Day, fraction of, when to be considered full day.

If a mortgagor pays the exact amount due on his mortgage into Court and causes notice to be issued to the proper address of the mortgagee, paying *batta* therefor, he has done all that is required of him by sections 83 & 84 of the Transfer of Property Act to stop the running of interest

Where the amount deposited falls short of what is due by even a few annas owing to a *bona fide* mistake in calculation, it is not a sufficient tender within the meaning of the section and the mortgagor is not entitled to mesne profits on the mortgagee's refusal to accept it.

In the absence of a mercantile custom or usage, interest cannot be charged for either the day on which money was advanced or on which it was repaid

In computing the interest due on a mortgage amount for making a deposit under section 84 of the Transfer of Property Act, interest accruing due for the day of deposit should be included.

Where there are conflicting rights as between subject and subject, a fraction of a day will be treated as a whole day. M SUBRAI GOUNDAN v. PALANI GOUNDAN, 30 M. L. J. 607 825

— S. 83—Tender, full or inadequate, effect of—Costs, mortgagee's right as to.

A tender made under section 83 of the Transfer of Property Act may be either full or inadequate. If it is full the interest stops altogether from the date of the tender. If it is inadequate the mortgagee is at liberty to ignore it and is entitled to recover interest at the contract rate up till the date of the redemption suit. The mortgagee is not bound to accept anything less than the full amount that is owing to him and he cannot be damaged by any mistake made by the mortgagor in making the tender. There is no *via media* in the matter.

A mortgagee is entitled to costs in suits for redemption or foreclosure unless he has been guilty of any misconduct; and the fact that he claims more than is found owing to him is not *per se* any sufficient ground for depriving him of his costs. ○ GAURI SHANKAR v. ABU JAFAR KHAN, ■ O. L. J. 204 690

— S. 84 825

— S. 88 756

— S. 95 244

— S. 100 900

— S. 106 516

TRANSFER OF PROPERTY ACT—concl'd.

— S. 106—Lease—Notice to quit, issue of, on behalf of some of joint owners—Tacit assent of other co-owners—Notice, whether sufficient.

A notice determining a lease issued on behalf of some of the owners is a sufficient compliance with the requirements of section 106 of the Transfer of Property Act, if the other co-owners are proved to have assented to it by their conduct. **C** KARAMAT ALI v. HANUMAN DAS MARWARI 56

— S. 107—Agricultural lease—Lease for planting casuarina trees—Registration.

A lease for planting casuarina trees is not one for an agricultural purpose and is consequently invalid if not in writing and registered. **M** DEVARAJA NAICKEN v. AMMANI AMMAL, 3 L. W. 319 539

— S. 108 (b) 1

— S. 110 (g) 516

— Ss. 111, 117 833

— S. 123 450

— S. 132 859

— S. 136 360

TRUST. See UNIVERSITIES ACT, s. 3.

—, breach, of—Employment of trust moneys in private trade or business—Liability of trustee—Interest in excess of statutory rate, award of 900

— charitable, scheme for settlement of—Temple. 551

— Public trust—Suit by two worshippers with Advocate-General's sanction—Death of one plaintiff, if causes suit to abate—Court's power to add parties—Sanction of Advocate-General, if necessary for such addition 384

TRUST PROPERTY. See ADVERSE POSSESSION.

TRUSTS ACT (II OF 1882), S. 23 (f)—Trust, breach of—Employment of trust moneys in private trade or business—Liability of trustee—Interest in excess of statutory rate, award of.

Under section 23 (f) of the Trusts Act, a trustee charged with employing trust moneys in his own private trade or business cannot be directed to pay interest exceeding six per cent. per annum, even though he admits liability at a higher rate. **M** VISWANATHAN v. BRAHMANADHAN 900

S. 91 488

U. P. LAND REVENUE ACT (III OF 1901), s. 36 441

— Ss. 110, 111 689

— S. 138 749

U. P. MUNICIPALITIES ACT (I OF 1900), Ss. 130, cl. (a), (c), 132—Breach of rules—Conviction—Notice, necessity of.

In order to render a person liable to punishment for committing breach of any rules made under clause (a) or clause (c) of section 130 of the U. P. Municipalities Act, it is necessary that notice should have been served upon him as provided by the section. **A** JHAMMAN v. EMPEROR, 14 A. L. J. 604: 17 Cr. L. J. 269 989

— S. 132 989

UNIVERSITIES ACT (VIII OF 1904), Ss. 8, 14—Calcutta University Act (II of 1857)—Calcutta University—Acceptance of trusts—Grants burdened with conditions—Illegal conditions, effect of—University Regulations—Founding of chairs to be filled by Indian Professors—Management by a governing body, some of whom being founder's nominees—Ultra vires—Absence of Governor-General's sanction—Exclusion of one of several trustees, if occasions a failure of trust.

The powers of the Calcutta University under Act II of 1857 and Act VII of 1904 to hold and possess property for its purposes are extensive and the University is empowered to accept trusts, grants, or charitable gifts beneficial for its purposes, even where they are subject to conditions. The grant cannot fail, even if the conditions accompanying it are held to be invalid or incapable of fulfilment by the University.

The term 'students' in section 3 of Act VIII of 1904 is not confined to students of any one University in particular. There is nothing in the Act to prohibit the University giving their aid to research by students who may not belong to any University and yet, by their exceptional gifts, may well be requisitioned to extend the bounds of knowledge.

The exclusion of one of several trustees, by reason of legal disability, would neither occasion a failure of the trust, nor affect the status of the other trustees or their competence to carry out the directions in the trust-deed.

Per *Imam, J.*—If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift discharged from the conditions.

The object of Act VIII of 1904 is to extend the usefulness of the University and not to cramp it and to construe the term 'students' (in section 3) to mean the students of the University alone is to fall into a rigidity of interpretation that is neither justified by the words of the Act nor its purpose.

Neither Act II of 1857 nor Act VIII of 1904 fetter the discretion of the Calcutta University to accept gifts subject to conditions. It could never have been intended that a grantor should either hand over his property free to the University or not make a grant at all.

The Calcutta University Regulations which are derived from the Acts themselves, do not curtail the power of the University to accept endowments of Professorships made by donors subject to conditions.

Section 2 of the Regulations, read with section 1, does not mean that the University can accept such Professorships only as are sanctioned by the Governor-General in Council. The qualifying word 'likewise' in the first line of section 2 does not govern the word 'accept' in the last but one line of that section. Section 2 clearly leaves it to the University to determine the fitness of an endowment for the purposes of their acceptance and it is not *ultra vires* of the University to accept fresh endowments subject to conditions.

Per *Greaves, J.*—*Obiter*—If it is within the power of the University to accept trusts or gifts under Acts II of 1857 and VIII of 1904, the fact that the internal Regulations of the University may not have been observed, as that the previous sanction of the Governor-General was not obtained, that the

UNIVERSITIES ACT—contd.

Senate did not accept the trust or that the seal was irregularly affixed to the indenture, cannot invalidate the gift, as no question of *ultra vires* arises and these are merely irregularities, which, if necessary, may be cured at any time.

One Sir Tarak Nath Palit granted, by two separate indentures and by his last Will and testament, certain properties to the Calcutta University for the diffusion of Scientific and Technical Education in Bengal. The grant was made subject *inter alia* to the following conditions, (1) that the University of Calcutta should found two Professorships or chairs, one of chemistry and the other of physics to be filled by Indian Professors, (2) that there should be a governing body to manage the trust, a proportion of them to be the nominees of the founder or his heirs and some members to be foreign to the University. Clause 9 of the Indenture provided that, during the settlor's lifetime, the trustees should never be less than three in number and by clause 11 it was declared that, during the settlor's lifetime, he, in conjunction with any of the trustees, should be competent to do all the acts required to be done by the trustees or to exercise all the powers conferred upon them. The indenture was executed by the parties thereto, the seal of the University being affixed by the Vice-Chancellor. The plaintiff, one of the sons of the grantor, brought the present suit against the executors of the testator's estate and the University of Calcutta for a declaration that the grant to the University was invalid in law and for an order that the executors do administer in due course of law the properties as assets of the late Sir Tarak Nath Palit. The plaintiff urged that it was beyond the powers of the University to accept the grant subject to the donor's conditions and in view of the constitution of the governing body which was to include members foreign to the University. He also took minor objections, as, that the Senate did not accept the grant, that the sanction of the Governor-General was not obtained and that the action of the Vice-Chancellor in affixing the seal of the University to the indentures was irregular. It was also urged by the plaintiff that it was *ultra vires* of the University to act as trustee during the lifetime of Sir Tarak Nath Palit, and that the surviving trustees on Sir Tarak Nath's death could make no valid assurance or transfer of the properties to the University, inasmuch as they were never vested in them. It was, however, established from the Minutes of the Syndicate that the gift was accepted by both the Syndicate and the Senate and that the Vice-Chancellor was authorized to take such further steps in the matter on behalf of the University as he might deem necessary:

Held, (1) that under clauses III and XIV of Acts II of 1857 and VIII of 1904, the University had power to accept the grant;

(2) that there was nothing in the Regulations made under the Act prohibiting the acceptance of the conditions imposed by the donor;

(3) that, assuming that the subsidiary objections, *viz.*, the want of the Governor-General's sanction or the consent of the Senate or the affixing of the seal by the Vice-Chancellors without the Syndicate's

UNIVERSITIES ACT—conold.

sanction, were true, they did not invalidate the grant;

(4) that it was competent to the surviving trustees, on Sir Tarak Nath's death, to make a valid transfer of the trust property to the University. **C** JITENDRA NATH PALIT v. LOKENDRA NATH, 22 C. L. J. 593 657

VENDOR AND PURCHASER—Construction of document—Sale-deed, interpretation of—Shares sold—Plots omitted inadvertently—Pleader, authority of—Withdrawal of plea—Client's position in appeal.

The body of a sale-deed contained a description of the property sold,—certain distinct shares in a village, together with their respective areas. At the end of the deed there was a table giving a detail of those shares by showing the *khata* numbers with their respective areas. The village was sub-divided into enormous numbers of *khatus*, some of which were of very small areas, and a few small plots were omitted to be mentioned in the sale-deed by inadvertence:

Held, that the intention of the vendor was to transfer the whole of the shares to which he was entitled, and that, therefore, the fact that certain numbers had been omitted from the list attached to the sale-deed made no difference in the case.

A Pleader has full authority to withdraw any plea raised in the pleadings, and his client is not at liberty to have the issues, based on such a plea and withdrawn from trial in the first Court, re-opened in appeal. **O** SURAJPAL SINGH v. DEBI BAKHSH SINGH, 3 O. L. J. 156 390

— Contract for sale of land to mortgagee in possession—Specific performance against subsequent purchaser—Constructive notice of rights and equities of party in possession 906

— Contract Act (IX of 1872), s. 118—Warranty of quality—Goods not in accordance with contract, when to be rejected—Onus to prove rejection within reasonable time.

Some bales of jute, warranted to be of a certain quality, were purchased by the defendants under a contract, which stipulated that the plaintiff-vendor was to receive 90 per cent. of the price when the defendants-vendees received documents from the Railway Company, and when the goods were actually delivered the balance of 10 per cent was to be paid. The documents were received by the defendants on the 28th July and the goods were actually delivered to the defendants on the 31st July and were taken to their godown, where they remained until the plaintiff sued for the price at the contract rate. The goods being of inferior quality the defendants on the 2nd August wrote to the plaintiff rejecting the same and asking him to remove them from their godown:

Held, that the defendants were liable to pay the price, as their rejection of the goods three weeks after delivery, having not been within a reasonable time could not be operative;

that inasmuch as the goods were delivered to the defendants, the onus was upon them to prove that they had in fact rejected them within a reasonable time. **C** KISSENDYAL JITSARIA v. ASKARAN CROWTHMULL, 23 C. L. J. 415 290

VENDOR AND PURCHASER—contd.

- Purchaser's lien, where sale void 34
- Purchaser under registered deed with notice of prior contract to sell to another—Subsequent execution of registered conveyance to contractee—Possession, suit for, by first purchaser—Right of second purchaser to resist suit—Priority—Trusts Act (II of 1882), s. 91—Specific Relief Act (I of 1877), s. 27—Transfer of Property Act (IV of 1882), s. 40.

A vendee of immovable property in possession under a registered sale-deed executed by the legal owner can resist a suit for possession by a prior registered transferee, if the conveyance to the defendant was made in pursuance of a contract to sell by the vendor, of which the plaintiff had notice at the date of his sale, inasmuch as under section 91 of the Trusts Act the prior transferee holds the property for the benefit of the subsequent transferee to the extent necessary to give effect to the contract to sell.

Where, however, the person in whose favour there is a contract of sale, sues to enforce the contract against a transferee, he should ask for possession and also for conveyance, as his right to possession shall commence from the date of such conveyance.

Per *Srinivasa Aiyangar, J.*—The right of a person in possession, under a contract of sale to resist a claim for possession by a transferee from the vendor has to be determined by the joint application of section 9 of the Trusts Act, section 40 of the Transfer of Property Act and section 27 of the Specific Relief Act, which enact in substance the right of the former to enforce the contract not only against the vendor but also against any person who has subsequently obtained the legal title from the vendor. The contract does not create a right *in rem* but only a right *in personam* against the vendor, and that obligation is made enforceable against the subsequent purchaser as an obligation *in personam* to a limited extent, viz., to the extent of compelling him to give effect to the previous contract by way of specific performance, though he is not liable in damages as the original vendor would be. **M**
THIRUVENKATA CHARIAR v. SESHADRI IYENGAR, 3 L. W. 457; 30 M. L. J. 559; 19 M. L. T. 369 488

- Registration of sale-deed, whether passes property—Failure of consideration, effect of, on vendee's right to possession—Intention of parties—Burden of proof—Document in vendee's possession—Presumption—Suit for possession—False statement by vendee—Conditional decree—Equities.

The mere registration of a sale-deed does not necessarily indicate the transfer of property to the vendee, especially if it be not accompanied by delivery.

The non-payment of consideration in whole or in part, will not affect the vendor's right to possession, unless the intention of the parties was that ownership should not pass till the full consideration was paid. The burden of proving such intention is on the vendor.

If the deed is executed and registered and the vendee also gets the document, the non-payment of consideration does not affect the passing of the property.

VENDOR AND PURCHASER—contd.

Where a vendee, in a suit for possession, makes a false statement that he has paid the full consideration while part of it is unpaid, the Court may make a conditional decree for possession to take effect only on his depositing in Court whatever is due under the purchase, interest thereon and costs and on such other appropriate terms as it thinks fit. **C**
JOGENDRA NARAIN ROY v. MANMATHA NATH 106

- Sale of mortgaged property Application of consideration in discharge of mortgage—Purchaser, whether can claim mortgagee's rights as against subsequent registered purchaser—Intention to keep mortgage alive 47

——— Sale of property subject to mortgage—Consideration reserved with mortgagee for payment to prior mortgagee, return of, to mortgagor, after sale of property—Redemption, suit for, by vendee—Accounts—Vendee, whether entitled to credit of amount returned by mortgagee to mortgagor—Notice of purchase to mortgagee, whether necessary

The law does not require the purchaser of property which is subject to a mortgage to give notice of his purchase to the mortgagee.

One T mortgaged certain property to J and he effected a second mortgage in favour of B. Rupees 50 out of the mortgage consideration was left with B for redemption of the prior mortgage. T then sold his equity of redemption to S for Rs. 100. Out of this amount Rs. 54 was left with S to pay off B's mortgage and Rs. 30 to redeem J's mortgage. After this sale B offered to pay the Rs. 50 to J and on the latter refusing to receive it, B returned the amount to the mortgagor T. S conformably to the conditions of his sale redeemed J's mortgage and instituted the present suit to redeem B's mortgage. On a question arising as to the amount due to B:

Held, (1) that the plaintiff was entitled to a deduction of Rs. 50, which was left with B to discharge J's mortgage and which he returned to the mortgagor contrary to his agreement;

(2) that the plaintiff only represented T, the former mortgagor, to the extent of the rights which the latter had under the mortgage at the date of the sale to the plaintiff and no subsequent dealings between T and B could affect the rights which the plaintiff acquired by his purchase;

(3) that it was not necessary for plaintiff to give notice of his purchase to the mortgagees. **O** **SHEO PRASAD v. BISHESHAR NATH, 19 O. C. 12; 3 O. L. J. 129 266**

- Sale—Suit by vendee to recover possession—Long delay in instituting suit inference—Sale in fraud of creditors, proof of—Sale nominal transaction—Burden of proof—Promissory note antedated—Presumption as to date, whether arises—Negotiable Instruments Act (XXVI of 1881), s. 118.

Plaintiff sued in 1909 to recover possession of property under a sale-deed executed in his favour on the 10th July 1897 by the last defendant, alleging that he had taken possession under the sale and remained in possession till May 190 when defendants (father and son) trespassed upon the

VENDOR AND PURCHASER—contd.

land and dispossessed him. The vendor's son, the 2nd defendant, contended that the sale was part of a scheme to defraud the creditors of the 1st defendant and was merely nominal and without consideration:

Held, Phillips, J., (dissenting) (1) that in order that the sale might be binding on the 2nd defendant, it was necessary to show that it was a real and not a nominal sale and that it was for antecedent debts;

(2) that there was satisfactory evidence on the record of the antecedent indebtedness of the 1st defendant to the plaintiff and although the plaintiff had been so long in enforcing his rights and had not accounted satisfactorily for not being in possession of the sale-deed, yet the fact that a part of the consideration recited in the sale-deed was true and real was sufficient to rebut the presumption as to the *benami* nature of the transaction;

(3) that under the circumstances the plaintiff was entitled to the relief claimed.

Per Phillips, J.—(1) Where the plaintiff has brought his suit just within the period of limitation in some circumstances no adverse inference can safely be drawn from delay in bringing the suit, but when each day's delay entails additional monetary loss on a plaintiff, his omission to bring a suit until just before the expiry of the period of limitation requires some explanation and the absence of any reasonable explanation must throw some doubt on his case.

(2) The burden of proving that a sale is a nominal transaction lies primarily on the person alleging it; but the facts that the vendee can produce none of the documents on which his case depends and that there is no satisfactory evidence as to possession, cast the utmost doubt on the case and shift the burden of proof on to him.

(3) Where there is evidence to show that a promissory note is antedated, no presumption arises under section 118 of the Negotiable Instruments Act that it was executed on the date it bears.

(4) Though the presumption as to consideration arising under section 118 may, in the case of a promissory note executed by a father, also bind the son, yet where the document itself is proved to be false, no presumption arises even against the father. *M. RAGHUNATHA CHARI v. ARAVAMUTHA- IYANGAR* 617

—Vendor pleading minority at execution—*Burden of proof—Estoppel—Transfer of Property Act (IV of 1882), s. 55—Evidence Act (I of 1872), s. 115.*

When a person transfers immoveable property, or makes a sale of goods, he thereby represents to the purchaser that he has authority to transfer or sell.

If in any suit on a transfer of immoveable property or a contract of sale, the execution of the deed of transfer or the contract of sale, as the case may be, is admitted but infancy at the time of execution is set up as a defence, the defendant is *prima facie* estopped from denying his authority under section 115 of the Evidence Act. Before the defendant can overcome the bar of estoppel, he must prove his minority. *S. SOBHAMMAL PONTMAL v. PACHAL*, 9 S. L. R. 214 890

VENDOR AND PURCHASER—concl'd.

— Vendor professing to sell particular quantity or quality of property, whether bound to pay damages for errors of quality or quantity 147

WAIVER. See BENGAL CESS ACT, s. 47; LANDLORD AND TENANT.

WAKF. See MUHAMMADAN LAW.

WARRANTY. See CONTRACT ACT, s. 118.

WIDOW. See BUDDHIST LAW.

WILL. See HINDU LAW.

— Burden of proof—Hindu Law—Minor—Testamentary appointment of guardian by father—Joint and trust properties, right of appointing guardian to—Will, genuineness of—Burden of proof—Thirumaligai, whether private property.

Whoever puts forward a Will as genuine ought to prove it and cannot throw the burden of proving the negative on the opposite party.

A Hindu father has the power to appoint by Will a guardian of the person of his minor child.

As regards properties, however, which survive to the minor son as ancestral family properties or properties dedicated to a trust, the father has no power to appoint a guardian.

Thirumaligais are private and not trust properties. *M. ALAGAPPA IYENGAR v. MANGATHAI AMMAN- GAR*, 30 M. L. J. 504 766

Demonstrative legacies, payment of interest on—From what time payable—Rate of interest 157

— Illiterate testator Mark of testator affixed by one of the attestors, validity of—Attestation 771

— Probate, grant of, where attesting witnesses did not prove due execution—Probate Court, duty of, to grant Probate when due execution proved otherwise than by evidence of attesting witnesses—Presumption in favour of due execution and attestation of Will—Evidence, necessary, to prove due execution of Will.

Where there is ample reliable evidence on the record to show that a Will was duly executed and attested, Probate should not be refused on the ground that the testimony of the attesting witnesses who have been examined does not establish full compliance with the statutory requirements.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court of Probate may, on consideration of the circumstances of the case or of other evidence, pronounce in favour of the Will.

For proving due execution and attestation of a Will, it is enough to establish from the circumstances that the relative position of the testator and the attesting witnesses was such that they might have seen the execution and the attestation respectively, and it is not necessary that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document.

WILL—conold.

Every presumption will be made in favour of due execution and attestation, when a Will is regular on the face of it and is apparently duly executed. **BRAHMADAT TEWARI v. CHAUDAN BIBI**, 20 C. W. N. 192 **586**

— — — professing to be over 30 years old—Suspicious circumstances—Presumption, whether to be drawn—Delay in suing, whether proves acquiescence or waiver **168**

— — —, revocation of, by tearing—Partial tearing, effect of—Question of fact—Trial Judge, opinion of—Appellate Court, interference by **707**

WORDS AND PHRASES—

ABKARI	927
AGRICULTURAL CATTLE	695
AGRICULTURE	730
ALL VEHICLES KEPT IN READINESS FOR HIRING ON DEMAND	647
AMOUNT CLAIMED	697
ATTEST	370
COURT	581
CULTIVABLE LAND	730
FAMILY HOUSE	99
FORMER SUIT	581
GOOD FAITH	760
IN THE SAME MANNER AND UNDER THE SAME PENALTIES	111

WORDS AND PHRASES—conold.

JAGIR AND INAM	803
JEROYATI	730
JOTE	93
JOTEDAR	185
JUST AND CONVENIENT	693
LAWFULLY PAID	341
LEGAL REPRESENTATIVES OR ASSIGNS	945
OBSTRUCTION	738
PERSON WHOSE INTERESTS ARE AFFECTED BY THE SALE	272
PLACE OF SUING	411
RENT	730
RIGHT TO SUBSCRIBE	263
RIOTOUS	993
SAMANODAKAS	294
SUCCESSOR	26
"SUIT" IN SN. 51, 55 OF BENGAL COURT OF WARDS ACT	86
TO THE PREJUDICE OF ANY OTHER PERSON	578
VALUABLE CONSIDERATION	602
VOID	602
WHERE NO APPEAL LIES	320

P. N. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

INDIAN CASES.

1916.

VOLUME XXXIV.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 261 OF 1914.

January 31, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

GOVINDASAMI NAIDU—DEFENDANT No. 1
—APPELLANT.

versus

ETHIRAJAMMAL—PLAINTIFF—
RESPONDENT.

Lease—Improvements—Lease invalid—Compensation for improvements—Transfer of Property Act (IV of 1882), s. 108 (b)—Fraud, averments of—Pleadings—Practice.

Per Seshagiri Aiyar, J.—A lessee coming upon a property under a lease which is found to be invalid is only entitled to have any superstructure erected by him removed and not to compensation, by virtue of the principle of section 106, Transfer of Property Act. [p. 2, col. 1.]

Per Coutts Trotter, J.—No claim for compensation can be made, except in the case of fraud, namely, if the persons really entitled knew that they were entitled and the persons in actual possession were not, and stood by and allowed them to spend money in building — the land. [p. 1, col. 2.]

An allegation of fraud must be made definitely and categorically in the pleadings, and must, in no circumstances, be allowed to be made at a subsequent stage of the suit. [p. 1, col. 2.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 64 of 1913, preferred against the decree of the Court of the Additional District Munsif of Chingleput, in Original Suit No. 59 of 1912.

Mr. T. V. Muthukrishna Aiyar, for the Appellant.

Mr. T. Ethiraja Mudaliar, for the Respondent.

JUDGMENT.

COUTTS TROTTER, J.—The first finding of the learned District Judge is that the two

persons who granted the earlier lease to the plaintiff were in fact the *dharmakartas* of the temple and the 2nd defendant had no right to grant the subsequent lease relied on by the defendants. That finding is conclusive.

It is next argued that the document relied on by the plaintiff is not a lease at all but a license; and the learned Judge has found that the lease is terminable at the option of the lessor. It is a mistake. The lease is terminable only at the option of the lessee, the plaintiff, and enures to her benefit so long as she is able and willing to perform the services for which she was given the lease.

The last ground taken is that the defendant, having in good faith spent money in building a house on the suit site, ought not to be ejected except on terms of the 1st defendant being paid compensation. How far the Indian Law has gone on this matter, it is not necessary to decide. At any rate, it is clear that no such claim for compensation can be made except in the case of fraud, namely, if the persons really entitled knew that they were entitled and the persons in actual possession were not, and stood by and allowed them to spend money in building on the land. That I say is an allegation of fraud. Even if that be not cause of action in this country, it is in England. No case of this kind is made either in the pleadings or set out in the issue and I think it is the settled practice of every Court that an allegation of fraud must be made definitely and categorically and must, in no circumstances, be allowed to be made at a subsequent stage of the suit.

The appeal fails and is dismissed with costs.

YADDANAPUDI LAKSHMI V. REPALLE SEETHARAMASWAMI.

SESHAGIRI AIYAR, J.—As at present advised, I am inclined to think that where a lessee comes upon a property and the lease is found to be not valid, the principle of section 108, clause (b), of the Transfer of Property Act applies to the improvements made by him. Therefore, if he seeks any remedy, he is only entitled to have the superstructure removed by him and not to compensation. Further, sufficient foundation has not been laid for the contention that the plaintiff is entitled to any compensation. I agree in the order proposed by my learned colleague.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL MISCELLANEOUS APPEAL NO. 33
OF 1915.

March 1, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

YADDANAPUDI LAKSHMI NARASIMHA RAO — COUNTER-PETITIONER—
APPELLANT

versus

REPALLE SEETHARAMASWAMI AND
OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Restitution proceedings—Suit in ejectment—Decree for plaintiff—Reversal in appeal—Landlord and tenant—Claim for mesne profits by party succeeding in appeal—Set-off for rent due for period prior to decree and for period of landlord's possession, whether allowable.

In a proceeding in restitution under section 144, Civil Procedure Code, the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the period of litigation. [p. 3, col. 2.]

Gunga Prosad v. Brojo Nath Das, 12 C. W. N. 642, followed.

A suit for ejectment against a tenant was decreed and the landlord was put in possession. The decree was, however, reversed in appeal. In a claim by the tenant, under section 144, Civil Procedure Code, for mesne profits for the period during which the landlord was in possession under the reversed decree, the latter wanted to set off some arrears of rent due to him and also the rent which would have been due to him for the period of his possession if the tenants had remained in possession:

Held, (1) that the tenants' liability to pay rent before the period of the landlord's possession had nothing to do with their right to get restitution; [p. 3, col. 1.]

(2) that even assuming that the landlord had a right to recover rent for the period in which he was in wrongful possession, the moneys due to him under

that right and which accrued to him during the period of litigation could not be taken into account in restitution proceedings. [p. 3, col. 2.]

Bhyrub Chunder Mozoomdar v. Huro Prosunna Bhattacharjee Chowdhry, 17 W. R. 257, doubted.

Appeal against the order of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 180 of 1914 (transferred from the District Court, Kistna, for disposal), preferred against that of the District Munsif of Gudivada, in Miscellaneous Petition No. 4013 of 1913, in Original Suit No. 381 of 1905.

Mr. S. Desikachariar, for the Appellants.

Mr. V. Ramadoss, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This appeal has arisen out of an application under section 144 of the Civil Procedure Code in restitution. The defendants were the petitioners in restitution and they are the respondents in this Court. The plaintiff is the appellant. He got a decree in Original Suit No. 381 of 1905 of the Gudivada District Munsif's Court for ejecting the defendants, who were his tenants, the decree awarding him the mesne profits from *Fasli* 1313 till delivery of possession. The decree was passed on the 23rd December 1907. He got possession in execution of that decree in 1908. But the case went up on second appeal to the High Court and the suit was then wholly dismissed with costs. The defendants then applied under section 144 to be restored to possession and they got back possession in *Fasli* 1321. They also applied for recovery of mesne profits wrongfully received by the plaintiff in *Faslis* 1318, 1319 and 1320. The plaintiff claimed to set off against the mesne profits the arrears of rent due to him for *Faslis* 1313 to 1317 as landlord and also the arrears of rent which would have been due to him for *Faslis* 1318 to 1320 if the defendants had remained in possession as tenants and if he (the plaintiff) had not dispossessed them in execution of the decree of the Court of the District Munsif, which was reversed finally.

The District Munsif in ordering restitution upheld the plaintiff's contention so far as the rents which would have been payable for *Faslis* 1318 to 1320 are concerned, but disallowed the contention claiming to set off the arrears of rent for *Faslis* 1313 to 1317. The defendants appealed to the Sub-

RUKMIN KUAR v. ASHIQ HUSAIN.

ordinate Judge as regards the deduction of the rent for *Faslis* 1318 to 1320 and the plaintiff filed a Memorandum of Objections against the disallowance of the deduction of the rents for *Faslis* 1313 to 1317. The learned Subordinate Judge allowed the appeal and dismissed the Memorandum of Objections. And the plaintiff has filed this appeal against the decision of the Subordinate Judge, contending that he is entitled to the deductions of both the above sums. So far as the rents for *Faslis* 1313 to 1317 are concerned, that is a question which has absolutely nothing to do with restitution. By the decree of the High Court, the plaintiff's possession in *Faslis* 1318 to 1320 became wrongful and the defendants are entitled to be placed, ■ far as possible, in the same position as they would have been if they had been in possession in *Faslis* 1318 to 1320. Their liability, if any, to pay rent for *Faslis* 1313 to 1317 has nothing to do with their right to get restitution for having been put out of possession in *Faslis* 1318 to 1320. The contention of the appellant's learned Vakil under this head must, therefore, be at once rejected.

As regards the rent claimed for *Faslis* 1318 to 1320, it is difficult to understand how, when the plaintiff himself remained in possession of the lands, the defendants became liable to pay any rents to him as landlord. But reliance is placed upon the case in *Bhyrub Chunder Mojomdar v. Huro Prosunno Bhattacharjee Chowdhry* (1). That was a case decided so long ago as in January 1872 before the enactment of the comprehensive Civil Procedure Code of 1877. It was not a case of restitution at all. There, the tenants brought a suit against their landlord for possession of land from which they had been wrongfully ejected without the intervention of the Court and for mesne profits. It was held that as the landlord, though a wrongdoer, would have been entitled to rents from the plaintiffs, the mesne profits due to the plaintiffs ought to be calculated after deducting the rent due to the landlord. Speaking for myself, I have grave doubts as to the correctness of that decision. "Mesne profits" is defined in the Civil Procedure Code "as those profits which a person in wrongful possession of the suit

property actually received, etc." The decision in *Bhyrub Chunder Mojomdar v. Huro Prosunno Bhattacharjee Chowdhry* (1) proceeds on the footing that "mesne profits" means the actual loss which would have been caused to the wronged litigant if he had fulfilled all his obligations to the other party. Further, in *Gunga Prosad v. Brojonath Das* (2) it was held, that in a matter of restitution, the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the period of litigation, and I think that that is the correct principle to be applied. Even assuming that the landlord had a right to recover rent during *Faslis* 1318 to 1320 when he was in wrongful possession (a proposition which, as I have said, I am by no means prepared to admit), the moneys due to him under that right and which accrued to him during the period of litigation cannot be taken into account in the matter of affording relief to the defendants in restitution.

I would, therefore, dismiss the appeal with costs.

MOORE, J.—I agree.

Appeal dismissed.

(2) 12 C. W. N. 642.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 379 of 1913.

February 11, 1916.

Present:—Mr. Lindsay, J. C.

Musammatt RUKMIN KUAR—DEFENDANT—
APPELLANT

versus

Chaudhri Syed ASHIQ HUSAIN AND OTHERS
—PLAINTIFFS AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Joint family—Deed executed by adult member and ladies belonging to family, validity of—Karta—Legal necessity—Minor member, when bound by deed executed by major member.

The mortgagee rights belonging to a joint Hindu family, consisting of two brothers one of whom was major and the other minor, could not, in view of the circumstances of the family, but be assigned and were assigned for the best sum then available. All the consideration-money was found to have been expended for purposes which were for the benefit of the joint family. The deed of assignment was executed by

(1) 17 W. R. 257.

RUKMIN KUAR v. ASHIQ HUSAIN.

the major brother, who did not therein purport to act as family manager on behalf of his minor brother, and by two ladies belonging to the family, who described themselves to be owners of portions of the mortgagee rights which were being transferred:

Held, that it must under the circumstances be taken that the major brother in executing the deed had been acting as *karta* on behalf of the joint family. [p. 6, col. 1.]

Held, further, that the assignment, being justified by a legal necessity, was binding upon the minor brother, although he had been no party to the deed. [p. 6, col. 1.]

Appeal from the decree of the Additional Judge, Lucknow, dated the 26th June 1913, upholding the order of the Subordinate Judge, Unao, dated the 5th December 1912.

Babu Basdeo Lal, for the Appellant.

Pandit Gokaran Nath Misra and Babu Hari Kishen Dhaon, for Respondents Nos. 1 to 3.

Babu Mahesh Prasad, for Sat Narain guardian.

Mr. St. George Jackson, for Respondent No. 6.

JUDGMENT.—This case has already been before me and the principal facts have been set out in an order, dated the 30th of July 1915, by which two issues were remitted to the lower Appellate Court for determination*.

*The order referred to was as follows:—

"This second appeal has arisen out of a suit for foreclosure brought by three plaintiffs, Syed Ashiq Husain, Narain and Ishri Singh. The main claim was for Rs. 4,632-3-0 and the mortgage which was sought to be foreclosed was one executed on the 27th of September 1882 by one Zalim Singh in favour of a man named Hanuman. The principal defendant in the case was *Musammal* Rukmin Kuar defendant No. 1, who is the daughter of the mortgagor, and the defence that she set up was to the effect that these plaintiffs had no right to bring the suit for foreclosure. *Musammal* Rukmin Kuar's case was founded on the following allegations. She said that Hanuman in whose favour the mortgage had been made was separate in estate from his brothers, and that after his death his widow *Musammal* Parbati who was impleaded as defendant No. 2 in the case became the owner of the mortgagee rights. It was further alleged that Parbati on the 1st July 1889 had sold these mortgagee rights to two persons named Koeli and Jham Singh. The plaintiffs claimed to be assignees of the mortgagee rights of Hanuman under a registered document which was executed on the 26th of July 1910. By that document *Musammal* Parbati the widow of Hanuman, Rup Narain a nephew of Hanuman, and *Musammal* Kaunsilla the widow of Mathura, a brother of Hanuman, purported to assign the mortgagee rights to these plaintiffs. At the time of this assignment Mathura's son Murli was a minor and he appears as the fifth defendant in this case; and one of the points which arose for decision, and really the most important point in the case, was whether or not this assignment in favour of the

As has been stated in the previous order the principal matter for determination in

plaintiffs was a good assignment on the basis of which they were entitled to sue the mortgagor's representatives for foreclosure. The validity of the assignment depended upon an allegation which was made by the plaintiffs to the effect that Hanuman lived in a state of jointness with his brothers. The Courts below have found that Hanuman was joint and they have also found that the assignment to the plaintiffs which was made on the 26th of July 1910 transferred to them a good title. I do not think it necessary to enter into a discussion of the merits of this part of the case at the present stage, for it has unfortunately become necessary to me to send the case back to the Court below in connection with a certain petition which has been put in this Court by the fifth defendant Murli. At the time this suit was brought Murli, who is one of the nephews of the mortgagee Hanuman, was a minor and he was represented in the suit by a guardian *ad litem* in the person of Sat Narain who is the husband of his sister. When the title of the plaintiffs as assignees was attacked the defendants Nos. 2, 3 and 4 who had joined in the conveyance of the plaintiffs admitted that the deed had been executed in favour of the plaintiffs and they supported the plaintiffs' case. A written statement was also filed on behalf of the minor defendant Murli by his guardian *ad litem*. In paragraph 3 (a) of that written statement it was admitted that the deed of transfer by which the other members of the joint family assigned the mortgagee rights to the plaintiffs on the 26th of July 1910, was a good and valid transfer and binding upon him inasmuch as it had been made for the benefit of the whole joint family including himself. The case has been dealt with throughout in both the Courts below on the footing that this defendant Murli admitted the binding nature of the document which had been executed in the plaintiffs' favour. Murli has now come forward in this Court with an allegation that he is a person of full age and he now puts forward the case that the deed of transfer executed on the 26th July 1910 in favour of these plaintiffs does not bind him. These allegations are set out in a petition which was presented in this Court on the 13th of May last. In the 5th paragraph of this petition Murli states that he was a minor at the time the deed of the 26th July 1910 was executed. He further states in the same paragraph that he has now reached the age of majority. In the 6th paragraph it is stated that his aunt and his mother who purported to sell his rights under the deed of 1910 had no authority to do so. In paragraph 7 he states that there was no family or legal necessity for the sale of these mortgagee rights, and in the 8th paragraph of the petition he states that his guardian *ad litem* was entirely wrong in admitting on his behalf that this transfer of the 26th July 1910 was binding upon him. In the concluding paragraph of the petition he asked the Court to remit an issue asking for an inquiry into the validity of this deed of transfer, dated 26th July 1910. The allegations in this petition are supported by an affidavit. It has been argued that it is not possible for this defendant Murli at this stage to get rid of admissions which were made on

RUKMIN KUAR v. ASHIQ HUSAIN.

this appeal is whether or not the plaintiffs, who claimed to be assignees, were entitled to sue the representatives of the mortgagor for foreclosure. The principal defendant was the appellant Musammât Rukmin Kuar and her case was that there was no good assignment in favour of the plaintiffs, the reason being that one Murli who was one of the parties interested in the mortgagee rights was a minor at the time the deed of assignment was executed in the plaintiffs' favour. In the Court of first instance Murli had been impleaded as a minor and a guardian *ad litem* had been appointed for him. In the written statement which was filed on behalf of Murli it was admitted that the assignment which

his behalf by his duly appointed guardian *ad litem*. It seems to me that this contention cannot be accepted. If, as is now stated, this defendant, Murli is a person of full age he is entitled to conduct his own case and is not obliged to have his case conducted on his behalf by a guardian. In fact the guardian *ad litem* has no *locus standi* where the ward becomes of full age. It has been asserted that this petition is a collusive proceeding and that it has been put in by Murli at the instance of the first defendant Musammât Rukmin; but that is a matter regarding which there is no proof before me. On the other hand when the case was put up before me the guardian *ad litem* of the defendant Murli was represented by Counsel. He traverses the statements which are made in the petition and it was stated that Murli was not a person of full age. Up to the present time no order for the discharge of the guardian *ad litem* has been made and it appears to me that before this case can be decided, it is necessary to have further inquiry made into the case. In the first place it will be necessary to ascertain whether as a matter of fact the defendant Murli is now a person of full age. If that should prove to be the case, it will be further necessary to examine into the question as to whether this transfer executed in favour of the plaintiffs on the 26th July 1910 was made in circumstances which are binding upon this defendant. I must, therefore, remit issues to the lower Appellate Court for findings on these points. The issues will be:—

"(1) Has the defendant No. 5 Murli attained full age?"

(If the finding on this issue is in the affirmative then a further issue will be decided, namely,—)

"(2) Whether this deed of transfer executed on the 26th of July 1910 is binding upon Murli?"

Both parties should be allowed to produce all the evidence they desire and the findings of the Court below should be submitted to this Court within two months from the date of receipt of this order of remand. Ten days to run from the date of the lower Court's finding will be allowed to the parties for filing of objections in this Court."

had been executed in favour of the plaintiffs was binding upon Murli, inasmuch as it had been made for the benefit of the joint family of which Murli at that time was a member. It became necessary for the reasons stated in my previous order to examine into the allegation made afterwards on behalf of Murli, to the effect that he was of full age at the time he was impleaded as a defendant in this case. According to the finding of fact which has been arrived at by the learned Judge of the Court below Murli was not of full age in the month of June 1912, when he was brought upon the record. He is certainly of full age now and having regard to that fact his guardian *ad litem* has been dismissed from his office and Murli has been allowed to act on his own behalf in the present appeal, in which he figures as a respondent. The other question which was sent for disposal to the lower Appellate Court was whether the deed of transfer which was executed on the 26th of July 1910 in favour of the plaintiffs was binding upon Murli. The finding of the learned Judge is that the assignment is binding on him. The facts which have been found by the lower Court in this connection are that in the year 1910 when the deed of assignment was executed, the mortgagee rights which were transferred to the plaintiffs belonged to a joint family. The two members of that family were Rup Narain, the elder brother of Murli who was then about 18 years of age, and Murli who was then about 16. The period of limitation for a suit on the mortgage which was held by this joint family was about to expire, and it was admitted before the learned Judge that the joint family at the time this deed of assignment was executed was in very poor circumstances. There was no money to institute a suit on the mortgage and as the Judge says the only course which was open to them was to sell the claim they had for the best sum they could obtain, otherwise their chance of recovering anything under the mortgage would have been extinguished by the lapse of time. The learned Judge was of opinion that the consideration-money for the assignment, namely, the sum of Rs. 1,500, was in no way inadequate considering the state of

GOVINDASWAMY PILLAI v. RAMASWAMI AIYAR.

affairs at that time. With regard to the items which go to make up the sum of Rs. 1,500, the learned Judge had before him evidence which satisfied him that moneys had been borrowed in the name of Rup Narain and of two ladies belonging to the family, namely, Parbati and Kaunsilla, and that these sums had been expended on purposes which were for the benefit of the joint family. It seems to me, therefore, that in view of these findings the appeal must fail. It has now been found that at the time this deed of assignment was executed the two male members of the joint family to which Murli belongs were Murli himself and his elder brother Rup Narain. It must be taken, therefore, that Rup Narain in executing this deed of assignment was acting as *karta* on behalf of the joint family and if this is found, the transfer was justified by a legal necessity which is binding upon Murli although he was no party to the document. A good deal has been said with regard to the phraseology of the deed in question. It is pointed out that *Musammatt* Parbati and *Musammatt* Kaunsilla, both of whom were executants of the deed, profess to be owners of portions of the mortgagee rights which were being transferred. It is also pointed out that Rup Narain did not in the deed purport to act as family manager on behalf of his minor brother Murli. This, however, does not appear to me to be a matter of any importance. We have it now proved that Rup Narain was the sole adult male member of this family at the time the assignment was made and it must be assumed, therefore, that in the circumstances he was acting on behalf of all the other members. Mr. Jackson who appeared on behalf of Murli referred to the frame of the suit as set out in the plaint. He pointed out that it had not been the plaintiffs' case that Murli and Rup Narain were members of the joint family, but the finding now is that Rup Narain and Murli were members of the joint family and it does not seem to me to matter whether or not the plaintiffs asserted to the contrary in their plaint. It is not necessary for me in view of what I have said to examine into the other question, namely, as to whether Murli is bound by the admission made on his behalf by his guardian *ad litem* in the written statement

which was filed in the Court of first instance, ■ written statement in which it was admitted that the deed of assignment executed in the plaintiffs' favour was binding upon Murli. I am satisfied that it was binding for the reasons above stated and, this being so, the appeal fails and is dismissed with costs accordingly.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 200 OF 1915.

March 7, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

GOVINDASWAMY PILLAI—DEFENDANT
—PETITIONER—APPELLANT

versus

RAMASWAMI AIYAR AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Unregistered lease—Admissibility in evidence to prove tenancy or terms—Landlord and tenant—Payment of rent—Tenancy from year to year, inference as to—Holding over—Use and occupation, compensation for—Liability to pay on holding over—Transferability—Transfer of Property Act (IV of 1882), s. 6—Assent to tenant's continuance, if inferable from passive failure to eject—Intention to hold adversely, if necessarily follows holding over—Tenancy by sufferance, fiction of, if obtains in India—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Interference only discretionary.

An unregistered lease for three years is inadmissible in evidence to prove a tenancy or its terms. [p. 7, col. 2.]

A tenancy from year to year can be inferred from the fact of payment of rent by the tenant to the landlord and its receipt by the latter, the annual rent due under such a tenancy being ascertainable from the amount of rent paid and received. [p. 7, col. 2.]

A tenant holding over is liable to pay compensation for use and occupation of the demised premises. [p. 8, col. 1.]

Mere passive failure to take steps to eject a tenant whose lease term has expired will not, by itself, constitute an assent on the landlord's part to the tenant's continuing in possession as tenant from year to year. [p. 8, col. 2.]

An intention to hold adversely to the landlord need not necessarily follow from a holding over, though the running of time under Article 139 of the Indian Limitation Act against the landlord will not be interrupted in such a case. [p. 8, col. 2.]

The fiction of a tenancy by sufferance, which is said to exist under the English Law on a tenant's holding over, has no place in the Indian Law

GOVINDASWAMY PILLAI v. RAMASWAMI AIYAR.

after the enactment of the Transfer of Property Act. [p. 8, col. 2.]

Subbravati Ramiah v. Gundala Ramanni, ■ Ind. Cas. 1080; 33 M. 260; 19 M. L. J. 732; 7 M. L. T. 289, referred to.

A claim for use and occupation against a person who has ceased to be the lessee owing to the expiry of the lease term and the non-creation of a new relationship of lessor and lessee, not being one based on an express or implied contract but sounding in damages due and payable to the owner by a person without any rightful claim thereto, is a mere right to sue and is not transferable under the provisions of section 6 of the Transfer of Property Act, 1882, whatever may be the English Law as to such rights. [p. 8, col. 2.]

Metropolitan Railway Co., v. Defries, 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841 and *Anker v. Franklin*, (1880) 43 L. T. R. 317; 44 J. P. 830, referred to.

Seetamma v. Venkataramanayya, 21 Ind. Cas. 357; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 308, followed.

The compensation for use and occupation, which is loosely described in the English cases as 'rent', fair rent, or 'occupation rent', is looked upon by the English Courts as based on an implied contract to pay a fair rent. But it is not advisable to extend to India the whole of the English Law of implied contract, many cases of which are already dealt with in the Indian Contract Act under the head of 'relations resembling those created by contract'. [p. 8, col. 1.]

The interference of the High Court under section 25 of the Provincial Small Cause Courts Act, IX of 1887, is a matter of discretion. [p. 9, col. 1.]

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Tyabji, reported ■ 31 Ind. Cas 604, in Civil Revision Petition No. 476 of 1914, against the decree of the Court of the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 1480 of 1913.

FACTS of the case appear from the judgment and from 31 Ind. Cas. 604.

Mr. V. C. Seshachariar, for the Appellant.

Mr. N. S. Rangaswami Aiyangar for Mr. T. Narasimha Aiyangar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This Letters Patent Appeal is against the judgment of ■ learned Judge of this Court, who dismissed the civil revision petition filed by the defendant (petitioner and appellant) against the decree of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 1480 of 1913.

The defendant was lessee of a garden for five years under a registered lease-deed, Exhibit B. The lease term expired in 1903. Then he executed an unregistered lease-deed, Exhibit A, in June 1900. But that lease-

deed is inadmissible in evidence for want of registration. The rent reserved for the whole garden under Exhibit B seems to have been Rs. 260 per annum. The plaintiffs originally owned one-fourth share in the garden and they purchased the other three-fourths share on 23rd October 1912 from the then owner thereof.

The suit was brought for rent due from the 1st September 1911 till the 14th November 1912 at Rs. 210 per annum with interest and costs and also Rs. 50 damages for the alleged injury caused to the land by the defendant's acts. The Subordinate Judge gave a decree for Rs. 290 and proportionate costs, disallowing the claim for the Rs. 50 damages.

The defendant denied that he was a tenant of the lands : but it is found by the Subordinate Judge that he did pay rent as tenant and that he has been enjoying the lands all along. It is a pity that the learned Subordinate Judge did not give ■ definite finding as to whether the defendant paid rent *after the expiry of the term in Exhibit B*, and, if so, at what rate he was paying rent and whether, as mentioned in the plaint, the rent was paid, as mentioned in the unregistered-deed Exhibit A, till the end of August 1911. There is, however, the evidence of the plaintiffs' 2nd witness that the defendant used to pay the rent due to his master in whose favour Exhibit A was executed. Though Exhibit A is inadmissible to prove the tenancy or its terms, the fact of payment of rent by the tenant after 1908 and the receipt of rent by the landlord will establish a tenancy from year to year, the annual rent due under such tenancy being ascertainable from the amount of rent paid and received.

If then the landlord was receiving Rs. 210 rent a year from 1908 till 1st September 1911, as alleged in the plaint and as seems to be suggested by the evidence of P. W. No. 2 in cross-examination, that fact establishes the tenancy from year to year at the yearly rent of Rs. 210, and we need not, as we should not, resort to Exhibit A to find out the terms of the yearly tenancy. Taking it, however, that it is not proved that the defendant paid rent after the expiry of the term in Exhibit B, he was

GOVINDASWAMY PILLAI v. RAMASWAMI AIYAR.

a tenant holding over. In that view, he was liable for compensation for use and occupation as regards one-fourth share in the property to the plaintiffs and as regards the other three-fourths share to the plaintiffs' predecessors-in-title in respect of the other three-fourths share between the 1st September 1911 and 23rd October 1912; and to the plaintiffs alone for the period from 23rd October 1912 till 14th November 1912. The plaintiffs claimed that under their sale-deed the rent or compensation due to their predecessors-in-title between the 8th December 1911 and 23rd October 1912 for the said three-fourths share has been transferred to them under Exhibit E. Mr. V. C. Seshachariar contends that such a transfer was a transfer of a mere right to sue and is, therefore, invalid. If, as I hold, there is evidence to prove the defendant's payment of rent at Rs. 210 a year after 1908, he is a tenant from year to year at that rate and the transfer of a claim for rent due is not a transfer of a mere right to sue but a transfer of an actionable claim. If, however, he was not a tenant from year to year but what is called a "tenant by sufferance", then the question arises as to whether the right to sue such a person for compensation for use and occupation is an actionable claim or a mere right to sue. The compensation for use and occupation is, in English cases, loosely called 'rent', or 'fair rent', or 'occupation rent'. [See *Metropolitan Railway Company v. Defries* (1).] The English Courts look upon it as based on an implied contract to pay a fair rent. But it is inadvisable to extend to India the whole of the English Law of implied contracts. Under the Indian Contract Act, many cases of implied contracts under English Law are dealt with specially under the head of "Relations resembling those created by contract." [See *Gibson v. Kirk* (2) for the report of a case which speaks of an implied contract to pay rent by a party who is in, what is called, permissive occupation.] In Halsbury's Laws of England, Volume 18, page 487, note (c), the action for use and occupation is said to be one based on implied contract. Under the English Law, a tenant holding over is usually called

a tenant by sufferance. See also Woodfall's Landlord and Tenant (19th Edition), page 631, at the top of the page. The English Courts seem to make a distinction between claim for compensation for use and occupation against a person who is in permissive occupation and a claim for profits against a trespasser. (See also Foa on Landlord and Tenant, pages 389 to 394.) As Benson and Krishnaswamy Aiyar, JJ., remarked in *Subbravati Ramiah v. Gundala Ramanna* (3): "It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the Transfer of Property Act, according to which a lease is determined by the efflux of the time limited thereby [See section 111]." Under section 116 of that Act, the tenant holding over becomes a tenant from year to year, only "if the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession as lessee." I take it that mere passive failure to take steps to eject will not, by itself, constitute an assent to the tenant's continuing in possession as tenant from year to year. It may be that such a tenant holding over need not necessarily be credited with an intention to hold land adversely, though, as pointed out in *Subbravati Ramiah v. Gundala Ramanna* (3), the running of time under Article 139 of the Limitation Act against the landlord will not be interrupted. I think that the claim for use and occupation against a person who has ceased to be the lessee owing to the lease term having expired and owing to no new relationship of lessor and lessee having been created under section 116, is not a claim based on contract, express or implied, and is one sounding in damages due to the owner by a person in possession without rightful claim to remain in such possession. It is, therefore, a mere right to sue which cannot be transferred under the Transfer of Property Act, whatever may be the English Law as to such rights to compensation coming under the head of "profits" which might be transferred along with the land. [See *Metropolitan Railway Company v. Defries* (1) and *Anker v. Franklin* (4).]

(1) (1876-77) 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841.

(2) 113 E. R. 1357; 1 G. & D. 252; 10 L. J. Q. B. 297; 1 Q. B. 850; 6 Jur. 49.

(3) 4 Ind. Cas. 1080; 33 M. 260 at p. 262; 19 M. L. J. 732; 7 M. L. T. 289.

(4) (1880) 43 L. T. R. 317; 44 J. P. 830.

BAKHTAWAR SINGH v. DHARAM SINGH.

If, then, the defendant was a tenant from year to year from 1st September 1911, he ought to pay the following amounts to the plaintiffs: (a) ■ rent for one-fourth share from 1st September 1911 to 8th December 1911 at Rs. 210, *i. e.*, about Rs. 56; (b) rent from 8th December 1911 to 14th November 1912 on the whole garden at the same rate, *i. e.*, about Rs. 196; total Rs. 252. If, however, he was not a tenant from year to year, the plaintiff will be entitled to (a) damages for use and occupation as regards one-fourth share between 1st September 1911 till 23rd October 1912 at Rs. 65 a year, *i. e.*, about Rs. 75; (b) damages for use and occupation of the whole garden from 23rd October 1912 to 14th November 1912, *i. e.*, about Rs. 20; total Rs. 95, because according to my view the damages for use and occupation of the three-fourths share between 8th December 1911 and 23rd October 1912 cannot, under the Indian Law, be validly transferred. See *Seetamma v. Venkataramanayya* (5).

Whether my view that there is sufficient evidence that the defendant paid rent after 1903 till 1st September 1911 as alleged in the plaint and that, therefore, the defendant became a tenant from year to year on an annual rent of Rs. 210 is correct or not, I have held that a revision under section 25 of Act IX of 1887 is a matter of discretion in this Court [see *Gopala Iyengar v. Venkatakrishna Iyengar* (6)], and I am clearly of opinion that this is not a case in which it is at all desirable to exercise the High Court's powers of revision. The defendant, who is a Vakil's *gumashta*, had no merits whatever in the case set up by him, and he advanced (according to the Sub-Judge) false defences on the facts. I would, therefore, dismiss the Letters Patent Appeal with costs.

MOORE, J.—I agree.

Appeal dismissed.

(5) 21 Ind. Cas. 387; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 308.

(6) 17 Ind. Cas. 748; (1912) M. W. N. 1227.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 358 of 1913.

April 27, 1915.

Present:—Mr. Lindsay, J. C.

BAKHTAWAR SINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

DHARAM SINGH, DECEASED, AND AFTER

HIS DEATH HIS WIDOW Musammāt MUKTA

—DEFENDANT—RESPONDENT.

Declaratory suit—Irrigation right—Tank—Cause of action.

The plaintiffs brought a suit for a declaration and damages against the defendant, on the allegation that they had a right to draw water from a tank and were further entitled to exercise that right before the defendant could do the same for his own crops, and that they had sustained damages owing to the defendant's not allowing them to exercise that right. The defence set up was a denial of the plaintiffs' right to draw any water from the tank. There was also a denial that the plaintiffs had been obstructed or that they had suffered any damage. The lower Courts found that the plaintiffs were entitled to draw water from the tank in proportion to the extent of their cultivation, although without any preference over the right of the defendant, and that they had failed to prove that they had been obstructed in such a way as to cause them any damage. Their suit being dismissed *in toto*.

Held, that in view of the defence set up the lower Courts ought to have declared the plaintiffs' right to the extent to which they were found to be entitled, as there was a sufficient cause of action for such a declaratory relief. [p. 10, cols. 1 & 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 25th June 1913, upholding the order of the Munsif, Bilgram, dated the 13th May 1913.

Pandit Gokaran Nath Misra, for the Appellants.

Mr. G. H. Thomas, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for declaration brought by the plaintiffs against one Dharam Singh, who is now represented in this appeal by Musammāt Mukta his widow. The claim was with respect to irrigation rights in a tank No. 165 situated in Mauza Dabha in the Hardoi District. The claim of the plaintiffs was that they were entitled to a right to draw water from this tank and further that they were entitled to exercise that right before the defendant could draw water for irrigation of his own crops. There was also a claim for damages, the plaintiffs' case being that the defendant had refused to allow them to set up their irrigation-lift, the result being that

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

certain crops were damaged. The amount of damage claimed was Rs. 50. The defence set up was ■ denial of the plaintiffs' right to draw any water from the tank in question. In paragraph 9 of the written statement it was set out that after a perfect partition had taken place in the year 1900, the plaintiffs had ceased to have any right to draw off water from the tank in question which had fallen into the defendant's *mahal*. There was also a denial that the plaintiffs had been obstructed or that they had suffered any damage. The Court of first instance found that in spite of two partitions which had taken place, one in the year 1881 and the other in the year 1900, the previously existing rights of irrigation from this tank had not been disturbed and that the plaintiffs were entitled to draw water from this tank in proportion to the extent of their cultivation, although without any preference over the right of the defendant. As regards damages the Munsif was of opinion that the plaintiffs had failed to prove that they had been obstructed in such ■ way as to cause them any damages. He, therefore, dismissed the suit *in toto* and this decree has been upheld in appeal by the learned District Judge.

The point which is taken here in second appeal is that at any rate the plaintiffs were entitled to some relief, if not to the full relief which they claimed. There can be no doubt that the plaintiffs failed to establish that they had a right to draw water from this tank in preference to the defendant. It is argued, however, that as it has been proved that they have at least an equal right with the defendant that right should have been declared. The argument on the other side is that in fact there was no cause of action for this declaratory suit as the plaintiffs' right to draw water had not been obstructed. I do not think this argument is quite correct. It is proved that the defendant received a written post card from the plaintiffs asking him to admit their right to draw water from the tank in question and that the defendant took no notice of this communication, and in view of the defence which was set out in the written statement it seems quite clear that the defendant was at least interested to deny that the plaintiffs had any right of irrigation from this tank. In my opinion, there was a sufficient cause of action for a declaratory suit in

this case and in the interests of the parties and to put a stop to any further litigation, I think the Courts below ought to have declared the right of the plaintiffs to the extent to which they found they were entitled. I therefore, allow this appeal and set aside the decision of the Courts below. The plaintiffs will get a decree to the effect that they are entitled to draw water for the irrigation of their crops from tank No. 165 in proportion to the extent of their share in the village but without any priority over the right of the defendant to use water for the same purpose. As both parties have been in fault, I allow no costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 18 OF 1915.

January 19, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe, Kt.,
and Justice Sir Asutosh Mookerjee, Kt.
GUNGADHAR BOGLA—DEFENDANT

—APPELLANT

versus

HIRA LAL BOGLA—PLAINTIFF

—RESPONDENT.

Hindu Law—Mitakshara—Succession—Adopted son, rights of, as compared with natural son—Interpretation of special texts of Hindu Law, rules for—Stridhan of widow, right of an adoptive step-son to inherit.

Under the Mitakshara Law adoptive and natural step-sons of a Hindu widow have equal rights of succession to her *stridhan* property as *sapindas* of her husband. [p. 14, cols. 1 & 2; p. 15, col. 2; p. 16, col. 1; p. 21, col. 1.]

The text of Manu which says that "if among the wives of the same man one becomes mother of ■ son, by that son all of them become mothers of male children", does not operate to make the son of the husband by one wife the issue of the rival wife for the purpose of succession to her. [p. 14, col. 1; p. 15, col. 1; p. 18, col. 1.]

Obiter dictum.—Under the Hindu Law the rights of an adopted son in the family of the adopter, unless curtailed by express texts, are in every respect similar to those of a natural son. [p. 14, col. 2.]

Per Mookerjee, J.—The text of Vasistha which says that if after an adoption, a legitimate son be born, then the adopted son shall obtain a fourth share, should not be extended to cases not comprised strictly within its letter and spirit. [p. 20, col. 1.]

A special text of Hindu Law forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it. [p. 20, col. 1.]

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

Appeal from the following judgment of the Hon'ble Mr. Justice Chitty, dated the 1st December 1914:—

"This is a suit filed by Hira Lal Bogla against his brother Gungadhar Bogla for a declaration that the brothers are entitled to share equally in the estate of Rani Mohori Bibee, widow of their father Rajah Sewbux Bogla, for administration of the estate by the Court, and for other reliefs. Mirza Mall and Rajah Sewbux Bogla were brothers, members of a joint Hindu family, governed by the Mitakshara School of Hindu Law. Mirza Mall died leaving a widow Dhuni Bibee and a son Ballav Das. Ballav Das and his wife Bhugwandai both died shortly after Mirza Mall. The plaintiff had been adopted by Rajah Sewbux Bogla and his first wife, Soli Bibee. Soli died and Rajah Sewbux married Moni Bibee, by whom he had a son, the defendant Gungadhar. Moni died and Rajah Sewbux married Sundar Bibee, by whom he had a daughter Fulbai. Sundar died and he married a fourth wife, Mohori Bibee. Rajah Sewbux Bogla, his two sons, his wife Mohori Bibee, and Dhuni Bibee, widow of Mirza Mall, in 1907, submitted their family disputes to the arbitration of Hardatrai Praladka and Ramniranjan Das Murarka who made their award on 15th September 1907. That award was filed in and became a decree of this Court, in spite of the opposition of Mohori Bibee.

Rajah Sewbux Bogla died leaving a Will, by which he left his property to Mohori Bibee for her life and after her death to the defendant Gungadhar.

Mohori Bibee died intestate on 5th June 1910 leaving property of considerable value consisting principally of jewellery. A box containing such jewellery is, I am told, now in the custody of the National Bank of India.

The following issues were raised:—

1. Were the ornaments claimed in the plaint the separate *stridhan* property of Mohori Bibee or did they belong to Rajah Sewbux Bogla?

2. Are the ornaments items 1-14 in the list to the award the *debuttar* property of Shatanarain Jew?

3. Is the plaintiff estopped from claiming as a heir of Mohori Bibee?

4. Is the plaintiff estopped from claiming the jewellery in suit as against the defendant by reason of the award, dated 15th September 1907?

5. Is the plaintiff an heir of Mohori Bibee?

6. If so, to what shares in her estate would the plaintiff and defendant be respectively entitled?

7. Whether, if plaintiff is entitled to participate in the inheritance, he is not bound to contribute to the expenses of the *sradh* of Mohori Bibee and the payment of her debts?

It is unnecessary to discuss the first two issues. They will be investigated in the enquiry as to the estate of Mohori Bibee. I may, however, mention that it was stated at the Bar that there is now no question as to which of the ornaments were *debuttar*. Such as were dedicated to the idol have already been handed over for that purpose.

The answer to issue No. 7 is obvious. In the administration of Mohori Bibee's estate her funeral and *sradh* expenses and debts will have to be taken into account. If the defendant has properly expended money for those purposes he will be entitled to be recouped by the plaintiff *pro rata* out of the share, if any, allotted to him.

As to issues Nos. 3 and 4, no question of estoppel really arises, and the point was not seriously pressed by Counsel for the defendant though it was not expressly abandoned. The adoption of Hira Lal to Rajah Sewbux Bogla and his wife Soli Bibee is admitted. It was suggested that Hira Lal had been subsequently taken in adoption to Mirza Mall and that he could not be allowed now to claim as the son of Rajah Sewbux Bogla. It is clear from the submission to arbitration and from the recitals to the award that this was not the case. At that time, 1907, Hira Lal was regarded as a son of Rajah Sewbux Bogla and the arbitration and award proceeded on that footing. The fact of his adoption to Mirza Mall is expressly negatived by the recitals to the award, and the property was divided on a partition between Rajah Sewbux Bogla and his two sons. The shares would have been different, had Hira Lal been regarded

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

as Mirza Mall's son. Hira Lal certainly did not take up that position. I find these two issues in favour of the plaintiff and against the defendant. The substantial question in this suit is that raised by the 5th and 6th issues, whether the plaintiff is an heir of Mohori Bibee and if so, in what shares do he and the defendant divide her estate. For the defendant it was contended (1) that the plaintiff being only the adopted son of one wife had no right of inheritance to a rival wife's *stridhan* as against a son subsequently born of a third wife and (2) that if he is an heir then he takes only $\frac{1}{4}$ th of what the legitimate son takes, in other words, $\frac{1}{5}$ th of the step-mother's estate.

For the plaintiff it was conceded that in succession to a father or to paternal relatives, by the Law of the Mitakshara, the adopted son would take a $\frac{1}{5}$ th share and the subsequently born legitimate son a $\frac{4}{5}$ th share of the estate. But it was contended that that is a special rule affecting that kind of succession, and that in the absence of any special rule applicable to the present case, the ordinary rule would apply and the adopted and legitimate sons would take in equal shares.

A number of texts, commentaries and decided cases were referred to and the matter was fully argued on both sides. I have carefully considered the materials placed before me, but do not think that any useful purpose will be served by an elaborate discussion. The matter lies in a narrow compass and it will be sufficient if I briefly indicate the conclusion at which I have arrived.

The first contention raised on behalf of the defendant is unsupported, so far as I can see, by any authority, and, moreover, appears to be diametrically opposed to those decisions which say that as regards inheritance an adopted son is in all respects on an equality with the legitimate son except where such rights are expressly denied to him. I hold, therefore, that the plaintiff is entitled with Gungadhar to succeed to the estate of Mohori Bibee.

With regard to their shares in the inheritance, it is no doubt true that in succession to the estate of a father or a father's relatives the adopted son takes a lesser share than the legitimate son. But this is in consequence of express texts to that effect, and is one of the exceptions to the general rule referred to in the decisions.

There is no decision, so far as I am aware, which deals with the precise question of inheritance arising here, but there is a series of decisions laying down in general terms the equal rights of the adopted and legitimate son in all matters of inheritance, except where there is an express authority limiting those rights. It is not suggested that there is any text limiting the right of an adopted son to share equally with his legitimate brother in the succession to the *stridhan* of their step-mother. I need only refer to the cases of *Teencowroe v. Dinonath* (1) and *Kalikomul v. Uma Sunker* (2), affirming the decision of a Full Bench of this Court *Uma Sunker v. Kalikomul* (9) and *Padma Coomari Chaudhrani Debia v. Court of Wards* (4).

Against these decisions, and the principle underlying them, the defendant's Counsel has not been able to cite a single case.

I accordingly hold that the plaintiff and defendant are entitled to succeed to the estate of Mohori Bibee in equal shares.

There will be the usual decree for administration of her estate with the necessary directions and enquiries. The defendant must pay to the plaintiff the costs of the second and third day's hearing before me, which have been occasioned by the contention raised by the defendant, in which he has failed. Further consideration and other costs of the suit will be reserved. Liberty to apply.

Mr. B. Chakravarti (with him Messrs. A. N. Chaudhuri and B. K. Lahiri), for the Appellant.

Messrs. B. C. Mitter and B. L. Mitter, for the Respondent

JUDGMENT.

SANDERSON, C. J.—This is a suit by Hira Lal Bogla against his brother Gungadhar Bogla in which the plaintiff asks for a declaration that he and the defendant are entitled in equal shares to the property of Rani Mohori Bibee, a widow who had been the fourth wife of Rajah Sewbux Bogla, for administration and partition of Mohori Bibee's estate and other incidental

(1) 3 W. R. 24.

(2) 10 C. 232; 10 I. A. 138; 13 C. L. R. 379; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458.

(3) 6 C. 256 (F. B.); 7 C. L. R. 145.

(4) 8 C. 302; 8 I. A. 229.

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

reliefs. The case raises the question whether the plaintiff, who was the adopted son of *Rajah Sewbux Bogla* and his first wife, is entitled to any (and if so what) share of the *stridhan* property of *Rajah Sewbux Bogla's* fourth wife in competition with the defendant, who was the son of the *Rajah* and his second wife.

The details of the family tree are given in the judgment of Chitty, J., and I need not repeat them; the only point which I need emphasize being that the fourth wife, whose property is in question, died without issue. It appears that a box of jewellery, alleged to be valuable, which had been deposited in a Bank by *Mohori Bibee*, constituted the main part of her estate. It was, however, alleged by the plaintiff, though denied by the defendant, that there was other property belonging to *Mohori Bibee* besides the jewellery, *viz.*, certain *hundis*.

The first of the issues raised was as follows:—Were the ornaments claimed in the plaint the separate *stridhan* property of *Mohori Bibee*, or did they belong to *Rajah Sewbux Bogla*?

This issue has not yet been decided, and the result may be that if on the enquiry, which must be held hereafter, it turns out that the jewels in question were the property of the *Rajah* and were not the separate *stridhan* of *Mohori Bibee*, the above-mentioned question would not arise: for the jewels would pass under the *Rajah's* Will to the defendant, and if there were no other property of *Mohori Bibee* besides the jewellery, then the discussion which we have had would become merely academical.

It was not until some considerable time had been occupied in argument that the true position became clear to the Court, otherwise, personally, I should have been in favour of postponing the decision of this case until the above-mentioned enquiry had been held.

But in view of the fact that considerable time had already been spent over the case, and that in one event the point will be material, we come to the conclusion that in the interests of the parties it would be best for us to give a decision at once.

It is agreed that the family were governed by the *Mitakshara* School of Hindu Law, but the learned Counsel for the defendant urged that the *Mitakshara* was uncertain or doubtful on the point in question and relied upon a passage in *Manu*. On the other hand it was argued for the plaintiff that the provisions of the *Mitakshara* were clear and admitted of no doubt. The *Mitakshara* in Chapter II, section XI, paragraph 9, provides as follows:—"If a woman dies 'without issue,' that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest, as will be (forthwith) explained." Paragraph 11 contains further provisions as to the succession of a woman dying without issue having regard to the different forms of marriage. This marriage, it was agreed, must be taken to be governed by one of the first named four modes, in which event the whole property of a woman dying without issue as before stated belongs in the first place to her husband: on failure of him it goes to his nearest kinsmen (*sapindas*). This is confirmed by paragraph 25.

It was argued, however, on behalf of the defendant that these paragraphs do not apply to this case, because it was said that *Mohori Bibee* was not a woman who died without issue, and reliance is placed upon the text of *Manu*, which says that "If among the wives of the same man one becomes mother of a son," *Manu* says "that by that son all of them become mothers of male children," and inasmuch as *Rajah Sewbux's* second wife had a son, *viz.*, the defendant, *Mohori Bibee* his fourth wife became a mother of male issue, and, therefore, did not die without issue. In other words, the learned Counsel's first and main point was that the defendant succeeded as the direct issue of *Mohori Bibee*, and that the plaintiff, being merely an adopted son, did not take a share.

In my judgment this argument ought not to prevail.

Even if the text in *Manu* has reference to questions of inheritance, as to which there seems considerable doubt [see *Anna-*

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

purni Nachiar v. Forbes (5) and *Bhimacharya v. Ramacharya* (6)], in my judgment the provisions in the paragraphs in the Mitakshara, to which I have referred, are not uncertain or doubtful and they govern this case. An examination of the provisions of these sections of the Mitakshara convinces me that the paragraphs, which are material to this case, viz., 9 and 11, refer to the case of a woman dying without issue in the ordinary meaning of the words, and that the fiction created by the above-mentioned text in Manu does not exclude the case from these provisions.

Applying, therefore, the rules there laid down, the property of Mohori Bibee on her death would have belonged to her husband if he had been alive; but "on failure of him, it goes to his nearest kinsmen *sapindas*."

Both the plaintiff and the defendant are *sapindas* of their father, but it was contended on behalf of the defendant that he was the nearest *sapinda*, and was superior to the plaintiff who was merely an adopted son. With this I do not agree: With respect to this matter I think that the rights of the plaintiff, the adopted son, are similar to those of the defendant, the natural born son [see *Joykishore v. Panchoo Baboo* (7) and *Padma Coomari Chaudhrani Debee v. Court of Wards* (4)] and that they both share in the property of Mohori Bibee as *sapindas* of their father.

The next point taken on behalf of the defendant was that even if both the plaintiff and defendant came in as *sapindas* of their father, the rule which is applicable in certain cases, viz., that the adopted son takes one-fifth only, should be applied to this case, which is one of competition between a real and an adopted son. The rule upon such a point as this has been laid down by the Privy Council in *Padma Coomari Dabee v. Court of Wards* (4) as follows: An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa.

Now there has been no text produced which exactly covers the case in question, but the learned Counsel for the defendant relied on a passage in Mr. Sastri's Hindu Law, 4th Edition, page 171, which refers to the Dattaka Chandrika. This authority apparently extends the above-mentioned rule to cases of partition between male descendants in the male line down to the great-grandson where there is competition between an adopted and real descendant, and he arrives at that result by way of an analogy which might cover all cases in which there is such competition.

In my judgment, however, the proper course to adopt is to apply the rule laid down by this Court in the above-mentioned case, *Joykishore v. Panchoo Baboo* (7), and in the above-mentioned Privy Council decision, *Padma Coomari Dabee v. Court of Wards* (4), viz., that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural son, and as there is no express text curtailing the rights of an adopted son who, like the plaintiff in this case, is claiming succession to a share of the property of his adopting father's fourth wife, in my judgment, the plaintiff is entitled to share equally with the defendant.

Since this judgment was written my attention has been drawn to the decision of the Privy Council in *Nagindas Bhugwandas v. Bachoo Hurkissendas* (8), which was given on the 26th November 1915 and the report of which has only recently reached this country. On the points which are material to this case, it confirms the conclusions I had arrived at.

As to the argument of estoppel which was raised but not strongly urged, there is nothing in the submission to arbitration or the award which, in my judgment, prevents the plaintiff from making the claim in this case.

Finally, the learned Counsel for the defendant asked that the question whether Mohori Bibee had any property of her own should be tried by a learned Judge on the Original Side, and intimated that

(5) 26 I. A. 248 at p. 253; 3 C. W. N. 730; 23 M. J. 9 M. L. J. 209; 1 Bom. L. R. 611; 7 Sar. P. C. J. 591.

(6) 3 Ind. Cas. 750; 33 B. 452 at pp. 460, 461; 11 Bom. L. R. 654.

(7) 4 C. L. R. 538 at p. 555.

(8) 32 Ind. Cas. 403; (1916) M. W. N. 258; 23 C. L. J. 395 (P. C.); 30 M. L. J. 193; 20 C. W. N. 702; 14 A. L. J. 185; 3 L. W. 259; 19 M. L. J. 193; 18 Bom. L. R. 172.

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

he would take this issue at the defendant's risk.

In my judgment it is desirable that this issue should be disposed of as soon as possible: if decided in one way, it will dispose of the whole case and this may save the parties further expense, and the best way of getting a decision on this issue will be to refer it for trial to the Judge on the Original Side.

This appeal will be dismissed with costs. The costs of the issue to be tried will be in the discretion of the learned Judge who tries it.

WOODROFFE, J.—I am of opinion that the text of Manu, according to which the son of a man by one of his wives is as a son to all his wives who are thus all mothers, does not operate for the purpose of determining the succession so as to make the appellant issue of Sreemutty Mohori Bibee. In my opinion the appellant is not entitled to claim as the son of that lady. It is unnecessary then to consider whether this text should be construed to include also the plaintiff Hira Lal, who was an adopted son of Rajah Sewbax Bogla through his wife Soli Bibee, as well as Gungadhar his natural son through his second wife Moni Bibee. But if the text were to be held applicable to establish the appellant's contention that he by a fiction takes as son of the deceased, which in fact he was not, then as neither the one nor the other are sons of Mohori Bibee in the natural sense of that term, I should in that case have seen no sufficient ground for distinguishing between the positions of the plaintiff and the defendant, and both plaintiff and defendant would be heirs in equal shares. As, however, pointed out by Chandavarkar, J., in *Bhimacharyya v. Ramacharyya* (6), the text of Manu on which learned Counsel for the appellant relies has been explained in such a way as to imply that its application is of a limited character, having no necessary reference to questions of inheritance. There are difficulties in applying that text in the way suggested by the appellant which the judgment of my brother Mookerjee explains. In my opinion according to the Mitakshara text both the appellant and respondent succeed to the *stridhan* of their step-mother

as the *sapindas* of their father, her husband, and the appellant does not come in as issue as he contends. For Hira Lal the adopted son of Soli Bibee is the stepson of the deceased just as Gungadhar is. The question then arises whether, if both the plaintiff and defendant are entitled to claim as *sapindas* of their father, in what shares do they take? For the appellant it is argued that in that case the plaintiff as adopted son is only entitled to one-fourth which, according to the decision of this Court, is one-fourth of that which the defendant gets or one-fifth to his four-fifths. The natural justice of the case favours equality of division, for Hira Lal on being adopted ceased to belong to his natural family and should not in the absence of any provision to that effect suffer by reason of the birth of natural sons to the father by other wives than she who was associated in such adoption. Though in succession to the estate of a father the adopted son takes a lesser share than the natural born son, no authority has been cited which directly establishes such a rule in the present case of inheritance to *stridhan* where neither plaintiff nor defendant are the natural or adopted sons of the lady whose property is claimed and where no natural reason exists for distinguishing between their respective cases. On the other hand both are *sapindas*, and as regards this *sapinda* relationship there is no difference between an adoptive and natural son. The adoptive son is his father's *sapinda* as the natural son is. Both are then entitled as *sapindas* of their father, the deceased's husband. There is no competition between them unless (as is not the case) there is any text which establishes a preferential claim in favour of the adoptive son. As against this there is authority in favour of holding that the adoptive son in general occupies the same position as a natural son. Thus in *Joykishore v. Panchoo Baboo* (7) it was held that the rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son. There is, therefore, in my opinion, no ground for disturbing the decision of Chitty, J., on this point. But in the absence of any special rule affecting the kind of succession before

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

us, the plaintiff and defendant or adoptive and natural step-sons of the deceased should take in equal shares. I hold, therefore, upon the fifth and sixth issues that plaintiff is an heir of Mohori Bibee and that he is entitled to an equal share in her estate (whatever it may be) with the defendant.

What that estate is and in particular whether the ornaments claimed in the plaint were in fact the *stridhan* property of the deceased to which the above findings apply, is not here decided for the facts are not before us nor any finding thereon. Mr. Chackerbutty for the appellant has contended that the deceased had no estate which the Court can administer and that he should have been permitted to lead evidence as to this at the time so that an administration account might have been avoided. On the other hand it is contended that the defendant has admitted that there is some estate, and, therefore, the question what that estate is will be determined under the preliminary administration decree. I think that this matter should have been determined at the trial, for if it turned out that there was no property of the deceased the suit would have been dismissed, and if the amount of the estate had been shown to be trivial, the plaintiff might not have elected to take an administration decree. The Court should, therefore, first determine whether there is any estate of Sremuttty Mohori Bibee and only in the event of its finding in the affirmative make an administration decree. As regards issues 3 and 4 the estoppel alleged is not, in my opinion, established, and no question has arisen in this appeal as to the learned Judge's finding on the last or seventh issue. This disposes of all the issues raised. In my opinion the appeal fails and should be dismissed with costs.

MOOKERJEE, J.—This appeal involves an important question of Hindu Law of first impression, which may be formulated in these terms. A Hindu lady, governed by the Mitakshara School of Law, dies possessed of *stridhan* property; the rival claimants to her estate are, respectively, an adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third

wife; is the latter the preferential heir in competition with the former, or do they both succeed by right of inheritance; if so, do they take in equal or in unequal shares? This question has arisen in connection with the estate alleged to have been left by Rani Mohori Bibee, the widow of Rajah Sewbux Bogla of this city. The Rajah successively took four wives. He had no son by his first wife, and consequently took a son in adoption in conjunction with her; that son is the plaintiff in these proceedings and is the respondent before us. After the death of his first wife, the Rajah took a second wife, by whom he had a son, the defendant in these proceedings and appellant before us. After the death of the second wife, the Rajah took a third wife by whom he had a daughter; ~~we~~ are not concerned with her in these proceedings. After the death of the third wife, the Rajah took Mohori Bibee as his fourth wife; the Rajah subsequently died on the 5th October 1908, and about two years later, the Rani died on the 5th June 1910. The appellant claims her whole estate as her sole heir, and contends, in the alternative, that he is entitled to at least a four-fifths share thereof. The respondent asserts, on the other hand, that he is entitled to a half share of the estate left by the co-wife of his adoptive mother. Mr. Justice Chitty has upheld this contention. The defendant has reiterated in this Court the objections unsuccessfully urged on his behalf before the Trial Judge, and his claim has been sought to be sustained by reference to texts of Manu (IX, 183) and Yajnavalkya (II—117, 145). Indeed, no reference was made to the Mitakshara by the Counsel for the appellant till his attention was drawn thereto by the Court. It is, consequently, desirable to emphasise the cardinal rule enunciated by Sir James Colvile in *Collector of Madura v. Mootoo Ramalinga Sathupathy* (9), namely, that the duty of an European Judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the

(9) 12 M. L. A. 397 at p. 436; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 20 Eng. Rep. 389.

GUNGADHUR BOGLA v. HIRA LAL BOGLA.

particular school which governs the district with which he has to deal and has there been sanctioned by usage, for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. The parties to this litigation are admittedly governed by the Benares School of the Mitakshara Law and we must consequently turn in the first place to the Mitakshara, which, in the words of Sir James Colvile, is universally accepted by all the schools except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dayabhaga in those points where they differ.

Section XI of the second chapter of the Mitakshara, as translated by Colebrooke, treats of the separate property of a woman. The first eight paragraphs embody an exposition of the nature of *stridhan*. The author next propounds the distribution of *stridhan* on the basis of the text of Yajnavalkya (II, 145), "her kinsmen take it, if she die without issue." Paragraph 9 lays down that if a woman die without issue, that is, leaving no progeny, that is, leaving no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property shall be taken by her kinsmen, namely, "her husband and the rest." Paragraphs 10 and 11 distinguish different heirs according to the diversity of the marriage ceremonies; it is there laid down that in any of the four approved modes of marriage, the property belongs in the first place to her husband: on failure of him, it goes to his nearest kinsmen (*sapindas*). Vijnaneswara then proceeds, in paragraph 12, to consider the case of the woman who leaves progeny, *i. e.*, has issue, and, in the six following paragraphs, defines the order of succession of daughters and their descendants. We next come to paragraph 19: "if there be no grandsons in the female line, sons take the property: for it has been already declared 'the male issue succeeds in their default.' [Yajnavalkya, II, 118.] Mann, IX, 192, likewise shows the right of sons as well as of daughters to their mother's effects: 'When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate.'" Paragraph 20 interprets this to mean that brothers and sisters do not succeed together, but that one class excludes the other. Paragraph

21 follows with an explicit statement that the whole blood is mentioned to exclude the half blood. Paragraphs 22 and 23 deal with the exceptional case of the daughter of a rival wife of a superior class, who takes the property of a childless step-mother of an inferior class. Paragraph 24 treats of grandsons who, on failure of sons, inherit the wealth of their paternal grandmother. Paragraph 25 then lays down that, on failure of grandsons also, the husband and other relatives succeed, and thus brings us back to the rule formulated in paragraph 9. The question consequently arises, whether the lady, whose estate forms the subject of controversy, died "without issue" within the meaning of paragraph 9 or "left progeny" within the meaning of paragraph 12. The appellant maintains the latter alternative, and in support of his contention relies upon the text of Manu (IX, 183): "if among all the wives of one husband, one had a son, Manu declares them all to be mothers of male children through that son." The argument is founded on this text, that if one of the several wives of a person gives birth to a son, all the wives become the mothers of such son, who thereupon becomes entitled to succeed by inheritance to the wealth of all the wives of his father, as if he were their son within the meaning of the text of the Mitakshara. In my opinion, this process of reasoning is based on a manifest misapplication of the text of Manu. Kulluka Bhatta and Raghavananda, two of the Commentators of Manu, (Mandalik's Edition, page 1908) explain the purpose of this text; the former points out that an adoption by the childless wife is excluded in such a case; the latter observes that this excludes levirate. This is also the view taken by Sarvajnanarayana, another commentator of Manu. In this view, it is needless to consider whether the term *patini* in the text of Manu means *auras patini* (mother of a naturally born son) as the Commentator Nandana interprets it. It is sufficient for our present purpose to note that texts of the same import are found in other Institutes, which indicate that this fiction had a very restricted application. Thus, Vishnu (XV, 41) ordains that "amongst wives of one husband also, the son of one is the son of all"; this is asserted to show that such son must present funeral oblations to all the

GUNGADHAR BOGLA v. HIRA LAL BOGLA.

wives of his father after their death (S. B. E., Volume VII, page 65). To the same effect is the ordinance of Vasistha (XVII, 11): "if among many wives of one husband, one have a son, they all have offspring through that son; thus says the Veda." This has no reference to the right of succession of the son to the wealth of the wives of his father (S. B. E., Volume XIV, page 85). The context where the text mentioned occurs in Manu makes it reasonably plain that it has no reference to the question now under consideration. The text which immediately precedes declares as follows:—"if among brothers, sprung from one father, one have a son, Manu has declared them all to have male offspring through that son." This is quoted in the Mitakshara (Chapter I, section 11, paragraph 36) and is explained by Vijnaneswara as intended to forbid the adoption of others, if a brother's son can possibly be adopted, but not intended to declare him as the son of his uncle. It may be observed here parenthetically that the Judicial Committee have ruled that not only does not this text invalidate an adoption in such circumstances, but that all texts which prescribe the preferential adoption of the son of a brother of a whole-blood are merely binding upon the consciences of pious Hindus and do not possess the imperative force of law [*Wooma Dace v. Gokulanand Dass* (10)]. I feel no doubt that a similarly restricted interpretation should be adopted in the case of the text whereon the appellant relies, and this view is plainly indicated by the Judicial Committee in *Annappurni Nachiar v. Forbes* (5) where this very text of Manu is quoted and its scope and purpose explained as follows:—"we must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purpose of inheritance, the natural mothers and fathers respectively are preferred." If the contention of the appellant were to prevail, whenever a son is born of the womb of one of the wives of a person, all his wives would stand in the position of mothers to the boy and would be entitled to succeed to him equally by right of inheritance; for it would be obviously illogical to hold that the ladies become his mothers, but he does not become their

son. Yet it was ruled by a Full Bench of this Court in *Lala Joti Lal v. Durani Kower* (11) that, according to the Mitakshara, in a divided family, a step-mother cannot succeed to the estate of her step-son; and this exposition of the law has been accepted as correct for over half a century.

Further, it is plain that the argument of the appellant involves an *atideca* upon an *atideca*, that is, a fiction upon a fiction, or a remote analogy on a remote analogy; the adopted son would by a fiction be a real son of the adopter, and, then, by another fiction, a real son, not only of the adoptive mother, but of all the other wives of the adoptive father, a train of reasoning most repugnant to a Hindu jurist. We may also add that the contention of the appellant is not supported by the decisions in *Manilal Rewadat v. Bai Rewa* (12), *Mahadu Ganu v. Bayaji Sidu* (13) and *Bai Kesser Bai v. Hansraj Moraji* (14), where a co-widow was preferred to the husband's brother and husband's brother's son as heiress to the *stridhan* of a Hindu widow who had died without issue; nor is assistance derived from *Bachha Jha v. Jugmon Jha* (15), where under the Mithila Law, the husband's brother's son was preferred to the sister's son. We have been pressed, however, with the opinion of Commentators on the Institutes of Yajnavalkya as also on the Mitakshara, but, in my opinion, they do not support the contention of the appellant that in paragraph 19 of section XI of Chapter II of the Mitakshara the term "son" includes the son of a rival wife. I am not now concerned with the question, which may, perhaps, hereafter arise, whether the term "son" includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband. The only question for determination now is, whether the expression includes the son of a rival wife. In my opinion, the answer must be in the negative. The terms used by Yajnavalkya and Vijnaneswara, namely, *apjasi* and *anpatgaya* make it clear that the text refers to the case where

(10) 5 I. A. 40; 3 C. 587; 12 C. L. R. 51.

(11) Sup. B. L. R. 67 (F. B.); W. R. (F. B.) 173.

(12) 17 B. 758.

(13) 19 B. 239.

(14) 33 I. A. 176; 10 C. W. N. 802; 30 B. 431, 4 C. L. J. 9; 8 Bom. L. R. 446; 3 A. L. J. 481; 1 M. L. T. 211; 16 M. L. J. 416.

(15) 12 C. 318.

GANGADHAR BOGLA v. HIRA LAL BOGLA.

the woman dies "without issue" or "leaves no progeny" in the ordinary acceptation of those phrases. This is made clearer by the phrase used in paragraph 12, *prasuta apatyabati*, that is, "a woman who has given birth to no child." This is further emphasised in paragraph 19 where reference is made to the text of Manu (IX, 192) which speaks expressly of uterine brothers and uterine sisters. It is inconceivable that Vijnaneswara should have used the expressions he did in paragraphs 9, 12 and 19 or referred to the text of Manu (IX, 182), if he had intended to import into the term "son" a secondary sense of step-son. Why should we impute to Vijnaneswara a manifest violation of an elementary rule of interpretation, namely, that he uses the same word in two different senses in the course of the same discussion, (Dattaka Mimansa, II, 35; Vyavahara Mayukha, Chapter I, section 1, 11-15; Dayabhaga, Chapter III, section II, pl. 30), which furnish illustrations of the Arthailkatva Axiom, "to a word or sentence occurring at one and the same place, a double meaning should not be attached" (*sakradach charitah shabdah sakridebaratham gamyati*); for let it not be overlooked that although in the translation by Colebrooke the text of the Mitakshara is divided into distinct paragraphs, in the original the passage appears as one continuous and unbroken discussion. Reference has been made to Subodhini (Setlur's Edition, pages 848-853), the Balamibhatti (Setlur's Edition, page 853, 1-9) (both commentaries on the Mitakshara), the Viramitrodaya (Chapter V, part II, section 14), Apararka (Anandasram Edition, Vol. II, 754), Vivada Ratnakar (Chapter X) and Kamalakara (Baroda Edition, pages 462); *Dwarka Nath Ray v. Sarat Chandra Singh Ray* (16). These do not support the contention that the term son in paragraph 19 includes the son of a rival wife, though some of them, for instance, the Viramitrodaya, apparently treats the son of a rival wife as a preferential heir to the husband. I am not now concerned with the question, whether the son of a rival wife can be squeezed in between the son and the husband and thus allowed to break through the compact line of heirs enumerated in the Mitakshara in paragraphs 20-24, but I may state that I do not at present see any plausi-

(16) 11 Ind. Cas. 572; 15 C. W. N. 1036; 15 C. L. J. 23; 39 C. 319.

ble answer to, much less any valid criticism on, the view expounded by Chandavarkar, J., in *Bhimachary v. Ramachary*, (6). That view is supported by a number of commentators, amongst others by Apararka (Volume II, page 754) and Kamalakara (page 462). I hold accordingly that neither the appellant nor the respondent is qualified as "son" to take by inheritance the estate of their step-mother who died without issue and left no progeny. It follows necessarily that her estate upon her death has devolved upon the *sapindas* of her husband in accordance with paragraph 25 read with paragraphs 9 and 11 of Chapter II, section XI, of the Mitakshara. The appellant and the respondent are incontestably *sapindas* of their father in the same degree, and consequently they have jointly inherited the estate of their step-mother.

The question then arises for consideration, whether the plaintiff and the defendant are entitled to the estate in equal halves or whether the respondent as the adopted son of his father is in a position of relative disadvantage. The appellant affirms the latter alternative and relies upon the well-known text of Vasistha:—"If after he has been adopted, a legitimate son be born, then the *dattaka* shall obtain a fourth share." This is of no assistance to the appellant; for the context shows that the text of Vasistha refers only to the estate of the adoptive father (Vasistha XV, 1-9, S. B. E., Volume XIV, page 76). I am not unmindful that the principle has been extended to other cases (Dattaka Mimansa X, 1; Dattaka Chandrika II, 11, V, 17); but there is no text directly applicable to the contingency before us. On the other hand, we have the text of Vridha Gautama cited in the Dattaka Mimansa (V, 43) which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers. Of similar significance is the qualification formulated by Vasistha himself (XV, 10): "provided he be not engaged in rites procuring prosperity," which Krishna Pandit interprets as indicating that in this case the estate is to be divided equally between the legitimate son and the adopted son; the interpretation

GANGADHAR BOGLA v. BIRA LAL BOGLA.

adopted by the author of the *Dattaka Chandrika* (V, 17-18) is obviously forced and, if one may say so without impropriety, erroneous. There is thus plain indication that even in archaic times, the rule was deemed harsh and an endeavour was made to restrict its operation. Consequently we should not extend its application to cases not only not comprised strictly within its letter, but undoubtedly beyond its true spirit; in this connection we may bear in mind that Hindu jurists, quite as much as English jurists [*Ebbs v. Boulnois* (17)], recognise the well-known canon of interpretation that a special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it; the *Mitakshara* itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to encroach unduly upon the general rule [*Gongu v. Chandra Bhagabai* (18) and *Anandi Ram v. Hari Suba Pai* (19); *Dattaka Chandrika*, section V, 27: *Mitakshara on Prayaschitta*, Edition Moghe, page 292; *yabatyabadhite anuppati prashmo na bhavati tavatradhaniyam.*] That the rule is not of universal application is clear from the decision in *Surjokant Nundi v. Mohesh Chunder Dutt* (20), where an adopted son of one daughter and the legitimate son of another daughter were held to be equal sharers in the estate of their maternal grandfather. The only case where the rule has been applied, though it is not covered expressly by the text of *Vasistha*, is *Raghubanund Doss v. Sadhu Churn Doss* (21), where partition was sought amongst the members of a joint *Mitakshara* family composed of the adopted son of one brother and the legitimate sons of two other brothers. The correctness of this decision, which is in conflict with *Tara Mohun v. Kripa Moyee Debia* (22) and *Dinonath Mukerji v. Gopal Churn Mukerji* (23), was doubted in

Baramanund Mahanti v. Chowdhry Krishna Charan Patnaik (24), *Birbhadra Rath v. Kaipataru Panda* (25) and *Raja v. Subbaraya* (26). It was, however, recently followed by the Bombay High Court in *Bachoo Harkisondas v. Nagindas* (27). On appeal to the Privy Council, the decision of the Bombay High Court has been reversed and the view adopted by this Court in *Raghubanund Doss v. Sadhu Churn Doss* (21) definitely overruled by a judgment which has been received in this country since the present judgment was composed. [*Nagindas Bhagwandas v. Bachoo Hurkissendas* (8) decided by the Judicial Committee on the 26th November 1915.] The position, then, is that there is neither authority nor principle which can be successfully invoked by the appellant in support of his contention that the estate of his step-mother should be unequally divided as between himself (the real son of his father) and the respondent (the adopted son of his father). We are consequently thrown back upon the fundamental position recognised in a long series of decisions that the adopted son becomes for all purposes the son of the father by adoption and occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the *Dattaka Chandrika* and the *Dattaka Mimansa*: *Sumloochunder v. Naraini* (28), *Padma Coomari Chaudhrani Debee v. Court of Wards* (4), *Kali Komul v. Uma Sunker Moitro* (2), *Uma Sunker Moitro v. Kali Komul Mozumdar* (3), *Joykishore v. Panchoo Baboo* (1), *Anandi Ram v. Hari Suba Pai* (19), *Juggurnath v. Mukhun Koonwur* (29), *Teencowree v. Lino-nath* (1), *Radha Prasad v. Ranee Mani Dassee* and *Peary Lal v. Ranee Mani Dassee* (30), *Narasammal v. Balaramacharlu* (31) and *Annapurni Nachiar v. Collector of Tinnevely* (32). The only point for consideration then is whether there is any text applicable to the present case which reduces the share of the

(17) (1875) 10 Ch. App. 479 at p. 484; 44 L. J. Ch. 691; 23 W. R. 820; 52 L. T. 610.

(18) 32 B. 275; 10 Bom. L. R. 149.

(19) 3 Ind. Cas. 745; 23 B. 404; 11 Bom. L. R. 441.

(20) 9 C. 70; 7 Ind. Jur. 195.

(21) 4 C. 425; 3 C. L. R. 534; 2 Shome L. R. 113.

(22) 9 W. R. 413.

(23) 8 C. L. R. 57; 9 C. L. R. 379.

(24) 12 Ind. Cas. 6; 14 C. L. J. 183.

(25) 1 C. L. J. 388.

(26) 7 M. 253.

(27) 23 Ind. Cas. 912; 16 Bom. L. R. 263.

(28) 3 Knapp 55; 12 E. R. 568.

(29) 3 W. R. 24.

(30) 10 C. W. N. 695; 3 C. L. J. 502; 23 C. 947.

(31) 1 M. H. C. R. 420.

(32) 18 M. 277 at p. 281; 5 M. L. J. 121.

MUNICIPALITY OF BELGAUM v. RUDRAPPA SUBRAO SUTAR.

adopted son. I have not been able to trace any text expressly applicable, nor can I find any which even by implication supports the contention of the appellant. I am not unmindful that in Chapter II, section XI, paragraph 9, of the Mitakshara the property goes to the kinsmen of the woman, namely, her husband and the rest, and in paragraph II, on the failure of the husband, it goes to his *sapindas*. In my opinion, this does not show that the property descends as if it belonged to the husband; the only effect of the two paragraphs is to determine the heir to the woman by application of the test of *sapindaship* with her husband. It follows accordingly that the respondent takes the same share in the estate of his step-mother as he would have done if he had been a real and not the adopted son of his father. I hold finally that Justice Chitty correctly decided both the points in the case.

As regards the question of estoppel, there is nothing in the arbitration proceedings which debars the respondent from contesting the claim of the appellant, and the point, which indeed was not seriously pressed, does not require elaborate investigation.

I agree with the Chief Justice and Mr. Justice Woodroffe in the directions they propose to give with regard to the costs and the further trial of the suit.

Appeal dismissed; Case sent back.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 294
OF 1915.

February 29, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

THE MUNICIPALITY OF BELGAUM—
PLAINTIFFS—APPLICANTS

versus

RUDRAPPA SUBRAO SUTAR AND
ANOTHER—DEFENDANTS—OPPONENTS.

*Bombay District Municipalities Act (III of 1901), s.
160 (3)—Revision, incompetent.*

An application for revision does not lie from the decision of a District Court under clause 3 of section 160 of the Bombay District Municipalities Act.

Civil extraordinary application from the decision of the Assistant Judge, Belgaum, in Suit No. 32 of 1914.

Mr. A. G. Desai, for the Applicants.

Mr. T. R. Desai, for Opponent No. 1.

Mr. K. H. Kelkar, for Opponent No. 2.

JUDGMENT.—In the case of *Chunilal Virchand v. Ahmedabad Municipality* (1) it has been decided by a Bench of this Court that no appeal lies from the decision of a District Court under clause (3) of section 160 of the Bombay District Municipalities Act. The object of this application is to obtain from the Court a decision that although no appeal would lie, yet an application in revision does lie. Such a decision would, in our opinion, be seriously anomalous, and we do not think that the words of the Statute require us to make such a pronouncement. The only decision which seems to us fairly consistent with that already recorded in *Chunilal Virchand's* case (1) is the decision that no application for revision is competent. In *Balaji Sakharani v. Merwanji Nowroji* (2) this Court has held that it has no jurisdiction to revise the order of a District Judge acting under section 23 of the Bombay District Municipalities Act of 1884. And although the words occurring in that section are 'District Judge,' whereas the words occurring in section 160, last clause, are 'District Court,' we do not think that the distinction is sufficient to support the argument that an application for revision is competent, although admittedly no appeal would lie.

The Rule, therefore, must, in our opinion, be discharged with costs.

There will be one set of costs.

We notice that the order in this case was made not by the District Judge but by the Assistant Judge. As, however, no point has been taken on this circumstance, it is unnecessary for us to decide—and, therefore, we do not decide—whether the District Judge was competent under section 16 of the Civil Courts' Act or otherwise to transfer to the Assistant Judge this particular case.

Rule discharged.

(1) 12 Ind. Cas. 540; 13 Bom. L. R. 958; 36 B. 47.
(2) 21 B. 279.

MADAN MOHUN NATH SAHI DEO v. PRATAP UDAI NATH SAHI DEO.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL ORDER No. 74
OF 1915.

RULE No. 170 OF 1915.

May 13, 1915.

Present:—Mr. Justice Holmwood and
Mr. Justice Walmsley.

Thakur MADAN MOHUN NATH SAHI
DEO—PLAINTIFF—APPELLANT

versus

Maharaja PRATAP UDAI NATH
SAHI DEO—DEFENDANT—

RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 139, 184, 191 (2), 208 (2), 210—Execution of rent decree—Arrest of judgment-debtor, effect of—Stay of proceedings for sale.

A warrant for the arrest of a person against whom a decree for rent has been obtained under the Chota Nagpur Tenancy Act has the effect of only staying proceedings for sale of the tenure. Neither section 191 (2), which refers to persons arrested on decrees for money, nor section 139, which refers to suits for recovery of money from defaulting agents, has any application to the case. [p. 22, col. 2.]

Appeal against the order of the Deputy Collector, Ranchi, dated the 10th February 1915.

Babu Bepin Chandra Mullick, for the Appellant.

Mr. Caspersz and Babu Jogesh Chandra Dey, for the Respondent.

JUDGMENT.—This is an appeal against the order of a Revenue Officer empowered to hear rent suits under the Chota Nagpur Tenancy Act who, in execution of the decree of another Deputy Collector for Rs. 11,103 and odd, passed an order in execution that a warrant of arrest against the judgment-debtor returnable by the 25th February should be issued in spite of the judgment-debtor's objections. Those objections as far as we have been able to understand them have been repeated here, and the first is that the decree for rent of Kairo, Perganah Khukra, is not a decree for the rent of the entire tenure. The learned Deputy Collector unnecessarily discusses this point, and incidentally misreads the decision of this Court in *Chandra Nath Tewari v. Pratap Udai Nath Sahe* (1). But with that we have nothing to do, inasmuch as the executing Court is not entitled to go beyond the decree, and the decree shows that the rent was for the

entire village, which is certainly an entire unit for agricultural purposes. There is, therefore, no reason why the decree should not be executed under the Chota Nagpur Tenancy Act.

Then section 184 is sought to be ignored by the appellant and he carries this on to section 210, then comes back to section 208 and so seeks to read the Act backwards. The procedure under the Act seems to be perfectly simple. The first section which deals with it is section 184, which lays down that the process of execution may be issued against either the person or property of the judgment-debtor and shall not be issued simultaneously against both the person and property. Then section 191 (2), which is relied upon by the appellant, has nothing whatever to do with the present question before us. That refers to a person who is arrested on a decree for money. Then on reference to section 139, which the appellant also relies upon, ■ suit referred to in clause (7) would clearly seem to be a suit which is not for rent on account of agricultural land but ■ suit for recovery of money from defaulting agents and others. Then section 208 (2) provides that when a warrant of execution has been issued under this Chapter against the person or moveable property of the judgment-debtor, that is, ■ warrant under section 184, no application shall be received under sub-section (1) of section 208 while such warrant remains in force. Nothing can be clearer than this, that a warrant of arrest may precede everything else and that it stays proceedings for sale of the tenure. The provision of section 210, giving the Deputy Commissioner protective jurisdiction in favour of agriculturists whose tenures and holdings have been sold in pursuance of section 208, has nothing whatever to do with the question before us; and we find that all the arguments adduced before us have been unnecessary and mostly irrelevant, and that from the time that has elapsed since those decrees were first made it would appear that the judgment-debtor is purposely endeavouring to throw every possible technical legal objection in the way of getting out of paying rent which has been

(1) 231 Ind. Cas. 105; 18 C. W. N. 170.

BHAGAT MAL SAHU v. ABDUL KARIM.

declared to be honestly due from him. This is a state of things which we cannot encourage.

The appeal is dismissed with costs. We assess the hearing fee at four gold mohurs ■ the value of the decree is upwards of Rs. 5,000.

There is a Rule connected with this appeal, namely, Rule No. 170 which was issued to show cause why the warrant of arrest should not be set aside as being made without jurisdiction under the Chota Nagpur Tenancy Act. We cannot find that any question of jurisdiction arises under that Act and this Rule must be discharged with costs, two gold mohurs.

The record will be sent down without delay.

Appeal dismissed; Rule discharged.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 245 OF 1913.

April 7, 1916.

Present:—Mr. Justice Chapman and
Mr. Justice Atkinson.

BHAGAT MAL SAHU—DEFENDANT No. 1

—APPELLANT

versus

ABDUL KARIM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Hindu Law—Debt of father—Liability of son—
Absence of son's consent to loan—Family necessity—
Application of money for immoral purpose—Proof.*

Under Hindu Law, the liability of a son to pay his father's debt arises from a moral and religious duty, and is not affected by the absence of the son's consent, the son being an adult at the time, or by family necessity. [p. 24, col. 1.]

Baso Koor v. Hurry Dass, 9 C. 495; 12 C. L. R. 292
7 Ind. Jur. 472, relied on.

Upooroop Tewary v. Lalla Baulhjee Sahay, 6 C. 749;
8 C. L. R. 192; 4 Shome L. R. 42, referred to.

A son is, however, exempt from liability if he can establish that the father was guilty of applying the money borrowed for an immoral purpose. The connection between the raising of the money and its expenditure for a specific immoral purpose must be shown, though direct proof is not necessary that it was spent on any particular person. [p. 24, cols. 1 & 2.]

Chintamanrao Mehendale v. Kashinath, 14 B. 320;
Dhattataraya Vishnu Dhamankar v. Vishnu Narayan Dhamankar, 12 Ind. Cas. 949; 13 Bom. L. R. 1161; 36 B. 68, relied on.

Mr. Guru Saran Prasad, for the Appellant.

Mr. Khurshed Hasnain, for the Respondents.

JUDGMENT.

ATKINSON, J.—This is an action brought

by the plaintiff to recover Rs. 2,400 by way of principal and a sum of Rs. 4,008 by way of interest on a mortgage-bond, dated the 29th December 1899. The bond purports to be made by the defendant's father and apparently the money was raised for the purpose of extinguishing three prior existing mortgage-debts on respective bonds, dated 20th February 1896, 7th December 1896 and 16th September 1899. These bonds were for various amounts and it would appear that irrespective of interest, the total amount of moneys raised by way of principal by these bonds would be about Rs. 1,200 to Rs. 1,500. The bond sued on is for Rs. 2,400 with interest. The original mortgagor is dead and the defendants are his two sons. The original mortgagee is also dead and this suit is brought by the plaintiff as his representative to recover the money due on this mortgage-bond for the amount of Rs. 6,408. It will be noticed that this appeal is brought against the decision of the learned Subordinate Judge by one defendant only, that is defendant No. 1, who is the eldest son of the original mortgagor. Defendant No. 2, although he joined in filing a written statement on behalf of himself and his brother, does not seriously contest the decision of the learned Subordinate Judge and expresses his willingness to pay Rs. 3,000 in discharge of his liability. Thus the appeal before us is simply an appeal by one of the parties liable as a son of the original mortgagor. He seeks to resist liability for this debt on three grounds. *First* of all, that he and his father were separate in mess and residence and that in fact the joint property which had previously belonged to his father himself and his brother had been severed or partitioned and that by reason of this he is not liable for the antecedent debts of his father. *Secondly*, it is contended that if the joint property has not been severed, he is within the class of exception which provides that a son is not liable according to Hindu Law for the debts of his father if the debts be contracted for an immoral purpose. And, *thirdly*, he contends that in point of law at the time that the mortgage-bond was made and given he was then of age, and that his father executed the bond without his consent, express or implied, and that

TANA PEENA CHUNA v. MAMAKKANTAKATH.

consequently he is not liable, it not having been shown that the debt was one incurred for any family necessity.

On the first question we are of opinion that there was no evidence given that there had been any partition of the joint property between father and sons.

Taking the third point next, we are of opinion that the case cited, *Uppercop Tewary v. Lalla Baudhjee Suhay* (1), in support of that argument is of little weight. It seems to have been overruled, if not distinctly qualified, by the later case reported as *Baso Kocer v. Hurry Dass* (2).

The only question which then remains to be considered is, whether or not the money raised in this case was raised for some immoral purpose. Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation; and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose. The only evidence adduced in this case for the purpose of showing that the money was applied for an immoral purpose is the evidence of the defendant No. 1 himself, which merely says in general terms "my father used to drink and keep women and borrowed money for the purpose."

That is the only affirmative evidence given by the defence on that issue. It in no way connects the money raised under this mortgage-bond now sued on with the keeping of any particular woman, nor in the evidence of the defendant is the name of any woman suggested. The evidence seems very elastic, indefinite, and inconclusive. Some little corroboration, however, is given to the defence pleaded by the evidence of witness No. 6 for the plaintiff, in which he says that the mortgagor kept a woman and that a dispute arose between him and his sons on account of this prostitute. There, too, no connection is shown between the raising of the money and its expenditure for any specific immoral purpose. We have considered the cases that have been decided. The cases reported as *Chintamanray Mehendale v. Kashinath* (3) and

Dattatraya Vishnu Dhamankar v. Vishnu Narayan Dhamankar (4) are directly in point and we think that while you need not have direct proof that the money was raised to be spent on any particular person, one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way, by reasonable legal proof, it must be shown that there is a connection between the debt and the immoral purpose. We are unable on the evidence here to say that there has been any reasonable proof connecting the debt incurred in this case with the immoral purpose alleged and, therefore, we must confirm the decision of the learned Subordinate Judge with costs.

CHAPMAN, J.—I agree.

BY THE COURT. — We allow the hearing-fee seven gold mohurs.

Appeal dismissed.

(4) 12 Ind. Cas. 949; 36 B. 68; 13 Bom. L. R. 1161

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 150 of 1914.

January 25, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Twomey.

TANA PEENA CHUNA PITDHAY
MEERA ROWTHER—DEFENDANT No. 1—
APPELLANT

versus

MAMAKKANTAKATH PATHUMA-
KUTTY UMA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 58 (a), 66—Mortgage—English mortgage—Lease by mortgagor, validity of.

Whatever may be the doctrine of English Law, an English mortgage, under the provisions of section 58 of the Transfer of Property Act, does not transfer the property absolutely to the mortgagee, but the mortgagor remains owner subject to the mortgage. The fictions of English Law in regard to legal and equitable estates have not been continued in India. [p. 25, col. 2.]

A mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession, save that he should not commit any act which will be destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act. [p. 25, col. 2.]

(1) 6 C. 749; 8 C. L. R. 192; 4 Shome L. R. 42.

(2) 9 C. 495; 12 C. L. R. 292; 7 Ind. Jur. 472.

(3) 14 B. 320.

TANA PEENA CHUNA v. MAMAKKANTAKATH.

In the case of ■■ "English mortgage," therefore, where the mortgagor is in possession, he can lease the property and his receipt of rent in advance for ■ certain period will not render the lease invalid unless the security is thereby rendered insufficient. [p. 25, col. 2.]

JUDGMENT.

Fox, C. J.—The relief claimed in the suit was (1) a declaration that a lease for three years of two separate plots of land made by one A. S. Mahomed Abu Backer to the defendant on the 27th September 1911 was void and of no effect, (2) an order for the delivery up by the defendant of the lease, (3) possession of the lands, and (4) costs. Backer was adjudged insolvent on the 14th June 1912. Previous to granting the above lease he, as mortgagee, obtained an order for sale of the lands by the Official Assignee. At sales by the latter the 1st plaintiff bought one lot and the 2nd plaintiff the other lot.

The grounds on which the plaintiffs claimed that the lease should be declared void, were because it was a colourable and fraudulent transaction in which no consideration passed, and because Backer who was at the time he executed the lease mortgagor of the lands could not validly give ■ lease of them. The mortgage was undoubtedly an "English mortgage" within the description of that kind of mortgage in section 58 of the Transfer of Property Act, and Backer remained in possession of the lands after making it, and was in possession when he granted the lease. For the plaintiff it was contended that one who mortgages his property by an English mortgage has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest to transfer until the land is re-transferred to him by the mortgagee in fulfilment of the condition or proviso that this shall be done upon payment of the mortgage-money.

No doubt this contention would be correct if the English Common Law were applicable to the case, but what has to be applied is the Transfer of Property Act, 1882. Under that Act a mortgage is a transfer of an interest in specific immoveable property for the purpose of securing (1) the payment of money advanced or to be advanced by way of loan, (2) an existing or future debt, or

(3) the performance of ■■ engagement which may give rise to a pecuniary liability. In whatever terms the document may be expressed nothing more than what is stated in section 58 (a) is effected, consequently although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee, the Indian Law does not recognize that he does so in fact, and the mortgagor remains in Indian Law owner of the property subject, of course, to the mortgage. The fictions of English Law in regard to the legal and equitable estate have not been continued in India.

A mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession. The only restriction imposed on him is that contained in section 66 of the Transfer of Property Act, that is to say, he must not commit any act which is destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act. In the present case the mortgagor is said by the document to have been paid the full three years' rent and advance, but there is nothing to show that even if this was the case the security was thereby rendered insufficient within the meaning assigned to that term.

It was not proved that the lease was colourable, *benami*, or fraudulent, and there was no ground for decreeing any part of the plaintiffs' claims. It is unnecessary to decide whether there was misjoinder of parties.

I would allow the appeal, set aside the District Court's decree and dismiss the suit with costs ordering the plaintiffs to pay also the 1st defendant's costs of this appeal, the representatives of the 1st plaintiff being made liable to the extent of the assets of his estate which have come to their hands.

TWOMEY, J.—I concur.

Appeal allowed.

DAYALPURI V. NARAYAN DUTT.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1745 OF 1914.

March 29, 1916.

Present:—Mr. Justice Walsh.

Mahant DAYALPURI—PLAINTIFF—
APPELLANT

versus

NARAYAN DUTT AND OTHERS—DEFENDANTS
—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 158—"Successor", meaning of—Hindu Law—Joint family—Survivor, if successor—Decision of Revenue Court—Appeal to District Judge, maintainability of—Court, duty of.

A survivor in a Hindu joint family is a "successor" within the meaning of the word in section 158 of the Agra Tenancy Act. [p. 26, col. 2.]

An appeal against the decision of a Revenue Court deciding the question of successor under section 158 of the Agra Tenancy Act lies to the District Judge. [p. 27, col. 1.]

Semble.—It is the duty of a Court of Law, specially in a matter which is after all more a matter of settlement and revenue than strict law in the sense of determination of the rights of litigants or redress of wrongs, to take a broad and liberal view, if it is possible. [p. 26, col. 2.]

Second appeal from the decision of the District Judge, Saharanpur, dated the 20th June 1914.

Mr. B. E. O'Connor (with him Dr. S. N. Sen), for the Appellants.

The Hon'ble Dr. Sunder Lal, for the Respondents.

JUDGMENT.—I do not see my way to interfere in this case. The first point on which the plaintiff relies, namely, that he is entitled to resumption under section 154 of the Tenancy Act turns to my mind upon a pure question of fact. That question has been determined against him by both the Courts below. The question that remains is, inasmuch as the suit is alternatively for assessment of rent, whether he brings himself within section 156 of the Tenancy Act. Undoubtedly if he brought himself within section 156 he would be entitled to assessment of rent. That question depends upon whether the defendants satisfy the conditions of section 158. As to this point I feel considerable difficulty. The facts are not in dispute. They are clearly set out in the judgments of both the Courts below. The question, I think, really turns upon whether, under the peculiar circumstances of this case, this land can be properly said to have been held by two successors of the original grantee within the meaning of section 158.

The first Court which is the Revenue Court held that it could. The lower Appellate Court obviously entertained considerable doubt as to whether in the circumstances of this particular case there having been survivorship in the joint Hindu family, that could be said to come within the expression "succession." I think it is the duty of a Court of Law, specially in a matter which is after all more a matter of settlement and revenue than strict law in the sense of determination of rights of litigants or redress of wrongs, to take a broad and liberal view, if it is possible. I am quite conscious that, inasmuch as it was thought necessary to come to this Court to get a decision that the word "successor" included a transferee, in affirming the decision of the lower Appellate Court I am putting upon that word a meaning which may be regarded as elastic, if not extravagant. But it is to be borne in mind that this is legislation, which at any rate was intended to deal with all persons in the same position, under the same circumstances and with the same results, that is to say, to put them on the same footing. In the absence of any language appropriate to the position and nature of survivorship in the case of a joint Hindu family, the result of holding otherwise would be practically to strike these provisions out of an Act of Parliament so far as Hindu joint families are concerned. I quote an observation from the judgment of the Court below: "If a survivor is not held to be a successor it is difficult to see how there can ever be two survivors to the original grantee in the case of a Hindu." I agree with that observation and, therefore, hold with some hesitation that the construction put upon the section by the lower Appellate Court is justified and is a correct construction. If it is wrong, the plaintiff's remedy is clearly for assessment of rent under section 156 and I should have had to send the case back for that assessment to be made. Similarly holding that I do that the case is covered by section 158, I should have had to send the case back, apparently in accordance with decided cases to which I have been referred, to the District Judge to determine the revenue. But as has been pointed out by Dr. Sunder Lal on behalf of the respondents, the assessment which has already been made has been adopted

KRISHNA DAYAL GIR v. SAKINA BIBI.

by the Assistant Collector who decided this case in the first instance; all, therefore, which is left for me to do is to affirm the decision of the Assistant Collector and to dismiss this appeal with costs.

I may just refer to the point which Dr. Sunder Lal argued with considerable force, apparently not realizing that there were decisions against him by one Judge if not by two. Whatever view I may have been inclined to take upon this question (and there seem to me many questions in this difficult Act of Parliament about which it is possible to hold two different opinions with great confidence within five minutes of one another) I am prepared to follow, if not absolutely bound by, the decision of Mr. Justice Banerji, which by implication was adopted by the learned Chief Justice in *Sunder Singh v. Collector of Shahjahanpur* (1). A similar decision appears to have been given by my brother Banerji in answer to a reference from the Board of Revenue in the year 1907. It must, therefore, be taken to be the law in this Court, until those authorities are overruled, that an appeal in such a case as this lies to the District Judge. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 11 Ind. Cas. 514; 8 A. L. J. 539; 33 A. 553.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 71
OF 1914.

April 27, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

Mahant KRISHNA DAYAL GIR—
DECREE-HOLDER—APPELLANT

versus

Musammam SAKINA BIBI AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Civil Procedure Code (Act XIV of 1882), s. 230—General Clauses Act (X of 1897), s. 6—Mortgage-decree passed before enactment of Act V of 1908—Application for execution after 12 years—Acknowledgment, whether saves bar under section 48, Civil Procedure Code—Limitation Act (IX of 1908), s. 19—Application for execution, when a continuation of a prior application.

Section 48, Civil Procedure Code, 1908, applies to decrees for sale. [p. 29, col. 1.]

An application for execution of a mortgage-decree made more than 12 years after it was passed is barred under section 48, Civil Procedure Code, and the fact that the old Code of 1882 was in force at the passing of the decree will not prevent the operation of the said section, as no vested right in the procedure prescribed by that Code was acquired by the decree-holder within the meaning of section 6 of the General Clauses Act. [p. 28, col. 2; p. 29, col. 2.]

Bisseshur Sonamat v. Jasoda Lal Chowdhry, 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622; *Jaimangalbat Misra v. Badan Chand Das*, 19 Ind. Cas. 899 and *Manjuri Bibi v. Akkel Mahmud*, 19 Ind. Cas. 793, 17 C. L. J. 316; 17 C. W. N. 889, relied on.

Kounsilla v. Ishri Singh, 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420, disapproved.

The words 'fresh period of limitation' in section 19 of the Limitation Act do not refer to the term of 12 years prescribed by section 48, Civil Procedure Code. Hence an acknowledgment under section 19 of the Limitation Act, whether made before or after the passing of the new Civil Procedure Code, 1908, will not give the decree-holder a further period of 12 years from the date of the acknowledgment within which to apply for execution of his decree. [p. 29, col. 1.]

Per *Chamier, C. J.*—An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application. [p. 29, col. 2.]

Per *Jwala Prasad, J.*—The law of limitation is a branch of the adjective law and governs all proceedings to which it is applicable, from the date of its enactment. [p. 30, col. 1.]

Messrs. *Hasan Imam, S. Sinha, Kailaspati, S. N. Palit and Gobardhan Misra*, for the Appellant.

Mr. *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against an order of the Subordinate Judge of Gaya, dismissing an application made by the appellant for execution of a decree. The facts are as follows:—

A decree *nisi* was passed for the sale of mortgaged property on August 11th, 1896, and was made absolute on February 6th, 1898. Various applications were made for execution of the decree with which we are not now concerned. The first application which it is necessary to notice was made on February 16th, 1904. It was dismissed by the Subordinate Judge on January 23rd, 1905, but was allowed by the High Court on appeal on June 28th, 1906. The next application was made on September 4th, 1907, and was also disallowed by the Subordinate Judge but was

KRISHNA DAYAL GIR v. SAKINA BIBI.

allowed by the High Court on appeal on June 29th, 1910. The next application was made on July 28th, 1911, and was struck off on June 29th, 1912, after the decree-holder had recovered a sum of about Rs. 67,000. The next application for execution was made on September 6th, 1912, and was dismissed for want of prosecution on December 5th, 1912. Finally the present application for execution was made on July 18th, 1913. The Subordinate Judge held that it must be dismissed under section 48 of the Code of Civil Procedure as it was made more than 12 years from the date of the decree sought to be executed.

The first question for decision in this appeal is whether section 48 of the Code of Civil Procedure applies to the application. The appellant relies upon section 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed, or affect any legal proceeding or remedy in respect of any such right. He contends that if section 48 of the present Code of Civil Procedure is held to apply to the application for execution now in question, the result will be that the right which he had acquired under the Code of 1882 to execute his decree will be taken away. The point was considered in two cases by the Calcutta High Court and in one case by the Allahabad High Court. In both the Calcutta cases it was held that section 48 governed an application made after the passing of the Code of Civil Procedure, 1908, for execution of a decree for sale passed at a time when the Code of Civil Procedure, 1882, was in force. [See *Bisseshur Sonamat v. Jasoda Lal Chowdhry* (1) and *Jaimangalbuti Misra v. Badan Chand Das* (2).] The view taken in these two cases is strongly supported by the judgments of Mookerji, Carnduff and N. R. Chatterjea, JJ., in the case of *Manjuri Bibi v. Akkel Mahmud* (3). A contrary view was taken by Knox and

Karamat Hussain, JJ., in *Konsilla v. Ishri Singh* (4). Those learned Judges were of opinion that a right to enforce execution of such a decree was a substantive right acquired under the Code of 1882 and was not affected by the passing of the Code of 1908. The Calcutta High Court on the other hand held that in such a case it could not be said that the decree-holder had acquired a right under the Code of Civil Procedure, 1882, within the meaning of section 6 of the General Clauses Act, 1897. They held that the decree-holder was entitled to execute the decree in accordance with the provisions of the Code of 1882 as long as it was in force but had no vested right in the procedure prescribed by that Code, that the right enjoyed by the decree-holder had been created by the mortgage debt and had merged in the decree passed in the suit, and, therefore, could not be said to have been acquired under the Civil Procedure Code of 1882. The view taken by the Calcutta High Court is supported by a long string of English decisions some of which are referred to by Carnduff, J., in one of the cases cited above. In my opinion the application for execution now in question should *prima facie* be dismissed with reference to section 48 of the present Code of Civil Procedure. It is argued, however, that the decree-holder was within the meaning of sub-section 2 of that section, prevented by fraud or force on the part of the judgment-debtor from executing the decree. There appears to be no force whatever in this contention. The objections put forward against the applications for execution presented on February 16th, 1904, and September 4th, 1907, were allowed in the first instance by the Subordinate Judge and were disallowed by the High Court on appeal. But it is impossible to hold that the objections put forward on those occasions were fraudulent. They were, as already stated, accepted by the Subordinate Judge and they raised fair questions for decision. Next, it is contended that there was in March 1902 an acknowledgment of liability within the meaning of section 19 of the Limitation Act. I will assume, though it is by no means clear, that the petition relied upon did amount to an acknow-

(1) 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622.

(2) 19 Ind. Cas. 899.

(3) 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889.

(4) 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420.

KRISHNA DAYAL GIR v. SAKINA BIBI.

ledgment within the meaning of the Limitation Act. An acknowledgment made in March 1902 gave the decree-holder a fresh period of 3 years within which to apply for further execution of the decree. The contention advanced before us was that the acknowledgment gave the decree-holder a fresh period of 12 years, but this contention overlooks the fact that at the time when the so-called acknowledgment was made the Code of Civil Procedure, 1908, had not been passed and section 230 of the Code of 1882 did not, according to the decisions of the Calcutta High Court, apply at all to decrees for the sale of mortgaged property. There seems to be no ground whatever for the contention that the acknowledgment gave the decree-holder a further period of 12 years within which to apply for execution of his decree. Section 48 of the Code of Civil Procedure, 1908, applies to decrees for sale, but the passing of that Code cannot be held to give retrospective operation to the so-called acknowledgment of March 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution. Nor in my opinion would any such acknowledgment, even if made after the passing of the Code of 1908, give a decree-holder a fresh period of 12 years. To construe section 19 in the way suggested by the learned Counsel for the decree-holder-appellant would render many of the provisions in the 3rd column of Article 182 of the First Schedule to the Limitation Act useless in any case in which acknowledgment of liability had been given. There can, I think, be no doubt that the words 'fresh period of limitation' in section 19 of the Limitation Act do not refer to the term of 12 years prescribed by section 48 of the Code of Civil Procedure. Lastly, it was contended that the present application for execution was one made in continuation of the application presented on July 28th, 1911. This contention also must be rejected. Upon the application of July 28th, 1911, a large amount of property was put up for sale. The present application for execution contains a prayer that it may be treated as being in continuation of the application of 1911, but it asks for relief altogether different from the relief claimed in 1911 and is directed against property which is not touched by

the application of 1911. In my opinion the present application is not one in continuation of the application of 1911. The result is that, in my opinion, the Court below was right in holding that the present application for execution is barred by section 48 of the Code of Civil Procedure. I would dismiss this appeal with costs, and would assess the hearing fee at three gold *mchurs*.

JWALA PRASAD, J. — This is an appeal in a proceeding for the execution of a decree. The question is whether the execution of the decree is barred by limitation. The decree for the sale of the mortgaged property was passed on August 11th, 1896, and was made absolute on February 6th, 1898. The present application for execution was made on July 18th, 1913. The Subordinate Judge dismissed the application holding that it was barred under section 48 of the Civil Procedure Code, Act V of 1908, inasmuch as it was made more than 12 years from the date of decree sought to be executed.

The contention on behalf of the appellant is that section 48 of the present Code does not apply to the application for execution as the decree in question was passed when the old Act of 1882 was in force, section 230 of which did not apply to mortgage-decrees, and hence there was no limit of time for the execution of the decree. The contention is based on section 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under any enactment repealed.

The contention does not appear to be sound. The decree-holder acquired a right to sell the mortgaged property under the Transfer of Property Act and not under the Code of Civil Procedure, which prescribes rules of procedure for the enforcement of the decree through the aid of the Court. The rule that no order for the execution of a decree shall be made after 12 years from the date of the decree, is a rule of procedure and is a part of the Procedure Code. The decree-holder did not acquire any right under section 230 of the Act of 1882, and hence its repeal by the present Code did not destroy any vested right in him.

The application for execution will, therefore, be governed by section 48 of the Civil Procedure Code of 1908 that was in force at the

TIRTHABASI SING ROY v. BEPIN KRISHNA ROY.

time when the application for execution was made. This view is supported by a series of decisions of the Calcutta High Court and is based upon the principle that the law of limitation is a branch of adjective law and governs all proceedings to which it is applicable, from the date of its enactment.

It is further contended that the period occupied in the litigation on account of the objections put forward by the judgment-debtors against the applications for execution presented on 16th February 1904 and 4th September 1907 should be excluded. The objections were partly allowed by the 1st Court but were disallowed by the High Court on appeal. These objections certainly could not be said to be fraudulent within the meaning of section 48, Civil Procedure Code.

The third contention of the decree-holder is that the judgment-debtors acknowledged their liability in a petition dated 17th March 1902 presented in Court in Execution Case No. 54 of 1901, and hence the decree-holder is entitled to a fresh period of 12 years from the date of the said acknowledgment.

For the reasons given by the learned Chief Justice in his judgment I agree that the contention should be rejected.

The last contention of the decree-holder is that the present application is in continuation of the application made in 1901. It appears from the order dated 29th June 1912 that the execution case was dismissed on part satisfaction on the prayer of the decree-holder. It is impossible to treat the present application as a continuation of that dismissed application.

The result is that I agree with the learned Chief Justice in the order proposed by him and would dismiss the application with costs.

BY THE COURT—The order of the Court is that the appeal is dismissed. The hearing fee is assessed at three gold mohurs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 4179
OF 1910.

March 14, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

TIRTHABASI SING ROY AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

BEPIN KRISHNA ROY AND OTHERS—
DEFENDANTS—RESPONDENTS.

Appeal, second—Civil Procedure Code (Act V of 1908), s. 100—Substantial error or defect in procedure—Rejection of Commissioner's report without directing further enquiry.

In an appeal the Appellate Court rejected the report of the Commissioner for local investigation, which was acted upon by the Primary Court, and instead of directing a further investigation decided the appeal on other materials on the record. The case was one which could not be decided without an investigation on the spot:

Held, that the decision of the Appellate Court was open to second appeal under section 100, Civil Procedure Code, as it involved "a substantial error or defect in the procedure provided by the Code... which may possibly have produced error or defect in the decision upon the merits." [p. 31, col. 2.]

Appeal against the decree of the Subordinate Judge of Burdwan, dated the 5th September 1910, reversing that of the Munsif, 2nd Court, Burdwan, dated the 29th June 1909.

FACTS.—The facts material to the report will appear from the judgment and the arguments given below.

Babu Dwaraka Nath Chakravarti (with him Babu Sarat Kumar Mitter), for the Appellants; contended that the Subordinate Judge was wrong in deciding the appeal without directing a further investigation. The report of the Commissioner was found to be unsatisfactory by the Subordinate Judge. That finding could not be questioned in second appeal, but he committed an error of law in disposing of the appeal excluding the report of the Commissioner. The case was one which could not be decided without investigation on the spot and without measurement and survey. The Munsif as well as the parties thought such investigation and measurements to be necessary.

The Sub-Judge did not say that such investigation was not necessary, still he decided the appeal without any reference to the report of a Commissioner. Further, the

TIRTHABASI SING ROY v. BEPIN KRISHNA ROY.

lower Appellate Court was wrong in deciding the question of limitation. It found that the plaintiff was not in possession of the land in 1900, from which it inferred that the plaintiff was not in possession within 12 years of the suit, though the suit was brought within 12 years from 1900, i.e., not later than 1909. In the Appellate Court the question was raised for the first time that *Kismat Kora* was not the same as *Kora proper*. Such a question ought not to have been allowed to be raised for the first time in appeal as it involved questions of fact.

Sir *Rash Behari Ghosh* (with him *Babu Basanta Kumar Bose*), for the Respondents, contended that the appeal was concluded by findings of fact. The Subordinate Judge's finding that the report of the Commissioner was unsatisfactory could not be questioned in second appeal and his decision based upon findings of fact was unassailable, even though the findings of fact arrived at by him were erroneous. Apparently he thought that the case could be decided on the materials on the record without the help of any further local investigation.

He might be wrong in that view, still as there was evidence on the record to support the decision of the lower Appellate Court, it could not be questioned in second appeal. The findings of the lower Appellate Court on the question of limitation and on the question whether *Kismat Kora* was the same thing as *Kora proper*, were findings of fact and as such conclusive in second appeal.

JUDGMENT.

SANDERSON, C. J.—We are of opinion that this appeal should succeed and we think that the right order will be to direct that another local inquiry should be held, and the short grounds for that opinion are these, that this case involved an inquiry into matters which in the ordinary course ought to be inquired into on the spot and the Munsif who directed the inquiry in the first instance, in my opinion, took the right course. The report of the gentleman who was appointed to make the inquiry was acted upon by the Court of first instance, but when it came to the Subordinate Judge he came to the

conclusion that the report of the Commissioner was an unsatisfactory one and could not be relied upon, and the learned gentleman who has argued this appeal has admitted that that report cannot be supported. Therefore, it seems to me that the right procedure was adopted in the first instance, namely, a local inquiry was directed, but unfortunately, the report of the gentleman who held the inquiry must be taken as unsatisfactory and unreliable. Then the Subordinate Judge, having rejected the material which in the ordinary course, if the inquiry had been properly held, would have been most valuable, proceeds to decide the case upon what was left. We think that this was not the proper way of dealing with the matter and that he ought to have directed a second inquiry to be held, and we think that that does come within the words of section 100, clause (c), of the Civil Procedure Code, namely "a substantial error or defect in the procedure provided by this Code.....which may possibly have produced error or defect in the decision of the case upon the merits." We think that the course which the Subordinate Judge took in coming to a conclusion or, I may say without disrespect to him, in trying to come to a conclusion upon a part only of the evidence in the case, after he had rejected the Commissioner's report, was a substantial error or defect in the procedure which might possibly have produced error or defect in the decision of the case upon the merits. Therefore, we think the proper order is to remit the case to the Munsif with the opinion from us that he ought to direct another inquiry to be held.

I ought to mention one fact, that the Subordinate Judge seems to have decided the very material part of the case upon the ground which is set out in page 23 of the paper-book, where he says: "The lower Court comes to this conclusion: apparently on the ground that *Kismat Kora* belongs to the *malik* of *Kora proper* which belongs to plaintiff. It appears, however, that *Kismat Kora* does not belong to the *malik* of *Kora proper*." Now as far as I understand this case and the judgment of the Munsif, it was never disputed in the Court of first instance that if the land or any part of the land belonged to *Kismat Kora* it belonged to the plaintiff, because there was no distinc-

MEYAJAN BUIAN v. JOYMALA.

tion in the Court of first instance between *Kismat Kora* and *Kora proper*. If there had been any point taken upon that in the Court of first instance, we do not know what evidence might have been led by the plaintiff with regard to that matter to show that the land, if in *Kismat Kora*, belonged to him. On the other hand it might be shown the other way. Now that does seem to show that there was not only material error or defect in the procedure but a wrong decision on the part of the Subordinate Judge in deciding that the land, if it belonged to *Kismat Kora*, did not belong to the plaintiff; ■■■ matter of fact there had been no dispute that the land, if it belonged to *Kismat Kora*, belonged to the plaintiff, just as much as the land belonging to *Kora proper*.

The other point that was raised was a question of limitation. As I understand the judgment of the learned Judge, he has held that because it was proved that in 1900 the plaintiff was not in possession of the land which is in dispute, therefore he was barred by the Statute of Limitation. That does not seem to be a sound ground for deciding that the plaintiff is barred by the Statute of Limitation. I think this is a matter which will have to be further inquired into in the manner I have indicated. Therefore I think this appeal should be allowed.

Cost will abide the result.

MOOKERJEE, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1054
OF 1913.

March 7, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

MEYAJAN BUIAN—DEFENDANT—
APPELLANT

versus

Srimati JOYMALA AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 103B,
104, 104J, 105, 112, 113—Enhancement of rent—3, 113,
scope and operation of.*

Section 113 of the Bengal Tenancy Act applies to rents which have been finally settled under the provisions of one or other of the sections 104, 104J, 105 or 112 of Chapter X of the Act but it does not apply to rents otherwise settled. [p. 33, col. 1.]

The provisions of section 113 are not applicable to a mere entry of an existing rent in the Record of Rights. [p. 33, col. 2.]

There is really no inconsistency between section 103B and section 113 of the Bengal Tenancy Act and the effect of the plain language of section 113 is not in any way controlled or out down by anything in section 103B. [p. 34, cols. 1 & 2.]

The operation of section 113 is not limited to cases where there was no dispute between the landlord and the tenant as to the correctness of rents settled. [p. 34, col. 1.]

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 12th December 1912, modifying that of the Munsif at Hatiya, dated the 9th March 1912.

Babu Dhirendra Lal Kastgir, for the Appellant.

Babu Gobinda Chandra Dey Roy, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for rent brought by the plaintiffs, the respondents before us, against the defendant, who is the appellant. The plaintiffs are the holders of lands in a Government *khas mehal* in which the land in suit is included. Upon the judgment of the Court below it appears that by an express contract between the parties the defendant held this land at an annual rental of Rs. 81-6-0, on condition that the landlord would be entitled to enhance the rent should it be found on measurement that the area occupied by the defendant was more than what was stated in the contract.

It appears further that a Record of Rights was prepared in respect of this *khas mehal* under Chapter X of the Bengal Tenancy Act. The Record of Rights was finally published in the year 1910. The area of the holding as therein entered is larger than the area stated in the contract but the amount of rent entered is the same as the rent stated in the contract. There is no mention of the circumstances in which the rent was liable to enhancement. The landlord, the plaintiff, had himself measured the holding before the Record of Rights was published. The two measurements—that made by the landlord himself and that made

MIYAJAN BUJAN v. JOYMALA.

by the Revenue Officer—are practically identical. In a suit for rent instituted in the year 1908, the landlord claimed an increased rent upon the footing of the actual area of which the tenant was found to be in possession. The suit was compromised and the petition of compromise filed by the parties is on the record. Its terms are not very clear and regard being had to the view we take of this case it is not necessary for us to examine its meaning closely.

The real question that arises is, whether the rent entered in the Record of Rights was the rent settled under Chapter X of the Bengal Tenancy Act, and, if so, whether section 113 of the Act precludes the plaintiff from obtaining in the present suit a decree for rent at a higher rate than that entered in the Record of Rights.

Section 113 runs as follows:—"When the rent of a tenure or holding is settled under this chapter, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration, in the area of the tenure or holding, be enhanced in the case of a tenure or an occupancy holding or the holding of an under-*raiyat* having occupancy rights, for fifteen years, and, in the case of a non-occupancy holding or the holding of an under-*raiyat* not having occupancy rights, for five years." The section, therefore, applies to rents settled under Chapter X. Under that Chapter rent may be settled in accordance with the provisions contained in sections 104-104-J, or rent may be settled under section 105 or under section 112. When rent is finally settled under one or other of those provisions, it cannot be enhanced (except on grounds which do not apply to the present case) within the periods mentioned in section 113.

The inference to be drawn from the way in which the case has been dealt with by both Courts below is probably that the rent entered in the Record of Rights was the rent settled under one or other of the provisions to which we have already referred.

The learned Munsif states in his judgment that "the increase in rent is claimed by plaintiff on the ground of increase in area." That is one of the grounds mentioned in

section 113. The learned Munsif refused to increase the rent on that ground, because in his own words "the quantity of land found on measurement in the Record of Rights proceeding is very nearly the same as stated by the plaintiff." In other words, the Munsif held that there was no substantial alteration in the area of the holding subsequent to the date of the Record of Rights. The Munsif, therefore, rejected the claim for an enhanced rent and made a decree for the amount due according to the entry in the Record of Rights. In the lower Appellate Court the learned Subordinate Judge agreed with the Munsif on the question of fact as to the area of the holding. But he seems to have held that, in spite of section 113 of the Bengal Tenancy Act, the plaintiff was entitled to recover rent at an enhanced rate under the terms of his lease, and in this connection he referred to the consent decree in the previous rent suit which has already been mentioned. He did not notice that that decree bears date the year 1908. The decree was prior to the Record of Rights and can afford no ground for increasing a rent subsequently settled under Chapter X of the Bengal Tenancy Act. The learned Subordinate Judge's reference, however, to section 113 is an indication that the rent was settled under Chapter X of the Act in the course of the Settlement proceedings. Unless that was the case section 113 would not have stood in the plaintiffs' way and the Subordinate Judge would have been under no necessity to deal with the section or to attempt to explain it away. The section, of course, is not applicable to a mere entry of an existing rent in the Record of Rights. The Subordinate Judge could hardly have thought that the section could have any application to such an entry. Nevertheless as the materials before us do not show definitely that the rent was settled by proceedings taken under the chapter, the order we are about to make will be made in the alternative.

We cannot accept the view of the learned Subordinate Judge in regard to the effect of section 113, if he was referring to the effect of the section upon a settled rent. He appears to have thought that its provisions were in some way inconsistent

RAMKHELAWAN SINGH v. SUNDER RAUT.

with section 103B of the Bengal Tenancy Act. As an escape from this supposed difficulty, he apparently came to the conclusion that section 113 was only applicable to cases where there was no dispute between the parties as to the correctness of a rent settled. The words of the section admit of no such limitation. There is really no inconsistency between section 103B and section 113, and if there were any inconsistency between them, the general provisions of section 103B would have to give way to the particular provisions contained in section 113. Section 103B applies to all entries in the Record of Rights and creates a presumption of correctness in regard to them. Section 113 applies in those cases where the rent of a tenure or holding has been actually settled under the Chapter. There is no hardship in this, because rents are settled by the Revenue Officer after full enquiry and by proceedings which are judicial or quasi-judicial in their character and there are provisions which, subject to the conditions specified, enable his decision to be challenged by appeal to higher Revenue Authority or by the institution of a suit in the Civil Courts.

In the case, for instance, of rents settled under sections 104 to 104J there are the provisions contained in sections 104G and 104H. But when a rent has been settled under that part of Chapter X, then section 104J lays down that "subject to the provisions of section 104H, all rents settled under sections 104A to 104F and entered in a Record of Rights finally published under section 103A, or settled under section 104J, shall be deemed...to be fair and equitable rents within the meaning of this Act." This enactment has also to be considered in connection with section 113 and it has been held that section 103B does not operate to modify its effect [*Ambica Charan Chakravarti v. Joy Chandra Ghosh* (1)].

In the case of fair rent settled under section 105, there are provisions (section 109A) which enable an aggrieved party to appeal, in the first place, to a Special Judge and then in some cases to come up to the High Court in second appeal. But subject to those provisions section 109 declares that "a Civil Court shall not entertain any application or suit concern-

ing any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive)." Section 109, therefore, has also to be considered in connection with section 113.

The settlement of rent under section 112 is governed by provisions contained in sections 104 to 104J and does not require separate notice.

A consideration of Chapter X as a whole shows that the effect of the plain language of section 113 is not in any way controlled or cut down by anything in section 103B.

The order we make is as follows:—

The decree of the lower Appellate Court is set aside.

The case will be remitted to that Court to ascertain whether the rent in question has or has not been settled under Chapter X of the Act. For that purpose fresh evidence may be admitted, if necessary. If the rent has been settled under Chapter X of the Bengal Tenancy Act, a fresh decree will be made dismissing the appeal from the Munsif's decree. The effect will be to restore the judgment and decree of the Munsif. If, on the other hand, it be found that the rent has not been settled under Chapter X, then the learned Subordinate Judge will make a fresh decree in the same terms as to the rent payable as his present decree.

Costs of this appeal will abide the result.

Appeal allowed; Case remitted.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 5
OF 1913.

April 7, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

RAMKHELAWAN SINGH—DEFENDANT—
APPELLANT

versus

SUNDER RAUT AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 54 (2) — Attachment of estate—Entry in Touzi Register, whether necessary—Supplementary information to Collector for entry in Touzi Register—Fresh attachment, effect of, on first attachment—Purchase pending

(1) 4 Ind. Cas. 470; 13 C. W. N. 210.

RAMKHELAWAN SINGH v. SUNDER RAUT.

attachment, legality of—Vendor and purchaser—Purchaser's lien, where sale void.

An attachment of immoveable property is complete when the formalities mentioned in Order XXI, rule 54 (2), are complied with. [p. 36, col. 2.]

An entry in the *Touzi* Register is no part of the procedure contemplated in the said rule. [p. 36, col. 2.]

A requisition from the Collector for additional information about the property for entry in the *Touzi* Register is no ground for the issue of a fresh attachment, if attachment has already been made in the manner provided by the said rule. If a fresh attachment is issued, it is a redundancy and does not render void the first attachment. [p. 36, col. 2.]

Gobind Singh v. Zalim Singh, 6 A. 33; A. W. N. (1883) 182, referred to.

Mookhesur v. Ramphul, 5 N. W. P. H. C. R. 70, approved.

A purchase made during the pendency of an attachment is void against all claims enforceable under it and the purchaser has not even a lien on the property to the extent of the purchase-money paid by him. [p. 37, col. 1.]

Appeal from the decision of the Second Sub-Judge, Darbhanga, dated the 26th August 1912.

Moulvi Mohammad Mustafa Khan, for the Appellant.

Messrs. S. R. Palit and B. N. Mitter, for the Respondents.

JUDGMENT.

ROE, J.—The plaintiff in this case is Sunder Raut. He is the *jamadar* of Rewari Factory, which was part of the estate of E. S. Llewellyn under the management of Mr. M. H. Mackenzie as trustee to that estate. Mr. Mackenzie was, at the time of his marriage in 1889, in affluent circumstances and settled a considerable sum of money upon his bride. This money Mrs. Mackenzie has dealt with as her own and has, both in Mr. Mackenzie's own property at Rajkand and in the property at Rewari for which Mr. Mackenzie is trustee, advanced from time to time sums from her private purse for carrying on the work of these two factories. About the year 1902 Mr. Follet was manager of Rewari Factory. He also found difficulty in carrying on the factory with the sums supplied him from the estate of which he was manager. He, therefore, borrowed money from Mrs. Follet to the extent of some Rs. 10,000 and, under his power-of-attorney, mortgaged the factory to Mrs. Follet as security for these advances. On his retiring from the management Mr. Follet put pressure upon Mr. Mackenzie for the liquidation of the debt due to Mrs. Follet.

Mrs. Mackenzie accordingly made an advance sufficient to repay Mr. Follet, and obtained a first mortgage upon the property of the factory, including, among other villages, a village of the name of Birnama. For the working expenses of the factory Mrs. Mackenzie advanced a further sum of Rs. 1,400 and took a second mortgage upon the factory property as security for this sum. The factory has of late come to its last tether. There are decrees outstanding against it for rent in all directions, and in particular a decree obtained by Ramkhelawan. In execution of this decree the village Birnama was attached and sold in due course to Ramkhelawan Singh, the appellant in this case. The plaintiff-respondent pleads that this sale is void as against him by reason of the fact that he obtained from Mr. Mackenzie a deed of sale for Rs. 13,000 covering four villages belonging to the factory, one of which is Birnama and, in consideration of this deed of sale, paid to Mrs. Mackenzie Rs. 5,300 in part satisfaction of her mortgage lien upon the property.

The learned Subordinate Judge on these pleadings found every issue in favour of the respondent. He found that Mrs. Mackenzie's mortgages were genuine, that the sale to Sunder Raut was genuine, and that when that sale was completed there was, in fact, no attachment subsisting upon the property in suit. Against that decision Ramkhelwan Singh appeals. It is not strenuously urged by Moulvi Mustafa Khan for the appellant that Mrs. Mackenzie's evidence can be seriously assailed. I am of opinion that it is a clear and straightforward account of the whole of her dealings with her marriage settlement since the time of her marriage. It is to be noted that when Mr. Follet was manager he took advances from Mrs. Follet, and this in itself is corroboration by probability that Mr. Mackenzie, for the benefit of the factory, also took advances from Mrs. Mackenzie. I am satisfied that these documents are good documents for valid consideration. I am also satisfied that the sale to Sunder Raut was, for the purposes of this case, a transaction made in good faith. Sunder Raut, no doubt, was anxious to improve his position from that of *jamadar* of the factory to that of managing proprietor; Mrs. Mackenzie

RAMKHELAWAN SINGH v. SUNDER RAUT.

was anxious, on her side, to secure what sum of money she could from the wreck of the factory. I am satisfied that the sale to Sundar Raut was made to this extent in good faith, and that, had there been no attachment upon the property, the village Birnama would have passed, out of that deed of sale, to Sundar Raut. I am not in agreement with the learned Subordinate Judge that there was no attachment subsisting upon the property.

In setting forth the dates of the various transactions I am handicapped by the respondent's failure to print in the paper book the services of second attachments, upon which he bases his claim that the first attachment was no longer subsisting on the 14th May, the date of his sale. I have, however, before me a full account of the first attachment made in execution of Ramkhelawan's decree. The first application for attachment was made in April 1910, and in accordance with that application, an order was issued to Mr. M. H. Mackenzie, defendant, which will be found on page 70 of the paper-book, prohibiting him from parting with the property by purchase, gift or otherwise. This order was proclaimed upon the spot by peons on the 13th April 1910, and was hung up on a conspicuous part of the Subordinate Judge's Court on the 14th April 1910. On the 16th April 1910 a peon hung up a copy of the attachment in a conspicuous spot of the Collectorate, and on the same date an order was sent to the Collector of the District, notifying him that the estate No. 12,822=6 annas 12 *gandas* 3 *cowries*, etc., out of the 16 annas *kham putti* of *Mouza Birnamatolla*, had been attached. On the 20th April 1910 the Collector's *amla* reported that, inasmuch as the estate had a separate account, the description given in the order of attachment was insufficient for notification by entry in the *Touzi* Register. Accordingly the order of attachment was sent to the Munsif of Samastipur "for favour of needful." On receipt of this, the Munsif ordered that a fresh attachment should be served. It is asserted, and it appears from the judgment of the learned Subordinate Judge, that a fresh attachment was so served, and that, not only was the information required by the Collector sent to

him, but also fresh notices of attachment served on this spot. The date of the furnishing of the Collector with the information required was the 7th May. The deed of sale executed by Mackenzie in favour of Sundar Raut was dated the 14th May. We are, therefore, asked by the respondents to hold that, in view of the fact that there was a second attachment issued upon the property, the first attachment was void, and that it cannot be said that the sale in this case arose out of the attachments which were completed on the 7th May. In support of this contention the ruling in the case of *Gobind Singh v. Zalim Singh* (1) is quoted. At the bottom of page 35 will be seen the real point in issue in this case. "It is incontrovertible that the attachment of 1866-1867 expired in 1867." In this case there was no expiry of the attachments made on the 13th, 14th and 16th April. They were attachments in due form, and from the date thereof the property of the estate attached remained bound for the execution of Ramkhelawan's decree. Even supposing for the sake of argument that it was necessary to enter attachment in the *Touzi* Register, even that was complete on the 7th May. It is obvious, however, that the entry in the *Touzi* Register is no part of the procedure contemplated in Order XXI, rule 54. It is sufficient that the attachment itself should be proclaimed in the Collector's office, and it cannot be denied that the description given of the property was a sufficient description within the meaning of Order XXI, rule 54. The attachments were complete on the 16th April; what was done afterwards was a mere redundancy. I have not been able to obtain a full report of the case quoted by Mr. Justice Woodroffe in support of the contention that mere redundancy does not nullify a previous attachment. It is that of *Mookhesur v. Ramphul* (2). But in my view the proposition is in itself obvious, that a work of supererogation on the part of the Munsif's office cannot have the effect of nullifying an attachment duly made. I am satisfied that the purchase made by Sundar Raut was made while the property was under

(1) 6 A. 33; A. W. N. (1883) 183.

(2) 5 N. W. P. H. C. R. 70.

SRI KISHAN LAL v. KASHMIRO.

attachment, and that, within the meaning of section 64 of the Civil Procedure Code, it is void ■ against all claims enforceable under the attachment. I hold that the sale, at which Ramkhelawan purchased in execution of his own decree, created a claim enforceable under this attachment. Therefore, the purchase of Sundar Raut is void as against Ramkhelawan.

Two further grounds are taken by the respondents upon which the decision of the learned Subordinate Judge should not be disturbed. The first is that, even if the sale be declared to have been made while the property was under attachment, Sundar Raut should be permitted to settle with Ramkhelawan by payment to him of the whole sum for which the attachment was made. This relief cannot be given in the present proceedings. The suit is for ■ declaration that the purchase of Ramkelawan is void ■ against Sundar Raut; we cannot make any order in execution of the decree of Ramkhelawan upon the basis of the present suit.

The third and last point taken is, that Sundar Raut has an equitable charge upon the property and that this charge saves him from eviction. Upon this argument the relief sought is that given in the plaint, "4, that if the Court is of opinion that it is not consistent with reason to grant relief No. 3 to the plaintiffs, in that case Rs. 5,300 paid by the plaintiff in satisfaction of ■ portion of the mortgage-money, under the purchase made by the defendants third party, and to which the purchase made by defendants first party is subject, may be awarded from the defendants first party". The relief asked for is that there shall be a decree for ■ lien upon the property in suit to the extent of the purchase-money paid to Mrs. Mackenzie. It is clear that Sundar Raut's purchase is void as against the property in suit. His purchase is void as against all claims created by Ramkhelawan's purchase. No relief may be given to him in respect of any right accruing to him out of a purchase which is in itself void. Upon all the grounds argued all the reliefs sought by Sundar Raut in this case are barred by reason of the attachment, if not on the 16th April, then on the 7th

May. The suit must, therefore, fail and is dismissed with costs. The appeal is decreed with costs.

SHARFUDDIN, J.—I agree.

*Appeal allowed.***PRIVY COUNCIL.**

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 28, 1916.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.
SRI KISHAN LAL—PLAINTIFF—APPELLANT
versus

Musammat KASHMIRO AND OTHERS—
DEFENDANTS—RESPONDENTS.

Pardanashin woman, dealings with—Family settlement—Consent of pardanashin lady—Matters to be considered—Burden of proof—Fraud, condonation of—Fraud pleaded in defence to an action—Limitation.

Where a family settlement or the award of a *punchayat* is impeached by a *pardanashin* lady on the ground that her consent to the arrangement was obtained by fraud on the part of her kinsmen whose interests conflicted with hers and who, therefore, misled her, and it is shown that the woman is illiterate and lacking in business capacity, the question which the Court has to consider is, not whether she knew what she was doing, had done or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf. [p. 44, col. 1.]

Fraud cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. [p. 44, col. 1.]

Huguenin v. Buseley, 14 Ves. (Jun.) 273; 9 R. R. 276; 33 E. R. 526; 1 Wh. & T. L. C. 7th Ed. 247; *Moron v. Payne*, 43 L. J. Ch. 249; 8 Ch. App. 881, referred to.

There is no limitation under the Indian Statute which will bar a defence of fraud to an action. [p. 44, col. 1.]

Appeal from a judgment and decree of the High Court, Allahabad, dated December 13th, 1912, reported as 21 Ind. Cas. 617, reversing a judgment and decree of the Second Additional Judge, Meerut, dated November 11th, 1910.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir W. Garth, appeared for the appellant and argued mainly on facts. He referred to Article 91, Schedule II, of the Limitation Act of 1877 to show that Kashmiro did not take

SRI KISHAN LAL v. KASHMIRO.

steps to set aside the award within three years from the time when the fraud became known to her and was, therefore, precluded from impeaching it.

Mr. *DeGruyther*, K. C. (with him Mr. *Dube*), referred to *Moxon v. Payne* (1) and *Huquenin v. Baseley* (2).

Sir W. Garth, in reply.

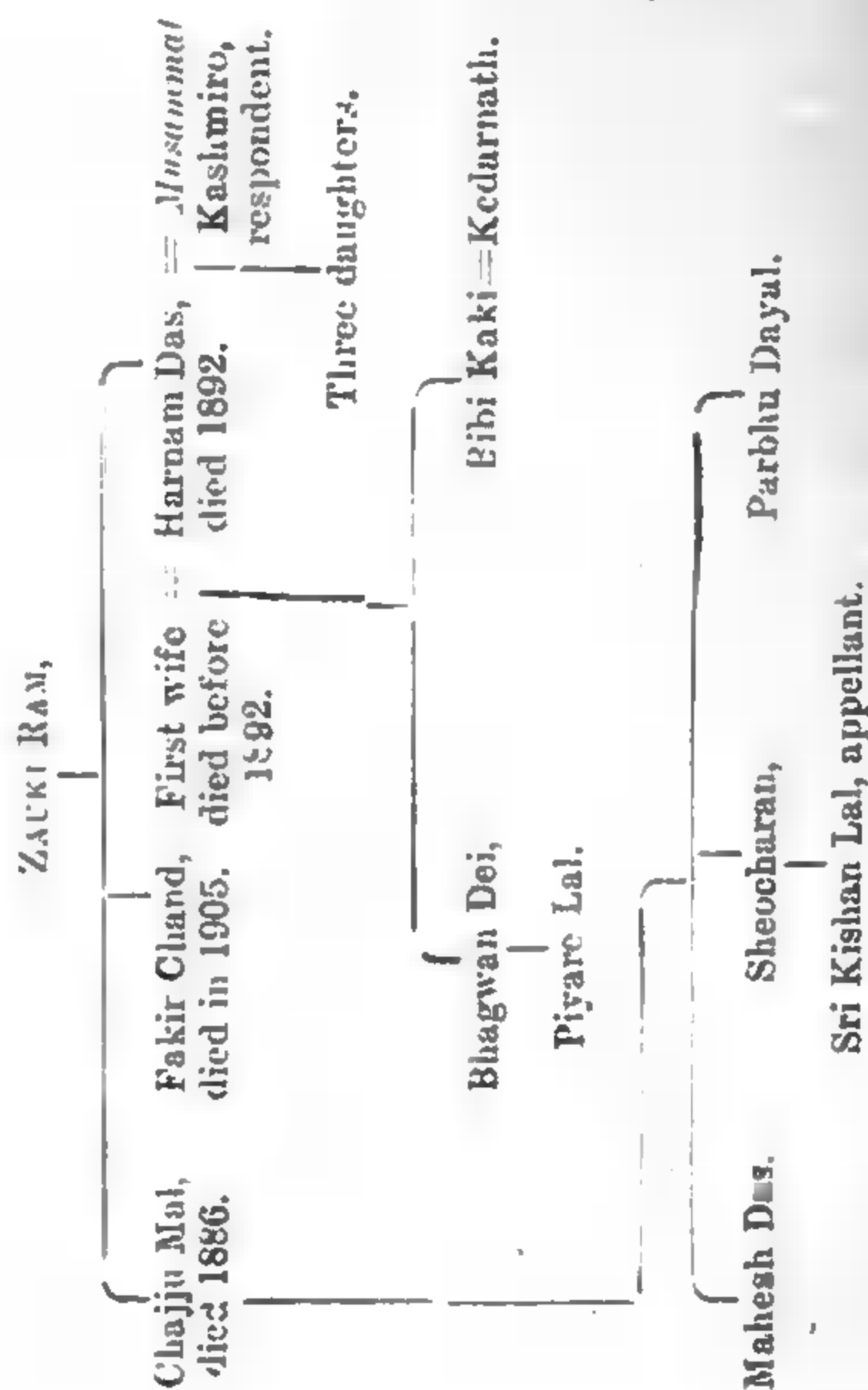
JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 13th December 1912, of the High Court at Allahabad, which reversed the decree, dated the 11th November 1910, of the Additional Judge of Meerut. The appellant, Sri Kishan Lal, is the plaintiff in the suit in which this appeal has arisen.

The suit was brought on the 8th September 1909 by Sri Kishan Lal, a minor, through his certificated guardian, on a mortgage of immoveable property, dated the 6th September 1897, to recover one-fourth of the mortgage-money alleged to be then due, together with interest and costs, by sale of the mortgaged property. The mortgage in question had been made by one Haji Muhammad Yahya Khan, in favour of one Faqir Chand, as the manager of Lala Harnam Das's estate. Haji Muhammad Yahya Khan died before this suit was instituted. His descendants and personal representatives are some of the defendants to the suit; they deny the plaintiff's title, and allege that the mortgage of 1897 was satisfied as to part of the mortgage-money by payment to *Musammât Kashmiro*, and as to the balance by the grant of another and subsequent mortgage in favour of *Musammât Kashmiro*. Others of the defendants are persons who allege that they purchased in 1903 portions of the mortgaged property from Haji Muhammad Yahya Khan, and paid the consideration money to Faqir Chand. The remaining defendant is *Musammât Kashmiro*, who denies the plaintiff's title, and alleges that the money which was advanced in 1897 as the consideration for the mortgage was money which belonged to her for a Hindu widow's estate, and was advanced by Faqir Chand as and being the manager of

her estate. On the other hand, the plaintiff's case is that the estate which was managed by Faqir Chand, and of which the mortgage-money formed part, was the ancestral property of a joint Hindu family, and that one-fourth share of the family property has devolved upon him. Hence he claims in this suit to recover one-fourth of the money which he alleges is due.

The following genealogical table will show how the plaintiff was related to Lala Harnam Das, who was the husband of *Musammât Kashmiro*, and the relationship which existed between Faqir Chand, Lala Harnam Das, Piyare Lal, and other persons, to whom it will be necessary to refer. The common ancestor was Lala Zauki Ram.



Having regard to the facts of this case, it is peculiarly necessary to see how the plaintiff alleges title in himself to sue upon the mortgage of 1897. In his plaint, which was filed on the 8th September 1909, the plaintiff alleges, so far as is material, as follows:—

(1) 8 Ch. App. 881; 43 L. J. Ch. 240.

(2) 14 Ves. (Jun.) 273; 9 R. R. 276; 33 E. R. 526; 1 Wh. & T. L. C. 7th Ed. 247.

SRI KISHAN LAL v. FASHMI C.

"1. The plaintiff is the mortgagee of the lands owned by the defendants.

"2. The particulars of the mortgage are as follows:—

"(a.) Date of mortgage.—Dated and registered on the 6th September 1897.

"(b.) Names of the mortgagor and the mortgagee.—Haji Muhammad Yahya Khan, mortgagor, and Munshi Faqir Chand, mortgagee.

"(c.) Amount of mortgage-money.—15,000 rupees.

"(d.) Rate of interest.—Interest at the rate of 12 annas per cent. per mensem and compound interest to be charged annually.

"(e.) Property mortgaged.—*Zamindari* in the villages of Dhautala and Uldhan, a detail of which is given in the reliefs.

"(f.) The amount claimed.—10,500 rupees.

"3. After the death of Lala Harnam Das a dispute took place among his survivors, in which Babu Sheocharan Lal, deceased, father of the plaintiff, alleged himself to be the owner of the whole on the ground of adoption. Under the agreement, dated the 28th November 1892, the said dispute was referred to Lala Sri Ram and Mohan Lal, arbitrators, and Lala Daya Ram, umpire, for arbitration.

"4. Under the arbitration award, dated the 10th and registered on the 17th January 1893, it was declared that defendant No. 9 (*Musammât Kashmiro*) would remain the owner of an 8-anna share of the property by virtue of life-interest; that Munshi Faqir Chand would remain the owner of a 4-anna share, and that Parbhu Dayal, Mahesh Das, and Sheocharan Lal would remain the owners of the (remaining) 4-anna share. But under the said award the property and the business of all the aforesaid shareholders were allowed to remain joint during the lifetime of Munshi Faqir Chand, and for the management of the whole of the property and the business Munshi Faqir was appointed manager, and his name was recorded in the revenue papers in respect of all the property and the whole of the business was carried on in his name.

"5. The share of Lala Mahesh Das and Parbhu Dayal was received by Lala Sheocharan Lal, father of the plaintiff.

"6. Munshi Faqir Chand, as manager of the aforesaid property, has advanced the aforesaid loan to the aforesaid mortgagor out of the estate under the aforesaid bond."

* ■ * * *

"16. The plaintiff was a member of the joint family with his father, Sheocharan Lal; he is the owner of the whole of the property and the capital by right of survivorship."

Musammât Kashmiro, in her written statement, amongst other things, alleged that, after the death of Zauki Ram, the ancestral property left by him was partitioned in or about 1863 amongst his three sons, Lala Harnam Das, Chajju Mal, and Faqir Chand, and thereafter the three brothers lived separate, and were separate in food and in business; and that her husband, Lala Harnam Das, through his ability and business made great additions to his share of the partitioned property, and with the profits of money dealings acquired a great deal of property. She also alleged that Faqir Chand, as her manager and agent, advanced the mortgage-money of 1897 out of the property which had come to her as the widow of Lala Harnam Das.

In her written statement *Musammât Kashmiro* denied all knowledge of any mutual dispute. She stated that the arbitration proceeding was not taken in good faith, but was taken to defeat the rights of the real heirs of Harnam Das; that the agreement of reference was signed without her authority by Piyare Lal; that she was under the influence of her brother-in-law, Faqir Chand, who deceived her, misrepresented to her the nature and the effect of the agreement of reference, and induced her by his misrepresentations and threats to acknowledge the agreement of reference before the Sub-Registrar, and that she had no legal adviser. According to her, the written contents of the award were never read out to her, and Faqir Chand during his lifetime had made her believe that she was the sole proprietor of the property which had been left by her husband. She alleged that since her husband's death, on the 15th October 1892, she had been in proprietary possession of the money-lending business without the participation of anyone else, and that she had appointed Faqir Chand as the manager of her business.

SRI KISHAN LAL v. KASHMIRO.

In order rightly to understand some of the points which arose in this case, it is necessary that the following considerations should be borne in mind. At the time, 1863, when it is alleged that the three sons of Zauki Ram separated, the joint family property was, so far as appears, of the value of about 9,000 rupees. From 1863 until he died in 1892, Lala Harnam Das carried on in his own name a money-lending business, in which he accumulated property of the value of about 300,000 rupees. When Lala Harnam Das died he left surviving him his second wife, *Musammât Kashmiro*, three daughters whom he had by her, and two daughters by his first wife, one of whom, *Musammât Kaki*, was childless, and the other of whom, *Musammât Bhagwan Dei*, had a son, *Piyare Lal*, who has been a prominent witness in this suit. Lala Harnam Das left surviving him his brother *Faqir Chand*, who was a *Tahsildar*, and the eldest male relation of Lala Harnam Das when he died. *Chajju Mal*, another brother of Lala Harnam Das, had died in 1885, but he had left surviving him three sons, *Mahesh Chand*, *Parbhu Dayal*, and *Sheocharan Lal*, a *Munsif*, who were living when Lala Harnam Das died. *Musammât Kashmiro* was a *pardanashin* lady, she was illiterate, and it has not been shown that she was a woman of any business capacity. She was a woman who, in matters of business, would have to rely for advice and guidance upon others. If on the death of Lala Zauki Ram the three brothers did not separate, but continued to live as a joint Hindu family, it may be assumed that the property which Lala Harnam Das had accumulated was, when he died, joint property. If, on the other hand, the three brothers separated in 1863, it is to be assumed on the evidence that the property which Lala Harnam Das accumulated was his separate property. If there was no separation, the members of the joint family who on the death of Lala Harnam Das were entitled to the property which had been accumulated by Lala Harnam Das, were *Faqir Chand*, whose interest represented one half, roughly speaking 150,000 rupees, on a partition, and *Mahesh Das*, *Parbhu Dayal*, and *Sheocharan*, whose interest between them represented the other moiety, or, roughly speaking 50,000 rupees each, on a partition. *Musammât Kashmiro* would in that event

have been entitled to nothing except maintenance. If the three brothers had separated and Lala Harnam Das had adopted his nephew *Sheocharan* as his son, *Sheocharan* would, on the death of Lala Harnam Das, have been entitled to the whole of the property, worth about 300,000 rupees, which Lala Harnam Das had accumulated, and *Musammât Kashmiro* would have been entitled to maintenance only. If the three brothers had separated, and Lala Harnam Das had not adopted *Sheocharan* as his son, *Musammât Kashmiro* would have been entitled for a Hindu widow's estate to the whole of the property which Lala Harnam Das died possessed of, and that property would, on her death, go to Lala Harnam Das's daughters.

Lala Harnam Das died on the 15th October 1892, and thereupon it was arranged between *Faqir Chand* and his nephew, *Sheocharan*, that *Sheocharan* should be put forward as the adopted son of Lala Harnam Das, *Faqir Chand*, however, insisting that he should be appointed manager of the estate. On the 20th October 1892 *Faqir Chand* having had prepared an application to the Revenue Court for mutation of names in favour of *Sheocharan* as the adopted son of Lala Harnam Das, presented it to the Revenue Court. There can be no doubt that at that time it was intended by *Faqir Chand* and *Sheocharan* that the whole of the property which was left by Lala Harnam Das should be claimed by *Sheocharan* as his adopted son. Subsequently on the 25th May 1905, *Sheocharan* alleged that he "was the heir to, and the owner of, the estate of Lala Harnam Das, deceased, on account of his being an adopted son." *Faqir Chand* had also had prepared a power-of-attorney, dated the 20th October 1892, according to which *Sheocharan Lal*, "adopted son" of Lala Harnam Das and *Musammât Kashmiro*, widow, appointed *Faqir Chand* and *Mahesh Das* their general attorneys for, amongst other purposes, an application to the Revenue Court for mutation of names. That power-of-attorney was signed by *Sheocharan*, and the mark of *Musammât Kashmiro* was put to it by *Piyare Lal*. The reference in that power-of-attorney to *Sheocharan* as the adopted son of Lala Harnam Das is the only piece of evidence to which their Lordships' attention has

SRI KISHAN LAL V. KASHMIRO.

been called as suggesting that *Musammât Kashmiro* had on any occasion recognised Sheocharan as the adopted son of her late husband. It is exceedingly improbable that she knew how Sheocharan was described in the power-of-attorney or the purposes for which that power-of-attorney might be used. She was then acting under the guidance and on the advice of her brother-in-law Faqir Chand. Although the design of making it appear that Sheocharan was the adopted son of Lala Harnam Das, and of having his name entered in the registers as the owner of the *zamindari* property, which Lala Harnam Das had acquired, was soon abandoned, the application to have his name entered in the registers as the owner is of importance, as it shows that at that time Faqir Chand and Sheocharan were treating the property which Lala Harnam Das had acquired as being the self-acquired property of Lala Harnam Das, and not as property which he had acquired as a member of a joint Hindu family.

Shortly after the 20th October 1892, Faqir Chand came to the conclusion that it would be more to his interests that his name, and not that of Sheocharan, should be entered in the Revenue Registers as the owner, and on the 2nd November he sent to Sheocharan drafts of applications for mutation of names in his, Faqir Chand's, favour, and of an agreement giving him authority to act as manager. Sheocharan sent a vague and evasive reply, and finally on the 19th November 1892, Faqir Chand filed applications in the Revenue Court for a stay of the mutation proceedings. On the 20th November 1892, Faqir Chand, Mahesh Das, and Piyare Lal went to *Musammât Kashmiro* at Meerut. The following entry of the 20th November 1892 in the diary of Faqir Chand is instructive as showing the influence which was brought to bear upon this illiterate *pardanashin* lady:—

"Sunday, the 20th.—I went to 'Bahabhi Saheba' at Meerut along with Mahesh Das and Piyare Lal. 'Bhabhi Saheba' said that she wanted to have mutation of names in respect of the property effected in her favour alone, that she did not want to have it effected in favour of anyone else, and that she had no confidence in anyone. After a long conversation, entreaties, and hesitation,

she consented to mutation of names being effected in my favour; and a telegram asking Sheocharan Lal to come, was sent. Drafts of the applications were caused to be prepared by Shaikh Ghulam Rasul."

Owing to some objections on the part of Sheocharan, the arrangements proposed by Faqir Chand fell through, and it appears from the following entry of the 26th November 1892, in the diary of Faqir Chand, that a new arrangement was agreed to between Faqir Chand, Mahesh Das, Sheocharan, and Piyare Lal:—

"Saturday, 26th (Meerut).—A conversation took place after 12 o'clock in the presence of Faqir Chand, Mahesh Das, Sheocharan Lal, and Piyare Lal, . . . the funds were agreed to be joint; it was further agreed that the *Musammât* (as one party), Faqir Chand (as second party), and Mahesh Das, Parbhu Lal, and Sheocharan Lal (as third party), were entitled to one-third share each. The property in respect of which Sheocharan Lal's name was entered in the lifetime of the brother, and the funds belonging to Faqir Chand, which were separate from the joint funds, were kept separate."

It will be observed that on the 26th November 1892, Sheocharan abandoned the position which he had taken up as an adopted son of Lala Harnam Das and abandoned the claim that the property which Lala Harnam Das had acquired was the self-acquired and separate property, of Lala Harnam Das, and claimed a share through his natural father, Chajju Mal. It will also be observed that it was at that meeting agreed that *Musammât Kashmiro*, who, if the property was joint family property was not entitled to any share, was to have a one-third share in it. The agreement that she should have a one-third share is explained by the fact that Piyare Lal was present and assenting and by the fact that he had been promised by Faqir Chand 10,000 rupees if he would consent. Piyare Lal had no interest in the property if it was in fact joint property; he had, however, a mere contingent reversionary interest of a then unascertainable value in the property if it had been separately acquired property of Lala Harnam Das.

On the 27th November 1892, Sheocharan and his brother Mahesh Das expressed

SRI KISHAN LAL V. KASHMIRO.

their dissent from the arrangement to which they had agreed on the 26th. However, on the 28th November 1892, an agreement of reference to arbitration was drawn up and was executed by Faqir Chand, Mahesh Das, Sheocharan, 'Musammat Kashmiro, by the pen of Piyare Lal,' Parbhu Dayal, Piyare Lal, and Kedar Nath, who was the husband of Musammat Kaki. By that agreement the arbitrators were not bound to allot to Musammat Kashmiro a one-third share; they might if they so chose allot to her an infinitesimal share; but out of the share which they might allot to her they were bound to allot a share, to be enjoyed at once, to Musammat Bhagwan Dei, and a similar share to Musammat Kaki, neither of whom could in any view of the law have been entitled to a share to be enjoyed during the lifetime of Musammat Kashmiro. Execution of that agreement was admitted by Musammat Kashmiro to the District Sub-Registrar, but it is impossible to believe that she understood the nature and effect of the agreement, and equally impossible to believe that anyone who had any regard to her interests could have advised her to be a party to it.

The arbitrators called for statements from the parties, but do not appear to have examined any witnesses, and on the 10th January 1893 they made their award, and allotted to Faqir Chand a 4 anna share, to Parbhu Dayal, Mahesh Das, and Sheocharan, a joint 4-anna share, to Musammat Bhagwan Dei a 2-anna share, Musammat Kaki a 1½-anna share, and to Musammat Kashmiro (to include the share of her three daughters) a 4½-anna share, and awarded that after the death of Musammat Bhagwan Dei, her male issue should get her share and the profits accruing therefrom. It appears from the award that Musammat Kashmiro had given to the arbitrators a written statement signed by the pen of Piyare Lal, in which she alleged herself to be the sole heir and entitled to the estate of Lala Harnam Das, and prayed that she should get the whole estate. The arbitrators had under the agreement of reference power to appoint a manager of the estate, and Faqir Chand was appointed the manager.

It has been contended on behalf of the plaintiff that some answers which were given

by Musammat Kashmiro to interrogatories on a commission in a suit in 1895 show that Musammat Kashmiro had fully understood the nature and effect of the agreement of reference of the 28th November 1892, and that the award had been read over to her, and that she had acquiesced in it. It appears to their Lordships that the answers to these interrogatories had been dictated to her by Faqir Chand, and were not such answers as might have been expected from an illiterate *pardanashin* lady like Musammat Kashmiro, and their Lordships attach no importance to them.

The learned Additional Judge of Meerut who tried this suit found that the award was made with the knowledge of Musammat Kashmiro, and was explained to and understood by her, and she accepted it. The Additional Judge came to no precise finding on the question as to whether Lala Harnam Das, Faqir Chand, and Chajju Mal had separated, but he appears to have considered that there may have been some partial separation, and that the brothers, or at least Lala Harnam Das and Chajju Mal, subsequently reunited. Assuming that there was a separation, their Lordships consider that there is no conclusive evidence that the brothers, or any two of them, reunited. The view of the situation of the Additional Judge, apparently, was that Faqir Chand and Musammat Kashmiro had conjointly defrauded Sheocharan, and had, by guile and trick of the award, got three-fourths of the property out of his hands. This view, it may be observed, involved the assumption that the three brothers, Lala Harnam Das, Faqir Chand, and Chajju Mal, separated, and that none of them had afterwards reunited, and that the property left by Lala Harnam Das was his property self-acquired after the separation; and the further assumption that Lala Harnam Das had adopted Sheocharan. The Additional Judge gave the plaintiff a decree. From that decree the defendants appealed to the High Court.

On the appeal the High Court considered that two main questions arose:—

"1. Were the arbitration proceedings and the award valid and binding? and

"2. Ought these proceedings to be regarded as a fair family settlement even if the

SRI KISHAN LAL V. KASHMIRO.

Court considers that there was no real arbitration in the strict sense?"

The learned Judges considered that the second question arose because, as they said, it often happens that the machinery of a pretended arbitration is had recourse to in order to carry out what is in reality a family compromise or arrangement. They found, and their Lordships agree with them, that there was in fact no real arbitration and that the so-called "arbitration was nothing short of ■ sham."

In arriving at a conclusion as to whether the award could be regarded as embodying ■ agreement as to a fair family settlement, the learned Judges in the appeal considered (1) How far the claim of Sheocharan to be the adopted son of Lala Harnam Das was honest? (2) How far the claim of Faqir Chand that the family was joint was honest? and (3) How far the interests of *Musammât Kashmiro* were protected, and what knowledge she had of the proceedings? They considered, and their Lordships agree with them, that if Sheocharan was really the adopted son of Lala Harnam Das he would never have given up his position as an adopted son. Sheocharan was a Munsif and must have known what his rights were if he was in fact an adopted son. It could not have been difficult for him to prove in 1892, if it was the fact, that he had been adopted by Lala Harnam Das. If he had been the adopted son of Lala Harnam Das and the family was joint, his share in the property which Harnam Das had accumulated would have been of the value of nearly 100,000 rupees; if, on the other hand, that property was self acquired by Lala Harnam Das, Sheocharan would have taken the whole of it, which was of the value of nearly 300 000 rupees. By abandoning the position of an adopted son, which he had at first on the death of Lala Harnam Das taken up, he reduced his interest in the property, if joint, to a share of about the value of 50,000 rupees. If the award embodies a family agreement, Sheocharan's claim to share in the property was through his father Chajju Mal and not as the adopted son of Lala Harnam Das, and Sheocharan must have known as a Hindu and as a lawyer that if he had been adopted by Lala

Harnam Das he could not claim a share through his natural father.

The learned Judges on the appeal found, and their Lordships agree with them, that the three brothers had separated, that there had been no reunion, and that the property which Lala Harnam Das had accumulated was his self-acquired property. They shrewdly observed that if Faqir Chand had been joint with Lala Harnam Das he would never for a moment have allowed an application for mutation of names in favour of Sheocharan to be made, nor would he have called Sheocharan the adopted son of Lala Harnam Das in the draft agreements which he prepared.

The learned Judges in the appeal to the High Court, having carefully considered the evidence, were of opinion that there was no fair family arrangement arrived at, and found that it had not been shown that *Musammât Kashmiro* had any independent advice, or understood the effect of the so-called award on her interests; they believed that she never knowingly consented to the division of her husband's estate, and they allowed the appeal and dismissed the suit with costs.

Their Lordships must not be taken as dissenting from the conclusions of the learned Judges of the High Court, but their Lordships consider that this appeal may properly be dismissed on the broad ground that on the death of Lala Harnam Das his widow, *Musammât Kashmiro*, came under the influence of her brother-in-law, Faqir Chand, who was an interested party in all the subsequent proceedings, whom she trusted to advise her, and on whose advice she acted until he died in 1905. His interests conflicted with hers. Faqir Chand advised her in his own interests, and not in hers. He concealed from her the true nature and effect of the different proceedings in this case, and misled her. She was not a woman of business, and he managed the property from 1893 until he died, and she believed that he was acting as manager for her. From the death of her husband Faqir Chand stood to her in a fiduciary relationship, which continued until he died, and she was entitled to receive from him a full disclosure of all the affairs which concerned her, but he betrayed his trust. Piyare Lal who was her

DWARKA SINGH v. LAYAKAT ALI KHAN.

husband's grandson, and in whom *Musammāt Kashmiro* also trusted as an adviser, acted from interested motives in collusion with *Faqir Chand* and betrayed the confidence which she reposed in him.

Under such circumstances, the award, whether regarded as an award, or as a document embodying a family arrangement, cannot stand, it must be treated as a nullity. *Musammāt Kashmiro* cannot be regarded as an assenting party to any arrangement for the division of the property which was left by *Lala Harnam Das*. The question in such a case as this is, not whether *Musammāt Kashmiro* knew what she was doing, had done, or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf. Fraud, such as there was in this case, cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. [See *Huguenin v. Baseley*, (1), *Moxon v. Payne* (2).]

It has been contended here that limitation is a bar to *Musammāt Kashmiro's* defence. The Indian Limitation Act would not apply to her defence. Even if she were suing to recover possession of property of which she was deprived by the award, time would not, under the circumstances of this case, begin to run against her until *Faqir Chand* died.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the first respondent, who alone appeared.

Appeal dismissed.

Solicitors for the Appellant: Messrs. T. L. Wilons & Co.

Solicitors for the Respondents: Messrs. Barrow Rogers & Nevill.

PATNA HIGH COURT.

CIVIL REVISION PETITION No. 107 of 1916.

April 4, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

DWARKA SINGH—PETITIONER

versus

LAYAKAT ALI KHAN—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal presented after time—'Sufficient cause'—Review of judgment, deduction of time occupied in—Practice.

It is not always a 'sufficient cause' for presenting an appeal after time that the appellant was unsuccessfully prosecuting an application for review of the judgment appealed against. [p. 45, col. 1.]

Whether the time occupied in proceedings for review may be deducted for admitting a belated appeal depends on the circumstances of each particular case. [p. 45, col. 1.]

It is common practice to file an appeal as well as an application for review. Where the application for review related to a small matter, the acceptance of which would not have rendered unnecessary an appeal, or where it must have been obvious to the appellant that the review petition could not be disposed of within the time limited for appeal, Courts will be slow to excuse the delay in filing the appeal. [p. 45, col. 1.]

Messrs. *Ganesh Dutt Sinha* and *Nirsu Narain Sinha*, for the Petitioner.

JUDGMENT.—A suit was brought against the present applicant and two other persons for rendition of accounts. The preliminary decree was made in August 1913, and a Pleader was appointed Commissioner to take the accounts. The Commissioner found the applicant liable for a sum of Rs. 3,777. The applicant lodged a number of objections against the finding of the Commissioner. Some of them were allowed, with the result that the sum payable by the applicant was reduced to about Rs. 2,420 and a final decree was made on March 24th, 1915, for payment of that sum and costs amounting to Rs. 1,220 odd were awarded against the applicant. On May 26th, that is, a little over two months after the final decree, the applicant filed a petition for review on two grounds, first, that there was an error apparent on the face of the record in a calculation regarding his share of 37 *bighas*, and secondly, that nothing had been allowed to him on account of his wages or the wages of his staff employed in making collections in the *zirat* land. The Court on January 10th, 1916, rejected the application for review. By this time the period prescribed for an appeal to the High Court had expired. An appeal was nevertheless presented on 31st January 1916 and

NAFAR CHANDRA PAL v. RAHAMAN SHEIKH.

the opposite party decree-holders were called upon to show cause why the appeal should not be registered. The applicant has to satisfy us that he had ■ sufficient cause for not filing his appeal within the prescribed time. He relies on the fact that he applied for review under the advice of two leading Pleaders of the Darbhanga Bar and we have been referred to cases in which the High Court has allowed a deduction of the time spent in applying for a review of judgment. In all these cases it is said that the decision must depend upon the special circumstances proved in the particular case. The fact that the applicant took the advice of two Pleaders of Darbhanga is not necessarily enough. The *first* ground taken in the application for a review related to ■ small matter and even if that ground had been accepted, the applicant would not have abandoned his right of appeal. The *second* ground, if allowed, would have relieved the applicant of liability to pay ■ considerable sum of money. We find that although the applicant lodged a large number of objections to the report of the Commissioner, the objection stated in the *second* ground in the application for review was not taken. It is common practice to file an appeal as well ■ an application for review. The applicant in the present case does not pretend that he was advised not to file an appeal when it became obvious that the application for review could not be disposed of within the time limited for an appeal. Comparing the grounds of appeal to this Court with the grounds taken in the application for review, we feel that the true reason for not filing an appeal has not been disclosed. We are not satisfied that the applicant had sufficient cause for not filing his appeal within time. The application to have this appeal registered is, therefore, rejected with costs. Hearing-fee two gold mohurs.

Application rejected.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1602 AND 1736 TO 1765 OF 1911.

March 30, 1916.

Present:—Mr. Justice Teunon and
Mr. Justice Chowdhury.

NAFAR CHANDRA PAL CHOWDHURY

—PLAINTIFF—APPELLANT

versus

RAHAMAN SHEIKH—DEFENDANT—
RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 29, cl. (6), proviso (1)—Enhancement of rent by contract—Contract to enhance more than 2 annas in the rupee, if partially valid—Division of a tenancy by contract, when has effect of creating new tenancies.

Proviso (1) to section 29 of the Bengal Tenancy Act does not control clause (6) of the section and a continuous realisation of rent at an illegal enhanced rate will not entitle the landlord to realise rent at that rate. [p. 46, col. 2.]

A contract providing for an enhancement exceeding 2 annas in the rupee in contravention of section 29 of the Bengal Tenancy Act is wholly void and cannot be operative to the extent of the enhancement of 2 annas. [p. 46, col. 2.]

Kristodhone Ghose v. Brojo Gobindo Roy, 24 C. 895; 1 C. W. N. 442, referred to.

A mere division of a tenancy in pursuance of a contract between the landlord and the tenant has not the effect of creating new tenancies unless that was the intention of the parties. [p. 46, col. 2.]

Mulluck Chand Das v. Sqtish Chandra Das, ■ Ind. Cas. 306; 11 C. L. J. 56; 14 C. W. N. 335 and *W. M. Grant v. Ram Rekha Bhugat*, 6 Ind. Cas 501; 14 C. L. J. 110, referred to.

Appeals against the decrees of the District Judge, Nadia, dated the 27th March 1911, modifying those of the Munsif, 2nd Court, Krishnagar, dated the 28th of April 1910.

Babus Haro Prosad Chatterjee and Amarendra Nath Bose, for the Appellant.

Babu Surendra Nath Guha and Jagindra Kumar Dey, for the Respondent.

JUDGMENT.—These 31 appeals arise out of suits for rent.

The plaintiff-landlord sued 62 tenants of village Andulia on the basis of ■ measurement and a rent-roll prepared in accordance thereunder in the year 1891. His case was that rents had been paid in accordance with the rent-roll from the years 1891 to 1906. When in the latter year he demanded agreements for the payments of enhanced rents, the tenants declined to make any payments whatever, and he was, therefore, compelled to sue.

The defence was that in 1891 the tenants were *raiya*ts with rights of occupancy, that

NAFAR CHANDRA PAL v. RAHAMAN SHEIKH.

the rentals entered in the rent-roll represented illegal and excessive enhancements contravening the provisions of section 29 of the Bengal Tenancy Act, that they had never consented to the rent-roll, and had never paid the rents entered therein.

In the Court of first instance the 62 suits were tried in 3 groups or batches and were all decreed. In 31 cases the appeals to the District Judge followed. In 28 of these cases the appeals were allowed and decrees, given at the rents admitted by the tenants. In three cases the District Judge found that the tenants had signed the rent-roll and, therefore, allowed an enhancement of 2 annas in the rupee over the admitted rents. Hence the 31 appeals to this Court, and 3 cross-appeals by the tenants.

The plaintiff sought to avoid the operation of section 29 of the Bengal Tenancy Act by asserting that, on his measurement (which followed upon his purchase of the *mahal*), the tenants of the village relinquished or abandoned their old holdings, and that the rent-roll of 1298 represented new settlements. On the evidence before him the District Judge has very properly negatived this case and has held that the old tenancies continued.

As to payment of rent from and after the year 1298 the judgment in appeal is not very happily worded, but in effect the District Judge disbelieves the plaintiff's collection papers, is of opinion that any excess collections entered therein may be explained by reference to payments made on account of what are known as *utbandi* lands and holds that the plaintiff has failed to show that he realised rents in accordance with the rent-roll of 1298, or indeed at any rates exceeding those paid prior to that year. It was suggested in argument that the explanation offered by the District Judge of the entries in the collection papers is not suggested in the written statements and is not based on evidence. The written statements are no doubt confined to the several holdings in respect of which the suits are brought, but extracts from the evidence which have been placed before us show that the contention that the District Judge's explanation of the entries in the collection papers is not suggested by the evidence, is not wellfounded.

But even if the criticisms on the Judge's findings on the question of realization were well-founded this would not advance the appellant's case. It is now settled law that proviso (1) to section 29 of the Bengal Tenancy Act does not control clause (b) of the section, and that continuous realisation of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court.

Lastly, it is contended on behalf of the appellant that there is no finding that the tenant defendants had in 1298 acquired the status of occupancy *raiya*s and further that there is no finding as to the rents then paid.

But from the issues and from the manner in which the cases were dealt with in the Courts below, and also from the extracts from the plaintiff's evidence that have been read to us, it is clear that on those points there was no controversy in the Courts below. It was never disputed that in 1298 the tenants were occupancy *raiya*s and that if the old tenancies continued, the rents entered in the rent-roll of that year were in fact enhanced rents exceeding the rents previously payable by more than 2 annas in the rupee.

We may add that the Judge's finding is in effect that the rents admitted by the tenants were the rents previously payable.

In the 3 cross-appeals it is clear that the Judge has fallen into error. In those cases he finds that by signing the rent-roll the tenants entered into a contract for the payment of enhanced rents. But in the first place, the contract is not registered and in the next place, as it provides for an enhancement exceeding 2 annas in the rupee it is wholly void [*Kristodhone Ghose v. Brojo Gobindo Roy* (1)].

In one of these three cases it next appears that the pre-existing holding had been divided between two brothers. It is suggested that this division being a contract between the landlord and the tenant has the effect of creating new tenancies and, therefore, of taking away the pre-existing occupancy rights. Certainly if this was not the intention of the parties, the division could not have the effect suggested. [*Mulluck Chand Das v. Satish*

(1) 24 C. 895; 1 W. N. 442.

MA KYUN v. MYAING SHIN.

Chandra Das (2) and *W. M. Grant v. Ram Rekha Bhaghat* (3).] No question as to any such intention was raised in either of the Courts below.

Further the provisions of section 178 (1) (b) of the Bengal Tenancy Act would seem to be a sufficient answer to this contention.

In the result the appeals are dismissed with costs, and the 3 cross-appeals are decreed with costs in all Courts.

Appeals dismissed;

Cross-appeals decreed.

(2) 3 Ind. Cas. 306; 11 C. L. J. 56; 14 C. W. N. 335.

(3) 6 Ind. Cas. 501; 14 C. L. J. 110.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 57 OF 1915.
February 23, 1916.

Present:—Mr. Justice Maung Kin.

MA KYUN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

MYAING SHIN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Vendor and purchaser—Sale of mortgaged property—Application of consideration in discharge of mortgage—Purchaser, whether can claim mortgagee's rights as against subsequent registered purchaser—Intention to keep mortgage alive

A person who purchases mortgaged property, part consideration whereof is applied in discharge of the mortgage, cannot claim the right of the mortgagee as against a subsequent registered purchaser, unless there was an intention on his part to keep the mortgage alive. [p. 48, col. 1.]

Mr. D. N. Palit, for the Appellants.

Mr. P. N. Chari, for the Respondent.

JUDGMENT.—This is a suit for the recovery of a piece of land.

The plaintiff is a Chinaman by name Myaing Shin. His case is that by a registered deed of sale, dated the 12th July 1906, he purchased the land in suit for Rs. 300 from Mg. Aung Myat and his wife, Ma Mya. He says that he worked it for one year and in the following year he had to return to China owing to ill-health leaving the land in charge of Ne Win. Ne Win wrote and told him that Aung Myat, husband of Ma Kyun, had forcibly entered upon and worked the land. He directed Ne Win to take legal proceedings but Ne

Win replied that, without a power-of-attorney, he could do nothing. He could not get one in China, so did nothing until he returned to Burma. He asks for the land and mesne profits for 3 years.

In the meantime, Ma Mya, wife of Aung Myat, plaintiff's alleged vendor, has died. So has Aung Myat, the husband of Ma Kyun.

The defendants, therefore, are Aung Myat, the plaintiff's alleged vendor, and his daughter Ma Pwa Kin, who is added as a representative for her deceased mother, Ma Kyun, the widow of Aung Myat, the alleged wrong-doer, and her two children Ba Than and Ma Shin, who are added as representatives of their father.

Aung Myat and his daughter have not defended the suit.

Ma Kyun on behalf of herself and her two children contests the suit on the allegations

(1) that the sale to Myaing Shin was a fraudulent one;

(2) that there was a mortgage of the land by Aung Myat, the plaintiff's vendor, for Rs. 250 to a Chetty; and that prior to the date of the sale to plaintiff her husband and she had, by a *pyatpaing*, bought the land by paying Rs. 500, the amount due on the mortgage.

The points for determination are

(1) whether the sale set up by the plaintiff was valid;

(2) whether there was a mortgage of the land to the Chetty for Rs. 250;—

(3) whether the purchase by Ma Kyun and her husband was valid; and

(3) to what relief is the plaintiff entitled.

Both the lower Courts have found that the sale set up by the plaintiff was valid and I have no reason to differ from them on the point. Indeed the Advocates have argued this appeal on the assumption that it was valid.

The Court of first instance found that there was no mortgage, whereas the lower Appellate Court has held that there was a mortgage and that Ma Kyun and her husband bought the land by paying off the amount due on the mortgage but that there was no intention on the part of the purchasers to keep the mortgage alive.

The plaintiff has won in both the Courts,

WASI ALI v. JANG BAHADUR SINGH.

Kanta Prasad v. Saiyed Ahmad, 1 Ind. Cas. 799; 31 A. 373, 6 A. L. J 451, distinguished from.

A section of an Act should be interpreted so as not to conflict with other known principles of law. [p. 51, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 14th April 1914.

Babu Basdeo Lal, for the Appellant.

Pandit Gokaran Nath Misra and Pandit Sarju Prasad Misra, for the Respondent.

JUDGMENT.—The decree-holder-respondent obtained a decree for the sale of the property mortgaged against the judgment-debtor-appellant on the 21st August 1912. That decree was made absolute on the 3rd May 1913. The property mortgaged was meanwhile sold in execution of a prior mortgage-decree obtained by Tikaram, to which the decree-holder-respondent was a party. The decree-holder-respondent did not pay the money due on the prior mortgage and allowed the mortgaged property to be sold, contenting himself with a sum of Rs. 823-5 received by him out of the surplus sale-proceeds in part satisfaction of his puisne encumbrance. On the 27th October 1913 he applied for a decree under Order XXXIV, rule 6, of the Code of Civil Procedure for the balance of the money due to him against the person and other property of the judgment-debtor. The judgment-debtor opposed the application on the ground that the decree-holder had no right to obtain a decree under Order XXXIV, rule 6, of the Code without bringing the mortgaged property to sale. He further contended that the decree-holder had got his lien notified when the property mortgaged to him was proclaimed for sale in execution of the decree obtained by Tikaram on the prior encumbrance and that no relief could be claimed against the person of the judgment-debtor under the terms of the mortgage. The learned Subordinate Judge repelled these contentions and granted a decree for Rs. 12,492-5-6 against the judgment-debtor-appellant.

The facts connected with the execution proceedings, in which the mortgaged property was sold, are somewhat singular. It appears that Waris Ali owned a 2-annas 8-pies share in the village Tera, which he

mortgaged without possession to Tikaram in lieu of Rs. 600 on the 9th July 1898. He subsequently mortgaged the same to Umrao Lal in lieu of Rs. 6,000 on the 7th April 1902 and executed a deed of further charge in his favour for Rs. 1,000 on the 1st August 1903. The share of Waris Ali was sold in execution of a simple money decree held by the Delhi and London Bank on the 20th March 1906 and was purchased by Wasi Ali, the judgment-debtor-appellant. On the 29th April 1903 the judgment-debtor-appellant executed a mortgage-deed of the 2-annas 8-pies share, purchased by him, in favour of Umrao Lal in lieu of Rs. 8,500, leaving the entire consideration to be credited towards the mortgage-deed of the 7th April 1902 and the deed of further charge, dated the 1st August 1903. On the 22nd July 1911 Tikaram obtained a decree for sale on foot of his prior mortgage, dated the 9th July 1898, against Waris Ali the original mortgagor and Wasi Ali who had purchased the mortgaged property, making the decree-holder-respondent who is the son and heir of Umrao Lal a party to the suit as a subsequent encumbrancer. No priority was at that time set up by the decree-holder respondent. The decree was made absolute on the 20th April 1912, and in consequence of the fact that the property mortgaged was ancestral, the execution of the decree was transferred to the Deputy Commissioner of Bara Banki. On the 21st August 1912 the decree-holder-respondent, who was one of the parties to that decree, in his capacity as a puisne encumbrancer applied to the Deputy Commissioner for the notification of certain liens which he claimed to hold over the mortgaged property. One of them was a mortgage-bond for Rs. 2,000 dated the 23rd January 1896, another was a mortgage-bond for Rs. 400 dated 16th July 1896 and the 3rd was a mortgage-bond for Rs. 5,000 dated 1st February 1900, in each of which a 5-annas 4-pies share was hypothecated. He also applied for the notification of his mortgage-bond for Rs. 8,500 dated 29th April 1908, in which a 2 annas 8-pies share of Waris Ali was mortgaged. The Deputy Commissioner directed the said liens to be notified at

WASI ALI V. JANG BAHADUR SINGH.

the time of the auction-sale. Whether these liens were properly notified is not a matter with which we are concerned in the case. No proper enquiry appears to have been made before the notifications were ordered and the fact that the person who had applied for the notification of liens was a party to the decree under execution as a puisne encumbrancer appears to have been ignored.

The decree obtained by the decree-holder-respondent against the judgment-debtor-appellant on foot of his mortgage, dated the 29th April 1908, appears to have been made under execution at or about the same time in the Court of the Subordinate Judge of Bara Banki. The property ordered to be sold in both the cases was the same, except in so far that it was treated as ancestral property in the hands of Waris Ali for the purpose of the former execution and as self-acquired property in the hands of Wasi Ali for the purpose of the latter execution. On the 20th June 1912 the decree-holder-respondent intimated to the Subordinate Judge of Bara Banki that the property hypothecated in his decree was the subject of sale proceedings then going on in the Court of the Deputy Commissioner of Bara Banki and applied for an order under section 73 of the Code of Civil Procedure, directing a rateable distribution of the proceeds among the holders of the two decrees. The order of the Subordinate Judge on that petition was that the decree-holder in the case pending before the Deputy Commissioner of Bara Banki should be required to deposit the purchase-money in cash and not admitted to set off against his decree except to the extent of his rateable share in the sale-proceeds, and that the application should be put up after the sale was over and information of its having taken place was received from the Collector (Exhibit 5). The order was open to as much objection as the order of the Deputy Commissioner directing liens to be notified, for under section 73 of the Code the duty of the Subordinate Judge was to have ascertained whether the decree-holder-respondent was a party to the decree which had been transferred for execution to the Court of the Deputy Commissioner of Bara Banki, and if not,

to determine which of the mortgagees was entitled to priority with a view to the distribution of the sale-proceeds in the manner laid down in section 73 and Order XXXIV, rule 13, of the Code. Section 73 lays down that where a property is sold subject to a mortgage or charge, the mortgagee or encumbrancer shall not be entitled to any share in the surplus sale-proceeds arising from such sale. But the Court allowed the decree-holder-respondent to get the amount of his subsequent encumbrance satisfied in part out of the surplus sale-proceeds, although he had applied and obtained an order for its notification at the time of the sale.

These irregularities do not, however, affect the right of the decree-holder-respondent to obtain a decree for the balance due on his mortgage against the person and other property of the judgment-debtor-appellant, for being a party to the decree in execution of which the mortgaged property was sold, he is bound by the sale and cannot bring the mortgaged property to sale again in execution of his decree. No question of estoppel arises in this case, for the judgment-debtor-appellant has not done anything on the face of the application made by the decree-holder-respondent for the notification of his alleged liens which can be treated as debarring the decree-holder-respondent from setting up his true rights on the discovery of his mistake. His application of the 20th June 1912 under section 73 of the Code was in fact one which, if properly dealt with at the time, would have set the matter at rest and the responsibility for the consequences that may have accrued cannot, therefore, be imputed to him. It was not obligatory on him to redeem the prior mortgage and if the property cannot be sold again, it is open to him to give up his lien and seek a decree for the balance due to him under Order XXXIV, rule 6, of the Code of Civil Procedure. Section 65, clause (c), of the Transfer of Property Act shows that it was the duty of the mortgagor to pay up the prior mortgage, and the security must, therefore, be taken to have vanished by reason of his default. The sale referred to in Order XXXIV, rule 6, of the Code of Civil Procedure is

TARAN KRISHNA BHOWMIK v. SAMIRUDDIN.

a sale of the property directed to be sold under the preceding rule and the words "any such sale" imply such sale, if any, rather than ~~any~~ sale out of many, for the sale of one property cannot be regarded ~~as~~ sufficient to determine the amount personally recoverable. There might be instances where the property mortgaged or that remaining unsold may prove to be unsaleable, for want of ~~a~~ subsisting title or other cause, and if no effective sale is possible there is no reason why the remedy provided under Order XXXIV, rule 6, should be withheld. In *Pirbhu Narain Singh v. Amir Singh* (1) and *Jugal Kishore Sahu v. Kedar Nath* (2) it was held that a mortgagee was entitled to abandon his claim against any portion of the mortgaged property so long as the rights of third parties were not prejudicially affected. In *Sheo Din v. Bhawani Bakhsh* (3) it was laid down that where the property hypothecated could not be sold owing to the absence of a saleable interest, ~~a~~ decree for the balance due on the mortgage could be granted under Order XXXIV, rule 6, of the Code. In *Badri Das v. Inayat Khan* (4), *Kamta Prasad v. Saiyed Ahmad* (5) and *Ram Ranjan Chakravarti v. Indra Narain Das* (6) a sale of the mortgaged property in execution of ~~a~~ prior mortgage-decree was held to be insufficient to justify a decree under section 90 of Act IV of 1882. But the effect of the decision in *Badri Das v. Inayat Khan* (4) is somewhat modified by the later decisions in *Sheo Prasad v. Behari Lal* (7), *Ghafur Hasan Khan v. Muhammad Kifayat-ullah Khan* (8) and *Pirbhu Narain Singh v. Amir Singh* (1). In *Kamta Prasad v. Saiyed Ahmad* (5) the puisne encumbrancer had purchased the mortgaged property in execution of his prior mortgage-decree and was not, therefore, allowed to recover the amount of his subsequent encumbrance from the non-hypothecated

property. The decision in *Ram Ranjan Chakravarti v. Indra Narain Das* (6), so far as it laid down that the mortgagee could not release the mortgaged property so as to impose ~~a~~ personal obligation on the mortgagor, was qualified by the later decisions in *Mir Eusuff Ali Haji v. Panchanan Chatterjee* (9) and *Lakhi Narain Jagdeo v. Kritlibas Das* (10). A section should be interpreted so as not to conflict with other known principles of law.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(9) 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 639.

(10) 19 Ind. Cas. 971; 18 C. L. J. 133.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1084 OF 1914.

March 10, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

TARAN KRISHNA BHOWMIK—DEFENDANT—APPELLANT

versus

Munshi SAMIRUDDIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Suit for breach of contract included in a *zarpeshgi* lease—Civil Procedure Code (Act V of 1908), O. II, r. 2 (2)—*Limitation Act* (IX of 1908), Sch. I, Art. 116.

The plaintiff executed a *zarpeshgi* of a lease-hold at a rental of Rs. 221 in favour of the defendant for a term of 9 years, which provided that the defendant was to pay the rent payable to the superior landlord and to apply the balance of the rental fixed in liquidation of the mortgage-debt and on the expiry of the 9 years there was to be a mutual adjustment of accounts, upon which the plaintiff would pay any amount which might be due to the defendant under the *zarpeshgi* (mortgage). The defendant failing to pay the rent to the superior landlord, the latter obtained a decree for rent against the plaintiff and in execution sold the property on 23rd November 1904. The term of the *zarpeshgi* expired on the 13th April 1905, and on the 11th April 1908 the plaintiff brought a suit for adjustment of accounts against the defendant which was decreed in part. The present suit for damages for the loss occasioned by the execution-sale in consequence of non-payment of rent by the defendant was brought on the 11th April 1911.

Held, that the suit was barred: if treated as founded on the mortgage, it was barred by Order II, rule 2 (2),

(1) 29 A. 369; A. W. N. (1907) 83.

(2) 16 Ind. Cas. 401; 34 A. 606; 10 A. L. J. 211.

(3) 9 Ind. Cas. 752; 14 O. C. 62.

(4) 22 A. 404; A. W. N. (1900) 132.

(5) 1 Ind. Cas. 799; 31 A. 373; 6 A. L. J. 451.

(6) 38 C. 890; 10 C. W. N. 862.

(7) 25 A. 79; A. W. N. (1902) 203.

(8) 28 A. 19; A. W. N. (1905) 165; 2 A. L. J. 413.

TARAN KRISHNA BHOWMIK v. SAMIRUDDIN.

Civil Procedure Code, the present claim not having been included in the previous suit for adjustment of accounts; if treated as a suit for compensation for breach of contract, it was barred by limitation as the contract to pay the head-rent must be taken to have been broken on the date of the execution-sale, if not earlier. [p. 53, col. 1; p. 54, col. 1.]

Sivachidambara Mudeley v. Kamakshi Ammal, 3 Ind. Cas. 433; 19 M. L. J. 498; 33 M. 71; 6 M. L. T. 239, distinguished.

A statement made in a previous suit by a party that he reserved the right of bringing another suit for damages, cannot prevent the operation of the rule of limitation or of Order II, rule 2, Civil Procedure Code. [p. 53, col. 2; p. 54, col. 1.]

Appeal against the decree of the District Judge, Rajshahye, dated the 29th January 1914, confirming that of the Subordinate Judge, Rajshahye, dated the 28th January 1913.

FACTS of the case appear from the judgment.

Babu Broja Lal Chakravarti, for the Appellant.—(1) Order II, rule 2, Civil Procedure Code, is a bar to the present suit. The respondent brought a suit for account against the appellant on the basis of the mortgage, and under section 76, Transfer of Property Act, that suit is a bar to the present suit.

(2) The suit is barred by limitation, having been brought more than six years after the breach of the covenant which took place on 23rd November 1904, the suit having been instituted on 11th April 1911.

Babu Krishna Kamal Maitra, for the Respondent.—As to the first point, the claim for damages for breach of covenant, the subject-matter of the present suit, was expressly left open to be litigated in a subsequent suit. Refers to pleadings and judgment in the account suit. Order II, rule 2, cannot, therefore, be any bar to the present suit. Section 76, Transfer of Property Act, provides a cumulative remedy and is not intended to operate as a bar to any other remedy which the mortgagor has under the law. See *Sivachidambara Mudeley v. Kamakshi Ammal* (1). As to limitation time began to run from the date of breach, no doubt, under Article 116, but the breach of the covenant took place when the defendant by his conduct made the performance of the contract impossible for him, that is to say, the breach took place when the sale

(1) 3 Ind. Cas. 433; 19 M. L. J. 498; 33 M. 71; 6 M. L. T. 239.

was confirmed on 9th May 1905, and the suit is within time from that date.

The defendant might have set aside the sale by depositing the decretal amount in Court, and until then it could not be said that there was any breach of the covenant.

Moreover, the claim being founded on the mortgage and the suit having been brought within six years from the expiry of the lease, it is within time. The true test is, whether the mortgagor's right of redemption in respect of the property sold is barred. If it is not barred, undoubtedly it is not, the mortgagee was under an obligation to put the mortgagor in possession of the mortgaged property, and this is in the nature of a continuing obligation which did not cease so long as the right of redemption was not barred. See section 23, Limitation Act; *Sivachidambara Mudeley v. Kamakshi Ammal* (1). The fact that there was no suit for redemption in the present case makes no difference.

JUDGMENT.—One Chuni Bibi, the predecessor-in-interest of the plaintiffs, executed a *zarpeshgi* lease in favour of the defendant No. 1 on the 11th Aghriyan 1301 B. S. on receipt of Rs. 500 at an interest of Rs. 1-4-0 per month for a term of 9 years. By the terms of the lease the defendant No. 1 was to pay the rent payable to the superior landlord for the property and to apply the balance of the rent, which was fixed at Rs. 221, in liquidation of the mortgage-debt. On the expiry of the period of the lease there was to be a mutual adjustment of accounts and it was agreed that the mortgagor would pay any amount which might be due to the mortgagee and that the property would remain liable for such amount after the expiry of the lease. The lessee failed to pay the rent to the superior landlord, the latter obtained a decree for rent against the mortgagor and in execution of that decree the property was sold on the 23rd November 1904. The *ejara* expired on the 13th April 1905, and on the 11th April 1908 the plaintiffs-respondents brought a suit for adjustment of accounts against the defendant and that suit was decreed in part.

The present suit was instituted on the 11th April 1911 in which the plaintiffs

TARAN KRISHNA BHOWMIK v. SAMIRUDDIN.

claimed damages in respect of the loss occasioned by the sale of the property in consequence of non-payment of rent by the defendant.

The Courts below have held that the plaintiffs are entitled to get a decree for the amount of rent which the defendant defaulted to pay to the superior landlord and the defendant has appealed to this Court.

We are of opinion that the suit is barred by limitation. A suit for compensation for breach of a contract in writing registered is to be brought within six years from the date on which the contract is broken. The contract to pay the head-rent must be taken to have been broken on the date of the sale, if not earlier.

It is contended on behalf of the respondents that the contract was broken on the date of the confirmation of the sale, which was within six years of the date of the institution of the suit, because the defendant might have paid the amount of rent and got the sale set aside. But apart from other considerations the decree being one for rent, and the defendant No. 1, not being a judgment-debtor, could not have paid the decretal amount into Court after the sale had taken place under the provisions of section 174 of the Bengal Tenancy Act.

It is next contended that the claim may be treated as being founded on the mortgage and the suit was within time, as it was brought within six years from the date of expiry of the lease which was the 13th April 1905. Reliance is placed upon the case of *Sirachidambara Muleley v. Kamakshi Ammal* (1) which has also been relied upon by the Court below. In that case, however, there was an usufructuary mortgage not for a limited term, and the mortgagor obtained a decree for redemption of the properties mortgaged, which included a certain property which had been sold for arrears of Government revenue owing to the default of the mortgagee to pay the revenue which he undertook to pay under the deed of mortgage. Subsequently the mortgagor brought a suit for compensation for the loss sustained by the sale of the

property. Previous to that the mortgagor, as stated above, had obtained a decree for redemption and it was contended that the mortgagor was bound to sue for the loss sustained by her within six years of the breach or she might, at the time the decree for redemption was passed, have asked that accounts might be taken and the mortgagee debited with the loss under section 76 of the Transfer of Property Act if that gave the mortgagor further time; but she was not entitled to any more. The learned Judges held that section 76 provided a cumulative remedy and was not intended to operate as a bar to any other remedy which the mortgagor might have under the law. They proceeded to lay down that the mortgagee was under an obligation, under section 92 of the Transfer of Property Act, on being paid the debt due to him to put the mortgagor into possession of the property and that it was in the nature of a continuing obligation which could not be said to cease so long as the mortgagor's right to redeem was not barred, and as the suit was brought within six years from the date of the redemption-decree though more than six years from the date of the sale, the suit was held not to be barred by limitation. But in the present case there was no question of redeeming the mortgagee or of the mortgagor being put into possession, because under the terms of the lease the mortgage was to continue only for a period of nine years on the expiry of which the mortgagee was not to remain in possession of the property, he having merely a charge on the property as a simple mortgagee. The only thing to be done was the adjustment of accounts between the mortgagor and the mortgagee for the period of nine years and a suit was brought for the purpose and was decreed. This case, therefore, may be distinguished from the Madras case on that ground, though we must confess that it does not appear very clear to us how the plaintiff in that case could derive any assistance from section 22 of the Limitation Act. We have been referred to a statement in the plaint of the previous suit, namely, that the plaintiff reserved the right of bringing the present suit for damages. Such a statement, however, made by the plaintiff, it is needless to observe, cannot prevent the

UMATOL SOGHRA v. ZOHRA.

suit from being barred by the provisions of Order II, rule 2 (2), of the Civil Procedure Code or from being barred by limitation. We are accordingly of opinion that the suit (treating it as founded on the mortgage) is barred by Order II, rule 2 (2), the present claim not having been included in the previous suit, and treating it as a suit for breach of contract it is barred by limitation.

The result, therefore, is that the decree of the Courts below must be set aside, the appeal allowed and the suit dismissed, each party bearing his own costs throughout.

Appeal allowed; Suit dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3632
OF 1913.

April 26, 1916.

Present:—Mr. Justice Chapman and
Mr. Justice Atkinson.

Musammât UMATOL SOGHRA
—APPELLANT

versus

Musammât ZOHRA AND OTHERS
—RESPONDENTS.

Contract Act (IX of 1872), s. 70—Contribution, suit for—Institution of action by several plaintiffs to secure common benefit—Expenses borne by one plaintiff—Liability of co-plaintiffs in contribution.

Where several persons join together in instituting a suit to secure a common benefit and only one of them bears the expenses of the litigation, he is entitled to be re-imbursed by his co-plaintiffs in contribution (1) by virtue of an express agreement between them settling the proportion in which the expenses had to be met by each, (2) by reason of the plaintiff having paid Counsel after he was engaged by all the plaintiffs jointly, or (3) under the provisions of section 70 of the Contract Act. [p. 55, cols. 1 & 2.]

Mr. Pugh, Counsel (with him Messrs. Muhammad Ishaq and Muhammad Mustafa Khan), for the Appellant.

Mr. Baldeo Narain Singh, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit for contribution. The plaint recites that the plaintiff is the proprietor of eleven annas odd of a certain Mouza Kusunda,

that the defendant No. 1 is the proprietor of four annas odd of that mouza and that defendants Nos. 2 to 4 are the proprietors of the remaining 13 annas odd. There arose a dispute with the proprietors of a neighbouring village over an embankment which affected the irrigation of the lands of Mouza Kusunda. The result was that the plaintiff and the defendants joined in instituting a suit against the neighbouring proprietors. In consultation with the co-sharers and servants of some co-sharers the services of a Pleader and Mukhtar were engaged. The plaintiff, being a co-sharer of a major portion of the property, was entrusted with the duty of looking after and conducting the prosecution of the aforesaid suit and it was agreed between the plaintiff and the defendants that they would refund the expenses incurred by the plaintiff in proportion to their shares in the mouza. The conduct of the suit was thereafter in the hands of the plaintiff, who spent a sum of Rs. 6,695 in the prosecution of it. The irrigation suit was dismissed. The defendants Nos. 2 to 4 repaid the plaintiff a proportionate amount of the expenditure incurred by her, but defendant No. 1 declined to make any payment. The present suit was for a sum of Rs. 1,749 odd, being the proportionate amount due from defendant No. 1 under the agreement by which the defendant No. 1 promised to pay a proportionate share of the expenses incurred by the plaintiff in the conduct of the irrigation suit. The present suit was contested by the defendant No. 1 alone. Her case was that it was the plaintiff alone who desired to institute the irrigation suit, that she was compelled by the plaintiff to join in the irrigation suit as a co-plaintiff, that undue pressure was exercised and that further it was expressly agreed that the expenses of conducting the suit would be borne by the plaintiff. When the present suit came to trial the question of jurisdiction arose. The suit was instituted in the Gaya District. The defendant pleaded to the jurisdiction and alleged that the suit should be tried in the District of Monghyr where both parties reside. One of the grounds upon which the plaintiff claimed that the suit should be tried in Gaya was that the agree-

UMATOL SOGHAR v. ZOHRRA.

ment that the expenses of the suit should be borne proportionately was concluded at a place called Kashi Chak in the District of Gaya. The learned Subordinate Judge noted that on the whole he disbelieved the story of the plaintiff's witnesses that the agreement took place at Kashi Chak, but he overruled the objection made by the defendant No. 1 to the jurisdiction upon other grounds. The learned Subordinate Judge in his final judgment in the case may, if the point be pressed, be said to have held that an agreement to pay a proportionate share of the expenses of the case was actually concluded; but his finding in this respect is very obscure. He awarded the plaintiff a decree for part of the sum claimed by her. Against this decision the defendant No. 1 appealed. The learned District Judge dismissed the appeal. In doing so he has come to no finding as to whether there was an agreement between the plaintiff and the defendant No. 1 that defendant No. 1 should pay a proportionate share of the expenses of the irrigation suit. The judgment of the learned District Judge appears to proceed upon the ground that the defendant was as interested as the plaintiff in bringing the irrigation suit, that her husband admittedly signed and verified the plaint and also a subsequent amendment to the plaint, that the parties were not shown to have been at that time on bad terms and that there was no evidence to show that there was any coercion or that the plaintiff promised to bear all the costs. The defendant No. 1 now appeals to this Court.

It is contended on her behalf that the grounds given by the learned District Judge are not sufficient to support his judgment. We are of opinion that the judgment cannot be supported upon those grounds. Where two plaintiffs join in the institution of a suit and the suit is conducted by one plaintiff alone and the entire expenses of the suit are borne in the first instance by that plaintiff, a suit for contribution by him against the other plaintiffs could succeed only upon one or other of three grounds: *first*, that there was an agreement between the two plaintiffs that the expenses should be borne proportionately, or *secondly*, that the plaintiffs had joined in engaging Counsel or Vakil and that after the joint engagement of Counsel or Vakil the one plaintiff had paid the

Counsel or Vakil on behalf of both, *thirdly*, under the provisions of section 70 of the Contract Act, which lays down that where a person lawfully does anything for another person not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former. Taking the *last* ground first, in the present instance the suit was dismissed and it is not possible to say that the defendant enjoyed any benefit. In regard to the *second* point the plaint does not proceed upon the ground of a common engagement of Vakil, and the ground does not appear to have been taken before either of the Courts below. There remains then only the *first* ground, namely, that an agreement was entered into between the parties that the expenses of the suit should be borne proportionately. As we have said the judgment of the first Court was obscure upon this point, but it is possible to say that the first Court intended in the final judgment to hold that such an agreement did take place. There is no finding upon the point in the judgment of the Court of first appeal. In that Court the plaintiff was a respondent and, therefore, to some extent may be excused for his failure to press the learned Judge for a finding on the point, specially as the learned Judge appears to have been in his favour upon another ground. We are of opinion, therefore, that in the interest of justice the case should be remanded for a finding upon the point. We set aside the judgment and decree of the learned District Judge and we send the case back to him and direct him to come to a finding as to whether there was an agreement between the plaintiff and the defendant No. 1, as alleged in paragraph 4 or 5 of the plaint, that the expenses of the irrigation suit should be borne proportionately between them. If he comes to a finding in favour of the plaintiff on this point, he will then give a decree to the plaintiff in the terms of the decree which we have just set aside. If, however, he finds no such agreement took place, the plaintiff's suit will be dismissed. Having regard to the fact that it is owing to the failure of the respondent to press this point in the Court of first appeal that this remand is necessary, we direct that the respondent do pay the costs up to date. The costs of the proceedings after remand will abide the

KARAMAT ALI v. HANUMAN DAS MARWARI.

result. We remand the case for final disposal by the District Judge in accordance with these directions.

ATKINSON, J.—I agree.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 831
OF 1914.

December 15, 1915.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Chapman.

Shaikh KARAMAT ALI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

HANUMAN DAS MARWARI—DEFENDANT
—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106—Lease—Notice to quit, issue of, on behalf of some of joint owners—Tacit assent of other co-owners—Notice, whether sufficient.

A notice determining a lease issued on behalf of some of the owners is a sufficient compliance with the requirements of section 106 of the Transfer of Property Act, if the other co-owners are proved to have assented to it by their conduct.

Appeal against the decree of the District Judge, Bhagalpore, dated the 9th November 1914, reversing that of the Munsif, 2nd Court at that place, dated the 9th of April 1913.

Maulvi Khurshaid Hussain, for the Appellants.

Babus Manmatha Nath Mukerjee and Satyendra Nath Mukerjee, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by three brothers, namely, Shaikh Karamat Ali, Shaikh Rahim Bux and Shaikh Karim Bux against the defendant for recovery of possession of a *pucca* house which is in the occupation of the defendant and also for recovery of compensation. Under section 106 of the Transfer of Property Act, a notice is said to have been served on the defendant, a copy of which is on the record. It was served by a Civil and Criminal Court Mukhtear Abdul Rahim on behalf of the two brothers Shaikh Karamat Ali and Shaikh Rahim Bux. The first Court gave a decree to the plaintiffs. The defendant appealed to the District Judge, who set aside the decree of the first Court and dismissed the suit on the ground that the

provisions of section 106 of the Transfer of Property Act had not been strictly complied with, inasmuch as there are three plaintiffs in the suit while the notice is by only two of them. The finding of the lower Appellate Court being that the notice was insufficient, it dismissed the suit without entering into the merits of the case.

On behalf of the plaintiffs-appellants it was contended that the interest in the property in question was purchased by two of the brothers whose names appear in the notice and that the third brother Karim Bux may have some private arrangement with the other two brothers for a share in the property. The real lessor was one Shaikh Toomy, whose interest has now come into the hands of the two brothers named in the notice. The defendant was originally a lessee of the shop from the time of the former incumbent, namely, Shaikh Toomy, and his interest having by conveyance come to the two brothers, they now stand in the shoes of Toomy as lessors of the shop in question. Another point urged on behalf of the appellants is that although the notice mentioned the names of only two of the brothers, it should be treated as a notice not only on their behalf but also on behalf of the third brother Karim Bux. On reference to the statements made by Karim Bux himself in the deposition in the suit, it appears that it was really he who acted on behalf of his two brothers in engaging a Mukhtear, having a draft made, posting the notice and receiving an acknowledgment. All this was done by Karim Bux, the reason being, we have been told, that he looks after the *karbar* and was, therefore, in charge of sending the notice to the defendant. He also says that he verbally told the defendant to vacate.

We are, therefore, of opinion that there are many facts on the record which go to show that the notice in question should be treated also as on behalf of Karim Bux. As the learned District Judge has not entered into the merits of the case, we remand it to him for the purpose of deciding it on the merits.

Costs will abide the result.

Appeal allowed; Case remanded.

KIRPIA v. HARDEO.

ALLAHABAD HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1618 OF 1914.

April 13, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, Mr. Justice Tudball and Mr. Justice Walsh.*Musamm* KIRPIA—PLAINTIFF—
APPELLANT
*versus*HARDEO AND OTHERS—DEFENDANTS—
RESPONDENTS.*Appeal, second—Document admitted in first appeal—Objection in second appeal, if allowed.*

The plaintiff sued for possession and to set aside an agreement which, she said, had been brought about by fraud and undue influence. The document was admitted without objection on her part in the first Court:

Held, that under the circumstances it was quite too late for the plaintiff-appellant to raise in second appeal questions as to the admissibility of the document which was received in evidence by the Court below.

Second appeal from the decision of the Subordinate Judge of Meerut, dated the 18th day of August 1914.

Mr. *Nehal Chand*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought possession and to set aside an agreement which, she said, had been brought about by fraud and undue influence. It is true that this latter relief was added by amendment after the plaint was originally filed. The case was referred to a Full Bench because it was thought that a somewhat important question as to the admissibility of unregistered documents of compromise in the Revenue Court in mutation proceedings was involved. This question has been dealt with by a Full Bench of this Court in Letters Patent Appeal No. 4 of 1915. Under the circumstances of the present case we do not think that the question of law arises. The plaintiff herself came into Court mentioning the agreement and alleging that it was not binding upon her because it was brought about by fraud. In the Court of first instance the documents were all admitted without objection on the part of the plaintiff. The question of fraud or no fraud was heard and decided by both Courts. Under these circumstances we think that it is quite too late for the appellant to raise questions as to

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

the admissibility of the documents which were received in evidence by the Court below. We accordingly dismiss the appeal with costs, including in this Court fees on higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 22 AND 36 OF 1911.

CIVIL REVISION PETITION No. 25 OF 1911.

December 20, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.THIRUVAMBALA DESIKAR GNANA
SAMBANDA PANDARASANNADI
AVERGAL AND ANOTHER—PLAINTIFF'S
LEGAL REPRESENTATIVES—APPELLANTS IN A. S. No. 22 OF 1911 AND
PETITIONERS IN C. R. P. No. 25 OF 1911*versus*CHINNA PANDARAM *alias* MANIKKA-
VASAKA DESIKAR (*died*) AND ANOTHER—
DEFENDANT AND HIS LEGAL REPRESENTATIVE—
RESPONDENTS IN A. S. No. 22 OF 1911 AND
C. R. P. No. 25 OF 1911.

Religious endowments—Mutt—Succession, mode of—Junior Pandarasannadhi, position of—Removal from office, causes of—Office held at pleasure, incidents of—Consent decree, how far binding—Suit by legal representative to establish his position as such—Plaintiff, what must prove—Civil Procedure Code (Act V of 1908), O. XXII, rr. 3 (1), 5.

The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts like that of Dharmapuram. The Pandarasannadhi has not got any power of arbitrary dismissal, but he may dismiss for good cause. [p. 61, col. 1; p. 66, col. 2.]

The position of a junior Pandarasannadhi during the life time of the elder appears to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for good cause, and dismissal without notice would be wholly void and inoperative. Where, however, an office is held at pleasure, the incumbent may be removed even on charges of misconduct without any opportunity of being heard, because he is removable at pleasure without any misconduct at all, but in all other cases "the objection for want of notice" can never be got over. [p. 61, col. 1; p. 65, col. 2; p. 66, col. 1.]

THIRUVAMBALA DESIKAR V. CHINNA PANDARAM.

Where, therefore, the Matadhipati of the Dharmapuram Mutt having ordained and appointed a junior Pandarasannadhi cancelled the appointment without giving the junior any opportunity to answer the charges against him, and nominated another successor:

Held, that the dismissal was illegal and the subsequent nomination invalid and inoperative. [p. 61, col. 2; p. 69, col. 1.]

A consent decree is binding on the parties to the suit until it is set aside, just as much as if it had been passed after contest. [p. 60, col. 1; p. 68, col. 2.]

The mere fact that a clause in a compromise decree purports to restrain the Pandarasannadhi from removing the junior in case of future misconduct, is no ground for setting aside the decree altogether in a suit by the former for that purpose, for it does not affect the consideration obtained by the former foreclosing into the compromise. [p. 60, col. 2; p. 67, col. 2.]

Per Seshagiri Aiyar, J.—The head of a Mutt is entitled to appoint a junior Pandarasannadhi, who has a recognised status and is entitled to succeed to the headship if he survives the appointer. He can be removed for good cause shown, but the tenure of his office is not dependent upon the good will of the appointer, who cannot dismiss him arbitrarily. [p. 64, cols. 1 & 2; p. 65, col. 2; p. 66, col. 1.]

Where the Matadhipati of a certain Mutt sues for a declaration that the defendant is not the lawful Pandarasannadhi, and on his death a person appointed by him as his successor applies for leave to continue the suit and he is directed to bring a separate suit to establish his character as the legal representative of the deceased, it is not enough for him in such subsequent suit only to show that he acquired all the rights which the deceased was capable of conferring on him, but he must prove that he has stepped into the shoes of the deceased with all the attributes that he claimed and it is open to the defendant to prove that the deceased had no rights to transmit. [p. 63, col. 2.]

Appeals against the decree of the Court of the Subordinate Judge, Mayavaram, at Kumbakonam, in Original Suits Nos. 33 and 53 of 1907, respectively, and petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Mayavaram, at Kumbakonam, in Original Suit No. 33 of 1907, dated the 30th September 1910.

Messrs. *S. Srinivasa Aiyangar* and *T. V. Gopalaswami Mudaliar*, for the Appellants.

Messrs. *R. Sadagopachariar* and *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.

IN APPEAL NO. 36 OF 1911.

WALLIS, C. J.—This appeal relates to the headship of the wealthy Mutt or Adhinam of Dharmapuram in the Tanjore District, the affairs of which are unfortunately the subject of endless litigation before us. Sivagnana, who was for many years

Pandarasannadhi or head of the Mutt, filed Original Suit No. 86 of 1906 in the Subordinate Court of Kumbakonam to set aside a deed of relinquishment, Exhibit S, executed by him in 1903 in favour of Manikkavasaka, the defendant in this suit, whom he had previously ordained and nominated as junior Pandarasannadhi with the right of succession according to the custom of the institution. Sivagnana died shortly after the institution of the suit and the present plaintiff sought to be brought on the record as his legal representative on the ground that the day before he died, Sivagnana had ordained him and executed a Will in his favour. It was held by the Subordinate Court, and by this Court on appeal, that the plaintiff in Original Suit No. 86 of 1906 called in question the right of the defendant to be junior Pandarasannadhi as well as his right to enjoyment of the Mutt properties under the deed of relinquishment, and it was accordingly ruled at the instance of the present plaintiff that the suit did not abate on Sivagnana's death, and under section 367 of the Civil Procedure Code, the Court stayed the suit and left the plaintiff to bring the present suit against Manikkavasaka to establish that he is the legal representative of the deceased Pandarasannadhi and so entitled to continue Original Suit No. 86 of 1906.

This suit necessarily involves the question whether the defendant Manikkavasaka had been lawfully appointed junior Pandarasannadhi, and also the further question whether he was lawfully removed during the lifetime of Sivagnana, as, if not, he and not the plaintiff is the legal representative of the deceased. Accordingly the pleadings and issues in this case cover much the same ground as the principal suit. During the pendency of this suit the defendant Manikkavasaka has also died after nominating and ordaining a successor who has been brought on the record as his legal representative, so that the contest is now between the plaintiff claiming as nominee of Sivagnana and the present respondent claiming as the nominee of Manikkavasaka.

The Subordinate Judge has dismissed the plaintiff's suit on two grounds, that

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

Manikkavasaka must be taken to have been validly appointed and not to have been removed and that he was consequently Sivagnana's legal representative, and *secondly*, on the ground that the plaintiff has failed to prove the Will and ordination on which he relies to establish his character of legal representative. Either of these findings is sufficient to dispose of the present suit.

As pointed out by the Subordinate Judge in his very careful judgment, this case is the last stage in a long dispute between the defendant and an opposing faction in the Mutt headed by one Somasundara Thambiran, who at one time belonged to the institution and subsequently became the head of the wealthy Tiruppanandal Mutt. These opponents of the defendant endeavoured in the first instance to prevent his nomination as junior Pandarasannadhi and afterwards to get that nomination revoked. In the course of the dispute we find Sivagnana a weak and feeble old man, embarrassed by the load of debts accumulated by his management, acting under the influence first of one side and then of the other.

We first find him ordaining and nominating the defendant on 22nd April 1900 (Exhibit XXIII), in spite of the pendency of a suit—subsequently dismissed—to prevent him from making the appointment, and then on 27th September 1900 giving a power-of-attorney to the defendant. On 19th June 1901 he cancelled the power by Exhibit MM which contained injurious charges against the defendant. The defendant on 2nd July 1901 by Exhibit UUUU surrendered the properties he had taken possession of under the power, and a few days later Sivagnana executed Exhibit X by which he withdrew the charges against the defendant contained in Exhibit MM. Two months later on 12th September 1901, he purported by Exhibit K to remove the defendant from the position of junior Pandarasannadhi on account of malversation and on vague charges of sexual immorality of which no particulars whatever were given. Thus challenged the defendant preferred a criminal complaint against him for defamation, and also filed a civil suit, Original Suit No.

74 of 1901, questioning his alleged dismissal. The next thing was that a compromise was arranged. The defamation case was withdrawn, and the suit was settled by a *razinamah*, Exhibit P2, in which it was recited that the defendant Sivagnana had on further enquiries ascertained that the accusations made against Manikkavasaka were groundless and that there were no reasons for dismissing him, and by which his right was recognised and it was further agreed that certain properties belonging to the Mutt should be handed over to him. On this a decree, Exhibit P1, was passed on 2nd January 1902 declaring him to be the junior Pandarasannadhi and the deed of dismissal to be null and void, and restraining Sivagnana from appointing any one else as junior Pandarasannadhi.

Eighteen months later on 7th June 1903, Sivagnana executed a deed of relinquishment, Exhibit S, by which he retired in favour of the defendant, and sometime afterwards made his way to Benares. He returned from Benares early in 1906 and went to stay with the defendant's enemy Somasundara at the Tiruppanandal Mutt, whence he sent the defendant on 12th May 1906 a notice, Exhibit T, of his intention to file a suit for declaration that Exhibit S was invalid and to recover the Mutt properties. A suit was subsequently filed as Original Suit No. 86 of 1906 for that purpose. It has been contended before us that Exhibit T amounted to a fresh dismissal of the defendant from the office of junior Pandarasannadhi, but we do not so read it. There is, however, oral evidence that on two occasions after his return Sivagnana purported to dismiss the defendant from this office also. Sivagnana died on the morning of the 1st December 1906, as alleged by the plaintiff, or on the evening of the 30th November as alleged by the defendant. According to the plaintiff's case Sivagnana conferred *abishekam* upon him on the 30th and also executed a Will, Exhibit W, nominating him as his successor, but the finding of the Subordinate Judge is that the alleged *abishekam* and Will have not been proved. This is a brief statement of the facts which are more fully set out in the judgment of the Subordinate Judge.

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

The fifth and sixth issues dealt with the validity of the defendant's original appointment, and with the question whether Sivagnana was entitled to dismiss him, referring to the first dismissal under Exhibit K.

It appears from a note made by the Subordinate Judge in his record of the evidence that it was arranged, probably at the suggestion of the defendant's Pleaders, that evidence on these issues should be reserved until after the disposal of issues Nos. 7 to 8 as to the compromise decree in Original Suit No. 74 of 1901 which, if found in favour of the defendant, would make issues Nos. 5 and 6 unnecessary.

It will be convenient to consider in the first place whether the compromise decree in Original Suit No. 74 of 1901 is valid and binding. As already stated, it was entered into after Sivagnana had purported to dismiss the defendant by Exhibit K and defendant had replied by filing a complaint for defamation and a suit to declare the alleged dismissal illegal. The Subordinate Judge has found that it was brought about after protracted negotiations and on the independent advice of persons who had the interests of the institution at heart, and not by means of any pressure or oppression on the part of the defendant. If Sivagnana was not in a position to justify the charges he had made against the defendant, it was eminently proper for him to withdraw them, instead of committing the Mutt to further ruinous litigation. I do not, however, consider it necessary to pursue the matter further, because, in my opinion, the consent decree in Original Suit No. 74 of 1901 was binding on Sivagnana and is also binding on the present plaintiff who claims through him and even if there had been any grounds for setting it aside by suit, such a suit became barred during the lifetime of Sivagnana. A consent decree is binding on the parties to the suit until it is set aside just as much as if it had been passed after contest. *Fatch Chand v. Narasingh Das* (1), citing *In re South American and Mexican Company, Ex parte Bank*

of England (2). The effect of the consent decree in Original Suit No. 74 of 1901 is to establish as against Sivagnana and those who like the present plaintiff claim through him that the defendant had been duly appointed junior Pandarasannadhi and continued to hold that office at the date of the decree. Consequently, unless he was subsequently removed, he was junior Pandarasannadhi at the death of Sivagnana and then became his legal representative and entitled to succeed to his office. As regards the alleged illegality in the compromise decree in so far as it restrains the plaintiff from removing the defendant in case of future misconduct, I do not think that this would be any ground for setting aside the decree altogether in a suit by Sivagnana for that purpose, for it does not affect the consideration obtained by Sivagnana for entering into the compromise. See also *Kearney v. Whitehaven Colliery Company* (3).

It is, however, found by the Subordinate Judge that after his return from Benares in 1906 Sivagnana purported to dismiss the defendant and it is contended that these dismissals were operative. To succeed in this contention it would be necessary for the plaintiff to get over the deed of relinquishment, Exhibit S, executed in 1903 by Sivagnana in favour of the defendant, which is attacked among other grounds ■ having been procured by coercion and undue influence and so liable to be set aside in the present suit. It is, however, unnecessary to consider this question because assuming that Sivagnana continued to hold the office of Pandarasannadhi after the execution of Exhibit S, and that ■ such he was empowered to dismiss the defendant, from the office of junior Pandarasannadhi, it is not shown that the defendant received any notice or was given any opportunity of answering the charges on which Sivagnana purported to dismiss him. It has been contended before us that the defendant only held office at the pleasure of the Pandarasannadhi and that consequently the latter was entitled to dismiss him

(2) (1895) 1 Ch. D. 37; 64 L. J. Ch. D. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131.

(3) (1893) 1 Q. B. 700; 62 L. J. M. C. 129; 4 R. 388; 68 L. T. 690; 41 W. R. 594; 57 J. P. 645.

(1) 16 Ind. Cas. 988; 22 C. L. J. 383.

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

without giving him any opportunity of being heard. The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts of this kind, and it is not shown that the Pandarasannadhi has any power of arbitrary dismissal, while on the other hand it has been held, in a previous suit relating to the institution that he may dismiss for good cause. In *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami* (4), where the question was whether a Pandarasannadhi forfeited his position as such by reason of lunacy, recourse was had to the analogies of the Canon Law, and applying those analogies to this case, the position of the junior Pandarasannadhi during the lifetime of the elder would appear to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for grave cause. When an office is held at pleasure the incumbent may be removed even on charges of misconduct without any opportunity of being heard, because he is removable at pleasure without any misconduct at all, but in all other cases, "the objection for want of notice", "in the language of an old case, "can never be got over. The laws of God and man both give the party an opportunity to make his defence if he has any." *Rev v. Chancellor, Masters and Scholars of the University of Cambridge* (5) and *Cooper v. Wandsworth Board of Works* (6). In *Willis v. Gipps* (7) the principle was applied to the case of a Colonial Judge who held office at the pleasure of the Crown but was also removable under a Statute by the Governor and Council of the Colony for neglect of duty or other misbehaviour, and it was held by the Judicial Committee that this order of amotion was bad because made without notice. It is not suggested in the present case that any notice was given to the defendant by Sivagnana of the charges on which he purported to dismiss him

after his return from Benares, and consequently such dismissal is wholly void and inoperative and the defendant, if he had not already succeeded by virtue of Exhibit S, remained the junior Pandarasannadhi and on Sivagnana's death was his legal representative and entitled to succeed him. This is sufficient to dispose of the present case, but as to the other part of the case I may say that after listening to the elaborate arguments which have been addressed to us I am not prepared to differ from the finding of the Subordinate Judge that the *abishekam* of the plaintiff and the alleged Will of Sivagnana in his favour have not been proved. The appeal is dismissed with costs.

Appeal No. 22 of 1911 and Civil Revision Petition No. 25 of 1911 follow and are dismissed with costs.

SESHAGIRI AIYAR, J.—In Original Suit No. 86 of 1906 Sivagnana Desika Gnana Sambanda sued for a declaration that Manikkavasaka Desika was not the Pandarasannadhi of the Dharmapuram Mutt and that the compromise entered into in Original Suit No. 74 of 1901 is not binding on him. Sivagnana died on the 1st of December 1906, while the original suit was pending. The present plaintiff claimed to have been nominated by Sivagnana as his successor and applied to be brought on the record as his legal representative to continue the suit against the defendant. Manikkavasaka, the defendant, pleaded that the suit abated with the death of Sivagnana and that plaintiff was not the legal representative of the deceased. On this application to be brought on the record the High Court, agreeing with the Court of first instance, directed the plaintiff to establish his claim as the legal representative in a regular suit. The present suit, Original Suit No. 53 of 1907, is the outcome of that order.

The plaintiff's case is that Sivagnana appointed him as his successor by a Will executed on the 30th of November and that the necessary ceremony of *abishekam* was performed on that day. He impeaches the validity of Manikkavasaka's nomination by the Will of Sivagnana on the 22nd of April 1900 on various grounds. He says that the Will was brought about in order to avoid a conviction for defamation and that it was cancelled by the later Will of the 12th September 1901. He

(4) 27 M. 435; 14 M. L. J. 105.

(5) (1723) 1 Str. 557; 8 Mod. 148; 93 E. R. 698.

(6) (1863) 14 C. B. (N. S.) 180; 32 L. J. C. P. 185; 9 Jur. (N. S.) 1155; 8 L. T. 278; 11 W. R. 646; 143 E. R. 414; 135 R. R. 643.

(7) (1846) 5 M. P. C. 379; 6 State Trials (N. S.) 311; 13 E. R. 379.

THIRUVAMBALA DESIKAR V. CHINNA PANDARAM.

further alleges that Manikavasaka was unfit to be a Pandarasannadhi in consequence of immorality and that Sivagnana validly revoked the nomination. As regards the compromise in Original Suit No. 74 of 1901, the plea was that it is *ultra vires* in that it restrained Sivagnana from making any further appointment and that it was beyond the power of a Pandarasannadhi to consent to the terms embodied in it. The relinquishment of the 7th June 1903 is attacked on the ground of undue influence. The plaintiff prays for a declaration that the defendant was not the lawful Pandarasannadhi of the Dharmapuram Mutt and for the recognition of his right to succeed Sivagnana.

The defendant (who died pending the appeal after nominating his successor who is the present respondent) traversed all the allegations and maintained that his nomination was proper and valid, that the *razinamah* was binding on Sivagnana and that the relinquishment clothed him with full rights even during the lifetime of Sivagnana.

Before discussing the various questions of law which have been very ably argued in the appeal, I shall deal with issues 3 and 3 (a) which relate to the plaintiff's nomination. The Subordinate Judge has dealt with this question at considerable length and although I am not prepared to agree with all the reasons given by him, I agree in the conclusion at which he has arrived.

The Will is said to have been made on the afternoon of the 30th November in Tiruppanandal, where Sivagnana had been living since his return from Benares six months ago. Sivagnana died on the morning of the 1st of December. The Will, Exhibit W, was not registered. Evidence has been let in to show that one Muthu Aiyar was asked at about 5 p. m. to go to Thiruvadamardur (8 miles from the place) to bring the Sub-Registrar. Muthu Aiyar went there only next morning with Exhibit SS. The Sub-Registrar learnt at about 7-30 that the testator was dead and therefore did not go to Tiruppanandal. The Will was apparently thought of on the 29th according to the plaintiff, and if that is true, it is impossible to believe that the Thumbrian of Tiruppanandal Mutt, who was helping Sivagnana, who was a gentleman of great influence, would not have sent a messenger to Thiruvadamardur early in the

day on the 30th to bring the Sub-Registrar. There is considerable force in the suggestion of Mr. Sadagopachariar that Exhibit SS was written to create evidence and not with the intention of procuring the attendance of the Sub-Registrar. Another circumstance is that the Will does not refer to *abishekam*, which according to the evidence preceded its execution. Mr. Sadagopachariar's suggestion that this important matter was left out because there was no *abishekam* and that the Will when got up did not, therefore, mention it, is entitled to weight.

A significant fact is that Somasundaram Thumbiran, the head of the Tiruppanandal Mutt, did not attest the Will. It was under his protection the testator lived. There can be no doubt that he was the man on whom Sivagnana relied for everything. If it was a genuine Will his failure to attest is not easily explainable. It is true that all the attesting witnesses have been examined in the case and support the Will. Almost all of them were under the influence of Somasundaram. No doubt at Tiruppanandal it is not easy to get witnesses who would not be beholden to the head of the Mutt in some way or other. At that same time too much stress should not be laid on the number of attestors and their consistency in supporting the Will. I do not think that the evidence of D. W. No. 2 is entitled to credit when it is not supported by his certificate, Exhibit XVII. I see no reason to think that the Sub-Assistant Surgeon was not speaking the truth. Even on that evidence I must say that the signatures in Exhibits SS and W do not satisfy me as those of the testator. They are not those of a person who had gone through the fatiguing ceremony of *abishekam* an hour earlier and who died the next day. I do not think it fair to compare these signatures with that in Exhibit XIII (c); because it is clear to my mind that Sivagnana was feigning illness at that time. The Subordinate Judge is apparently of opinion that the draft Will was itself a concoction. Although to my mind the language of the document shows that it was not the production of Mr. Ramasubbier, there are ample grounds for believing that this draft was in existence before the 29th of November. The pencil interlineations by Somasundaram show that he want-

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

ed the Will to contain a clause enabling the plaintiff to prosecute the suit. It was scored out. If it was a concoction after the 1st of December such an interlineation would not have taken place. Nor am I satisfied that Pleader Doraisami Pillai was not speaking the truth when he said that he had the Will on the evening of the 1st of December. What he says about what he heard before he started for Tiruppanandal must be due to lapse of memory. It is curious that the Will should have been handed over in such hot haste to Doraisami Pillai. I, however, see no reason to disbelieve his evidence. The Will was apparently brought into existence before Doraisami Pillai arrived and it was thought safer to entrust it to a respectable Pleader than to keep it at Tiruppanandal. On the broad facts of the case, I am not satisfied that the evidence adduced by the plaintiff is sufficient to establish the genuineness of the Will. I agree with the findings of the lower Court on these two issues. Even if the Will be true, if the plaintiff did not go through the ceremony of *abishekam*, he has no *locus standi*; for it is by that ritual, the nominee acquires the right to be installed as Pandarasannadhi. There is a considerable body of evidence on this question. To my mind the non-mention of it in Exhibit W is fatal to this part of the case. The entry of the expenses in the Mutt account does not carry the matter any further. I attach very little importance to what the Sub-Judge considers to be developments in the story; for after the cross-examination was directed to details, the plaintiff's legal adviser would naturally elicit those details in the examination-in-chief. I agree with the Subordinate Judge that the performance of *abishekam* has not been satisfactorily proved.

These findings would ordinarily be enough to dispose of the appeal, but as the right of the defendant has been strenuously attacked on various grounds, it is desirable to state our conclusions on the various points in controversy so that there may not be room for future litigation.

Mr. Srinivasa Aiyangar contended that in order to succeed in the suit all that need be shown by the plaintiff is that he acquired all the rights which Sivagnana was capable of conferring on his client, and that the

rights of the defendant need not be gone into in this litigation. I do not think that this contention is well founded. The plaintiff as legal representative must show that he has stepped into the shoes of the deceased with all the attributes which he claimed. It is open to the defendant to prove that the deceased had no rights to transmit. The right of representation is claimed with reference to an office, and it is undoubtedly within the competency of the defendant to show that the office was full and that there was no room for a successor. The learned Vakil's contention amounts to saying that the representation need only relate to all that the deceased was possessed of at the date of his death. This may or may not be the correct position to take where the deceased sued in his individual capacity. Probably in such cases, all that the applicant need show is that he is full heir to the party who is dead. But where the suit is brought in a representative capacity, the legal representative must show that the estate devolved on him. The estate in this connection is not the estate which the deceased had, but the estate which he represented, that is, the estate to which he laid claim. If there was no estate outstanding, there can be no legal representation. I realise that the effect of such a decision is to compel the person seeking to come in as a legal representative to prove the very matters in controversy in the main suit. I do not see much hardship in this. To hold otherwise would be to expose the defendant to attacks from persons who could establish no claim to the trust of which he is in possession. In my opinion, the import of the words in Order XXII, rule 3 (1), "where a sole plaintiff dies and the right to sue survives", shows that the applicant should be in a position to lay claim to the right which was agitated in the suit. Conversely the defendant can show that the person who seeks to continue the litigation had not acquired the right claimed, because that right was vested in himself. I am, therefore, of opinion that this objection fails.

In dealing with the right of the defendant, the first point on which Mr. Srinivasa Aiyangar laid great emphasis was that the position of a junior Pandarasannadhi is not

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

a free-hold office; but that it is a position held during the pleasure or will of the senior Pandarasannadhi, the appointer. I am not inclined to hold that it is a free-hold office in the sense in which the Subordinate Judge designates it. But I feel no doubt that the appointee does not hold it at the will or pleasure of the appointer. Under the Hindu Law the property of a hermit or an ascetic is inherited by the preceptor and after him by his disciple: Mitakshara, Chapter II, section 8. See also Yajnavalkya Smriti, Slokas 187, 188 and 191. In the cases of Mahants or heads of Mutts, the same rule would apply, although the precedence given to the preceptor is open to question. It is not well-established that the rule of succession among the Matadhipatis must be deduced from the usages of the Mutt. See *Greedharee Doss v. Nundokissore Doss Mohunt* (8) and *Ramalingam Pillai v. Vythilingam Pillai* (9). In the first of these two cases, their Lordships of the Judicial Committee inclined to the view that the ordinary mode of succession in Mutts is by appointment of the successor by the predecessor either by Will or by word of mouth. That is the practice in all the important Mutts in this Presidency. Now, the question is whether this power of appointment carries with it the absolute power of dismissal as was strenuously contended for by Mr. Srinivasa Aiyangar, or whether by the appointment a status is acquired by the appointee which is not lost unless removed for good cause. After listening to the very able argument of the learned Vakil for the appellant, I feel no hesitation in holding that the appointer has not the absolute power to dismiss which is claimed for him. Before dealing with the cases cited, I shall refer to what takes place on the nomination of a successor in this Mutt. Exhibit C, the plaint in Original Suit No. 21 of 1900, mentions in paragraph 4 the ceremonies that have to be gone through in selecting a successor and also those which the person selected has to undergo. The most important of these is the *abishekam*. The rites to be observed on this occasion are des-

cribed by the plaintiff — his 33rd witness. This may be taken to represent correctly what happens when a junior Pandarasannadhi is anointed. It is also in evidence that the senior Pandarasannadhi himself offers *pūja* to the junior, because by the *abishekam* the junior attains godhead. The *abishekam* enables the junior to initiate disciples himself. He performs separate *pūja* to gods Vignesvara and Subramania. He is called the Sadhaka Acharya, or co-adjutor with the senior. These being the attributes with which the junior is invested, I am unable to accede to the suggestion that he acquires no status and his position is dependent on the good will of the senior. To my mind, by these ceremonies the senior is instituting an heir to himself. It may be that the analogy of the adopted son would not apply in all particulars. I am willing to concede that the right of removing the junior for proved misconduct inheres in the senior. Otherwise a person once anointed must be retained even if he has proved himself utterly unfit to hold the religious office. But the grounds of removal must be such as would disentitle the senior himself to continue in office. Subject to this reservation I am of opinion that the person appointed under a Will and to whom *abishekam* has been performed becomes the heir-presumptive, entitled to succeed to the headship on the happening of a vacancy. Mr. Srinivasa Aiyangar relied strongly on *Sitapershad v. Thakur Dass* (10). In that case, the right of appointment vested in the incumbent in possession. The Mutt was a *moursee* Mutt, an incident of which was the right of selecting a successor vested in the Mahant for the time being. The report does not show that after the process of selection any ceremony was gone through by which the nominee became sanctified and competent to initiate disciples. Moreover, it was found in that case that the successor was found guilty of immoral conduct which led to his supersession. Mr. Justice Prinsep lays down too broadly, in my opinion, that the appointee holds his position "until the appointment has been declared to be a bad appointment and invalid." The learned Judge would give this right of

(8) 11 M. L. A. 405; 8 W. R. 25 (P. C.); 2 Suth. P. C. J. 86; 2 Sar. P. C. J. 306; 20 E. R. 154.

(9) 20 I. A. 150; 16 M. 490 (P. C.); 6 Sar. P. C. J. 351; 17 Ind. Jur. 578.

(10) 5 C. L. R. 73.

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

declaration absolutely to the appointer. The facts of the ■■■ before the learned Judge might have justified that view. But I am not prepared to accept it as a general rule of law governing succession in similar institutions. Reference is made among the cases cited in argument to ■ decision of Glover and Romesh Chunder Mitter, J.J., to the effect that the appointment cannot be cancelled. The decision has not been reported and is not available for reference. *Samarendra Chandra Deb v. Birendra Kishore Deb* (11) was next relied on. In that case it was found that the Tipera Raj was entitled to nominate his successor as Job Raj from among the members of the family. It was not denied that the person so nominated would succeed to the Raja if he survived him. But it was contended that as the right of succession was contingent upon the plaintiff surviving the reigning prince, ■ suit for declaration will not lie. There were other important questions raised in the case. The Full Bench, after deciding that the Calcutta Courts had no jurisdiction, held that the plaintiff was not entitled to a declaration. It is doubtful whether this decision is correct, having regard to the ruling of the Court of Appeal in England in the Law Times Reports and to the provisions of and illustration to section 42 of the Specific Relief Act. The Calcutta High Court accepted the principle of the previous decision in *Beer Chunder Manikkya v. Raj Umbar Nobodeep Chunder Deb Burmono* (12). However that may be, these decisions are not authorities for the position that a junior Pandarasannadhi has not ■ recognised status which he can protect when that status is denied. *Sellappaswamy v. Manikkaswamy* (13) was disposed of on the failure to plead the proper cause of action and is not a considered authority binding on us.

The English decisions to which our attention was drawn by the learned Vakil only lay down that the power to appoint carries with it the power to dismiss. That position is not denied here. The power, no doubt, can be exercised for good cause shown; and especially in religious institutions where the appoint-

ment carries with it a certain dignity and is construed by worshippers ■ implying sanctity of the person, it would lead to disastrous results to hold that the appointee is dependent for his position on the Will of the appointer. The attempts to show that the usage of the institution warrants the arrogation of such extraordinary powers has not been successful. The observation of the Subordinate Judge in Exhibit MMM does not find support in the appellate judgment, Exhibit A. Exhibits SSSS series only show that the junior Pandarasannadhi is subordinate to the Pandarasannadhi. I am clear that the usage of the institution does not justify the claim made on behalf of the appellant. On the other hand, there are numerous instances in this Presidency of the junior being regarded as the unquestionable successor to the office. The consciousness of the people is entirely opposed to the contention advanced in this behalf. This being my view, I do not consider it necessary to examine at any length the English decisions quoted by the appellant. In *Marquis of Abergareenny v. Bishop of Llandaff* (14) there was an absolute discretion given to the appointer. In *Reg. v. Manchester, Sheffield and Lincolnshire Railway Company* (15) the appointment was to be during the pleasure of the person appointing. On the other hand, it was held in *Wright v. Zelland Marquess* (16) appointees who held office during pleasure should not be removed without good cause. In a very elaborate judgment Bashyam Aiyangar, J., compares the position of the head of the Mutt to a Corporation Sole and says that "as in the case of a bishopric, perpetual succession in a Mutt is secured by the provision for nomination of a successor." Doubts have been cast upon certain *dicta* in this decision in relation to the rights of property possessed by the head of the Mutt, but I do not think the principle which is enunciated in this sentence has even been taken exception to. My conclusions on this point of the case are: (a) that the head of the Mutt is entitled to appoint a junior Pandarasannadhi, (b) that

(11) 35 C. 777; 8 C. L. J. 1; 12 C. W. N. 777; 4 M. L. T. 27.

(12) 9 C. 535 at p. 553; 12 C. L. R. 465.

(13) 11 Ind. Cas. 336; (1911) 1 M. W. N. 359.

(14) (1888) 20 Q. B. D. 460; 57 L. J. Q. B. 233; 58 L. T. 812; 36 W. R. 859.

(15) (1854) 4 El. & Bl. 88; 1 Jur. (N. S.) 419; 3 W. R. 591; 119 E. R. 35; 99 R. R. 562.

(16) (1908) 1 K. B. 63; 77 L. J. K. B. 152; 97 L. T. 867; 24 T. L. R. 48.

THIRUVANBALA DESIKAR v. CEINNA PANDARAM.

this junior has a recognised status, (c) that he is entitled to succeed to the headship, if he survives the appointer, (d) that for good cause shown he can be removed, (e) that the tenure of his position is not dependent upon the good will of the appointer and (f) that it is not open to the head of the Mutt to dismiss him arbitrarily.

The next branch of Mr. Srinivasa Aiyangar's argument was directed to showing that the appointer is the sole judge for ascertaining whether the appointee is guilty of conduct which disentitles him from continuing to hold on, and that Courts are not competent to scrutinise his reasons or to question his discretion. There have no doubt been cases where it has been held that the sufficiency of the reasons is not for the Court, *Hayman v. Governors of Rugby School* (17) and *Hill v. Reg.* (18). In another class of cases it was held that where a club or association is proprietary, dismissal from it need not be after enquiry, *Baird v. Wells* (19). It was contended that this Mutt was a voluntary association and that consequently the head of the association had plenary powers to expel a member including the junior Pandarasannadhi. I do not grant the premises. The origin of these Mutts has been explained elaborately by Sir Arthur Collins and Mnthusami Aiyar, J.J., in *Giyana Sambandha Pandara Sannadhi v. Kandusami Tambiran* (20). It is enough to state for the purpose of this case that they are not voluntary brotherhoods. They owed their existence in most cases to the piety of the ancient Rajas who founded Mutts to impart religious instruction; in some cases, the special sanctity of individuals was availed of by disciples to endow property to the institution founded in his name and honour. The fact that the Pandarasannadhi has a synod of Thambirans from whom he selects his successor, does not make the Mutt a voluntary association. They are not proprietary clubs in the sense in which Stirling, J., uses the

term in *Baird v. Wells* (19). *Green v. Hewell* (21) only construes the articles of the association ■ conferring unrestricted powers of expulsion. On the other hand, in *Willis v. Gipps* (7) the dismissal of ■ Judge without enquiry by the Colonial Governor, although the Judge held office only during the pleasure of the Queen, was held invalid by the Judicial Committee. The general principle is well established that no one who has a recognised status or office can be removed for misconduct without giving him an opportunity to show cause against his removal. I am, therefore, of opinion that the cancellation of the appointment is of no effect by itself. In this connection I cannot help expressing my regret that the Subordinate Judge should have declined to receive evidence on two of the issues in the case. In a case of such magnitude which engaged the attention of the Court for over six months, every part of the case should have been heard and adjudicated upon. However, I agree with the learned Chief Justice that this case can be disposed of on the materials on the record.

Closely connected with the argument that the defendant could have been removed by Sivagnana without notice was the contention that the defendant forfeited his rights by the various acts of misconduct alleged against him, Exhibit K. I am in agreement with Mr. Srinivasa Aiyangar that if the head of the Mutt or the junior is proved to be living an immoral life, he is liable to be removed. There can be no condonation of such an offence as in the case of breach of trust by trustees, where it has sometimes been held that the full leach should be given an opportunity to mend his ways before bringing in an empty leach to feed on the trust resources. Celibacy and a scrupulous avoidance of sexual indulgences are of the essence of the position held by these persons. Devotees of both sexes resort for initiation to them and it would cut at the root of the whole system, if the heads of the Mutts are permitted to live profligate lives. In the *Narada Smrithi*, it is stated "*raja eva hi dazah sayat khalah prabrajato api san*". This power possessed by the king is delegated to the

(17) (1874) 18 Eq. 28; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587.

(18) (1854) 8 M. P. C. 138; 14 E.R. 53; 97 R. R. 39.

(19) (1890) 44 Ch. D. 661; 59 L. J. Ch. 673; 63 L. T. 312; 39 W. R. 61.

(20) 10 M. 375.

(21) (1910) 1 Ch. 495; 79 L. J. Ch. 549; 102 L. T. 347.

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM.

Courts: and when a clear case is made out that a religious ascetic who ought to set an example of sexual purity is leading an immoral life, the Courts will find no difficulty in dismissing him from office. But it does not follow that suspected immorality entails forfeiture. This would lead to complications and would encourage baseless insinuations. Until the accusation is openly made and found, the incumbent should not be disturbed from his office. The learned Vakil has quoted no authority for the extreme contention that a forfeiture is incurred by an ascetic's (suspected?) immoral conduct.

I agree with the Subordinate Judge that the relinquishment by Sivagnana did not deprive him of his religious office. I understand Exhibit S in the same way as he does. Moreover I am not satisfied that Sivagnana was a free agent at the time of the release.

The real point on which the defendant's right rests is the compromise evidenced by Exhibits P1 and 2. The facts leading up to the compromise are fully stated by the Subordinate Judge. The learned Judge in one place seems to suggest that the pendency of the criminal prosecution for defamation against Sivagnana was one of the factors which led to the compromise. The evidence of Mr. Krishnaswami Aiyangar, which I see no reason to disbelieve, makes it clear that Sivagnana was harassed in all ways, that he was an imprudent manager, had incurred heavy debts, found it impossible to carry on his religious and secular duties owing to the number of claims made against him and that he sought relief from all this worry by making the defendant the virtual manager of the institution. He had competent advisers and influential adherents. I do not believe that the defamation case in any way affected the compromise. After all it was a compoundable criminal offence. I do not agree with the contention that the compromise was vitiated by any agreement to stifle prosecution. The next contention of Mr. Srinivasa Aiyangar is that as the compromise decree included an injunction restraining Sivagnana from making an appointment of a junior Pandarasannadhi under conceivable circumstances, the decree is invalid altogether. It is true that the last clause is bad. As

I have said already, the defendant was liable to be removed for good cause shown against him or he might die in the lifetime of the head of the Mutt. Therefore it was not competent to the Subordinate Judge to grant an injunction permanently depriving Sivagnana of the exercise of his power of making a fresh appointment. But, in my opinion, this portion of the decree is severable from the anterior portion. The first part of it confers a right on the defendant; the second part enforces an illegal disability. The two are not so mixed up as to be inseparable. The true principle applicable to mixed stipulations of this nature has been thus stated by Lord Esher in *Kearney v. Whitehaven Colliery Company* (3), to which Mr. Sadagopachariar drew our attention: "If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration; then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration. That rule of law has long been acted upon, and it was applied by the House of Lords in the *Netherseal Colliery Co. v. Bourne* (22)." See also *Newman v. Newman* (23). Section 24 of the Contract Act is not against this view. I am, therefore, of opinion that the portion of the decree enjoining Sivagnana not to make any appointment at all can be severed from that portion of it which recognises the defendant's appointment. We have next to see whether, as contended before us, Sivagnana was not competent to enter into this compromise. The objection is

(22) (1888) 20 Q. B. D. 606; on appeal 14 A. C. 228; 59 L. J. Q. B. 66; 61 L. T. 125; 54 J. P. 84.

(23) (1815) 4 M. & S. 66; 105 E. R. 759; 1 Stark 101; 16 R. R. 386.

THIRUVAMBALA DESIKAR v. CHINNA PANDARAM

based on the ground that as the head of the Mutt sues or is sued on behalf of the trust, he has no power to accept a compromise to the prejudice of the institution. Before dealing with the law bearing on the subject, it may be stated that in my view the compromise did not affect the usage of the institution in any way. By the compromise Sivagnana was only recognising a person who was entitled to succeed, had there been no aspersions on his character. Sivagnana in the compromise withdrew from the position of antagonism which he had taken up against the defendant. He was apparently advised that there was no justification for his attitude towards the defendant; and the compromise decree was only an act of reparation.

In *Giyana Sambandha Pandura Sannadhi v. Kandasami Tambiran* (20) a compromise regulating the course of succession to the Mutt was recognised, as it was in consonance with the usages of the institution. Mr. Sadagopachariar also quoted *Nilakandhen Nambulripad v. Padmanabha Ravi Varma* (24) in support of this position. In the Kamudi case, *Sankaralinga Nadan v. Rajeswara Dorai* (25), the compromise by the Rajah of Ramnad was distinctly against the usage of the institution and in the teeth of the decree recognising the usage. There are no English cases directly in point. It was held in *Attorney-General v. Landersfield* (26) that "an agreement between the next-of-kin and the governor of the charity to share the estate in a particular proportion should be given effect to by the Court." In Tudor's Charitable Trusts numerous authorities are cited for the position that questions relating to the interests of a charity may be compromised (see page 378).

In all such cases, the matter will be brought to the notice of the Court and its sanction will be obtained for the compromise. I do not see why the same principle should not be applied to the present case. It was said that the mere acceptance of a compromise by the Court is not proof of its sanction, and the case of minors was instanced. In the

case of infants, there is a statutory prohibition and a direction to observe certain formalities. It is not analogous to this case. Reliance was mainly placed upon the authorities which lay down that a trustee should not transfer his office to persons in the immediate line of succession. In Madras, although there is a course of decisions sounding that way, Mr. Justice Bashyam Aiyangar in *Ramanathan Chetty v. Murugappa Chetty* (27) was not prepared to regard it as settled law. The Bombay High Court has taken a different view. It is not necessary in this case to express any opinion on this question. I am of opinion that these cases afford us no guidance. The alienation of the office of trustee in most of the cases quoted before us was vitiated by considerations personal to the parties concerned. But where the object of the agreement is to recognise the usage of the institution and to accept the validity of an appointment which but for the conduct of Sivagnana would have in the ordinary course of events given the defendant the right which was secured to him by the decree, I see no reason for holding that the decree based on such an agreement is illegal. I do not, therefore, think it necessary to examine the cases quoted by Mr. Srinivasa Aiyangar.

Mr. Sadagopachariar argued that the compromise was binding on the parties until it was set aside and as Sivagnana died before that happened, his rights were unaffected by the suit. It was held in *Great North-West Central Railway v. Charlebois* (28) that the decree based on compromise was of no greater validity than the contract. If the observations in *Kumara Venkata Perumal v. Thatha Ramasawmy Chetty* (29) are against the view, I am not prepared to follow them. At the same time, it is well settled that until the decree based on the compromise is recalled, it is binding on the parties to the suit. Lord Esher in *The Belcairn* (30) says: "I agree with Batt, J., that

(24) 18 M. 1; 4 M. L. J. 233; 21 L. A. 128; 6 Sar. P. C. J. 478.

(25) 31 M. 236; 12 C. W. N. 946; 4 M. L. J. 101; 8 C. L. J. 220; 10 Bom. L. R. 781 (P. C.); 35 L. A. 176.

(26) (1743) 9 Mod. 286; 28 E. R. 456.

(27) 27 M. 192 at p. 196; 13 M. L. J. 241.

(28) (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35.

(29) 9 Ind. Cns. 875; 35 M. 75; 21 M. L. J. 709; (1911) 1 M. W. N. 290; 9 M. L. T. 487.

(30) (1855) 10 P. D. 161; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503.

JATINDRA NATH BASU v. PEYER DEYE DEBI.

when at ■ trial the Court gives judgment by the consent of the parties, it is a binding judgment of the Court and cannot be set aside by a subsequent agreement between the solicitors." I take the reason of the rule to be that although the force of ■ consent decree is derived from the *consensus ad idem* of the parties, it having received additional validity by being accepted by the Court, it cannot be set aside by the consent of the parties as any other contract could have been, but can only be vacated by the Court by a proper proceeding in that behalf. The Court of appeal in *In re South American and Mexican Company, Ex parte Bank of England* (2) affirmed the principle stated in *The Belcairn* (30). It follows, therefore, that until and unless the compromised decree was set aside, Sivagnana was bound by it and the defendant was entitled to the benefit secured to him under it. I agree with the Subordinate Judge in holding that the compromise is binding on Sivagnana.

The result of the above conclusions is that at the time that Sivagnana made the Will and had *abishekam* performed on the plaintiff, the position of the junior Pandarasannadhi was not vacant and consequently he had no power to appoint the plaintiff to it. I have, of course, assumed that the Will was made and that the *abishekam* was performed. I have given my reasons already for not believing the story in that behalf. The plaintiff is not, therefore, the legal representative of Sivagnana. The appeal fails and must be dismissed with costs.

Appeal No. 22 of 1911 and C. R. P. No. 25 of 1911 follow.

Appeals and revision petition dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.
March 28, 1916.

Present:—Lord Shaw, Sir John Edge and
Sir Lawrence Jenkins.

JATINDRA NATH BASU AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Srimati PEYER DEYE DEBI AND
OTHERS—PLAINTIFFS—RESPONDENTS.
Specific performance, object of—Agreement for pur-

chase of mortgage decree—Suit to enforce agreement—Decree barred on date of suit—Specific performance, whether should be decreed.

The expression 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed [p. 70, col. 2.]

Wolverhampton and Walsall Railway Company v. London and North Western Railway Company, (1873) 16 Eq. 433; 43 L. J. Ch. 131, referred to.

A suit for the specific performance of an agreement to purchase a mortgage-deed will not be decreed against the purchaser if, at the date of suit, the decree agreed to be purchased is barred, and, therefore, incapable of assignment. [p. 71, col. 1.]

Appeal from a judgment and decree of the High Court, Calcutta, dated March 1st, 1909, reversing those of the same Court in its Ordinary Civil Jurisdiction, dated April 6th, 1908.

FACTS.—The material facts are stated in their Lordships' judgment.

Mr. De Gruyther, K. C., and Sir William Garth, for the Appellants.—The executors did nothing to keep the decree alive and they alone could have done so. For specific relief the contract must be incapable of being compensated.

[SIR JOHN EDGE: Under the Indian Contract Act the property vests when there is a contract to sell.]

[LORD SHAW: Statutes in India are based upon different principles.]

[SIR LAWRENCE JENKINS: The Trusts Act does not apply to Bengal.]

The Indian Contract Act is quoted against us; but in the case lodged by the respondents it was not specified. If the decree was an immoveable property, then section 54 of the Transfer of Property Act applied and a registered deed was necessary for the transfer. If, on the other hand, it was a moveable property, a chose in action under section 131 of the Transfer of Property Act, then by the Contract Act property therein would not pass until notice in writing was given to the debtor, etc. If it was regarded as a moveable property in goods, then no property in it could pass without an assignment as required by section 233 of the Civil Procedure Code, 1882.

JATINDRA NATH BASU v. PEYER DEYE DEBI.

Reference was made to Lewin on Trusts (1911), pages 161-162, *Lysaght v. Edwards* (1); *Wood v. Griffith* (2).

Sir E. Richards, K. C., and Mr. Dunne, for the Respondents.

[LORD SHAW: We are satisfied that there was an agreement to sell; but what was the effect of that agreement?]

There is on our side an agreement to sell without an assignment. The point is whether events since the agreement would justify payment of the decretal amount. There were circumstances to justify specific relief. The appellant, who was a Pleader, knew the value of the property.

[LORD SHAW: The whole thing is the question of law. We want to know why the assignment was not completed?]

The action was brought under the Specific Relief Act of 1877, sections 13, 14 and 19, and section 50 of the Indian Contract Act of 1872. In equity the appellant was a purchaser of our decree and security. If there had been execution proceedings on our part we would have been estopped on the ground that he was the owner of the property. He was the beneficial owner of our property and the purchase had destroyed our right to redeem.

Reference was made to *Trailokya Nath Bose v. Jyoti Prakash Nandi* (3); *Rayner v. Preston* (4).

Mr. De Greyther, K. C., in reply referred to *Mulraj Khatau v. Vishwanath Prabhuram Vaidya* (5).

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from the decree, dated the 1st March 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April 1908, of Mr. Justice Chitty, who had tried the suit under the original jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June 1895, by which

(1) 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778.

(2) 1 Jacob & Walker 36 at p. 37; 37 E. R. 16; 1 Swans. 43.

(3) 8 C. W. N. 251; 30 C. 761.

(4) 14 Ch. D. 297; affirmed in 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 45 J. P. 829; 29 W. R. 546.

(5) 17 Ind. Cas. 627; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 37 B. 198; 40 A. A. 24.

the original defendant Trailokya Nath Bhowse, now deceased, had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandey for the price of Rs. 19,000 a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July 1893 against Pandit Nrisingha Prokash Misra on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bose was a decree for sale of certain immoveable hypothecated properties, which could also in certain events be executed against the person and other property of the defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June 1898, and thereupon Trailokya Nath Bose refused to pay the agreed price and to take an assignment of the decree, hence this suit for specific performance.

The agreement of which it is sought to obtain specific performance was an executory agreement, for the completion of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the 31st June 1895, they were intended to be placed. As was pointed out by Lord Selborne, L. C., in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company* (6), "the expression 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bose of the agreed price, the transference to him of the decree for sale of the 17th July 1893. Such a transfer of the decree to Trailokya

(6) (1873) 16 Eq. 433; 43 L. J. Ch. 131.

MAUNG SHWE GYAW v. MA SHWE THET.

Nath Bose could, by reason of section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June 1898, the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bose. It had become a dead decree whereas the decree, whatever might be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

It has been contended on behalf of the respondents to this appeal that it was the duty of Trailokya Nath Bose, and was not the duty of the executors, to keep the decree alive after the 21st June 1895. That is a contention which, in their Lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bose, he could not by any application to the Court have kept the decree alive.

The respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The plaintiffs-respondents must pay the costs of this appeal.

Appeal allowed.

Solicitor for the Appellants: Mr. G. C. Farr.

Solicitors for the Respondents: Messrs. Watkins & Hunter.

LOWER BURMA CHIEF COURT.
SPECIAL, SECOND CIVIL APPEAL No. 221
OF 1915.

February 17, 1916.

Present:—Mr. Justice Maung Kim.

MAUNG SHWE GYAW—DEFENDANT No. 2
—APPELLANT

versus

MA SHWE THET—PLAINTIFF—
RESPONDENT.

Estoppel—Landlord and tenant—Co-sharer, lease from

—Suit for rent—Tenant estopped from disputing right of co-sharer to receive rent.

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or to sue in ejectment. [p. 72, col. 1.]

Jamsedji Sorabji v. Lakshmiram Rajaram, 13 B. 323, referred to and followed.

Mr. Fagan, for the Appellant.

Mr. B. Dun, for the Respondent.

JUDGMENT.—This was a suit for the recovery of 140 baskets of paddy or their value, Rs. 128-8, alleged to be due for rent of a piece of paddy land.

The plaintiff is Ma Shwe Thet. The defendants are two in number. The 1st is Ma Shwe Thaung and the 2nd, Ma Shwe Gyaw.

The plaintiff alleged that she let out the land in suit to the 1st defendant, and that the 2nd defendant was added, as the first said that he had paid the rent to him.

It appears that the plaintiff and the 2nd defendant were at one time husband and wife and that the plaintiff's case was that there had been a divorce between them followed by a partition of the property, the land in suit, among other property, falling to her share.

The 2nd defendant denied the alleged divorce and partition. He alleged that he let out the land to the 1st defendant, claimed the right to receive the rent, and admitted the receipt of it from the 1st defendant.

The 1st defendant denied hiring the land from the plaintiff, said that he did so from the 2nd defendant and pleaded that he had paid him and was, therefore, no further liable.

The Court of first instance held that the 1st defendant hired the land from the plaintiff but that there had been no divorce. That being the case, the opinion of that Court was the husband had the right to receive the rent and as he had admittedly received it from the 1st defendant, the suit should be dismissed.

The Additional Judge of the District Court on appeal held that there was a divorce between the plaintiff and 2nd defendant and that the 1st defendant hired the land from the plaintiff, and would have to pay her the rent and could not dispute her right to receive it. This he held on the authority of

RAI CHARAN C. KANAI KAMAR.

Jamsedji Sorabji v. Lakshmiram Rajaram (1), where it was held that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or to sue in ejectment. The learned Judge then proceeded to pass a decree against both the defendants.

The 2nd defendant alone has appealed to this Court. The grounds are (1) that the District Court was wrong in holding that there was a divorce and (2) that the judgment of that Court was wrong in law.

I do not think that the Additional Judge of the District Court was right in holding that there was a divorce. The evidence upon which the plaintiff placed great reliance was that of Ko U. If his evidence is true, there could have been no mutual divorce, although a partition or disposition of property may be held to have taken place. He says that the 2nd defendant said: "Do not say (*lit. do*) divorce or no divorce. Ma Shwe Thet will take and enjoy five pieces of land. The daughter will take and enjoy six."

But the learned Judge was quite right in holding on the Bombay authority above cited that the 1st defendant hired the land from the plaintiff and that to her he was bound to pay the rent due.

The 2nd ground of appeal is not clear. Nor was it explained at the hearing.

But in the course of my deliberations upon the case, the point has occurred to me whether the plaintiff has a cause of action against the 2nd defendant, the present appellant. And I have now heard both the Advocates. They admit that in the view I take of the nature of the case, the 2nd defendant was not a necessary party as there would be no cause of action against him. The appeal is allowed and the suit is dismissed as against the appellant with costs in all the Courts.

Appeal allowed.

(1) 13 B. 323.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1226
OF 1914.

April 4, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir John Woodroffe, Kt.

RAI CHARAN MAHANTI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

KANAI KAMAR AND OTHERS—DEFENDANTS
—RESPONDENTS.

Lease, construction of—Lessees to enjoy phal phul of trees—Reservation of lessor's right to ownership in trees—License, whether includes right to grow shellac—Circumstances at date of lease, enquiry into.

A lease executed by plaintiffs to defendants provided *inter alia* that the lessees were to enjoy the phal phul of the trees, and the lessors were to have *khas* possession of the same. It was proved that, from before the date of the lease, the lessees grew shellac upon the trees and enjoyed the results thereof. In a suit by plaintiffs for restraining defendants from interfering with their right to cultivate shellac:

Held, that the license to enjoy *phal phul* included the growing of shellac on the trees and that plaintiffs were not entitled to the injunction. [p. 74, col. 1; p. 75, col. 1.]

Per Sanderson, C. J.—The expression '*phal phul*' (fruits and flowers) of the trees would, in the ordinary meaning of the words, include the natural products of the trees only, and *prima facie* the artificial cultivation of lac would not be included in the terms of the license. The circumstances, however, existing at the date of the lease should be looked at for the purpose of construing the words, and, so viewed, the words may have been intended to have a wider meaning than the English words 'fruits and flowers.' [p. 73, col. 2; p. 74, col. 1.]

Per Woodroffe, J.—On the construction of the lease itself, the expression *phal phul* would include produce of the trees other than the particular flowers and fruits of the trees itself. And the plaintiff is not entitled to the injunction as the lease did not reserve to the landlord the right of cultivation claimed, and the reservation of the trees is not a reservation of such right to cultivation. [p. 74, col. 2; p. 75, col. 1.]

Appeal against the decree of the District Judge of Bankura, dated the 10th February 1914, modifying that of the Munsif of Khatra, dated the 20th January 1913.

Babu Bepin Behary Ghose and Babu Bankim Chandra Mukerjee, for the Appellants.

Babu Samatul Chandra Dutt for Babu Saroshi Charan Mitra, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—The facts of this case are that the plaintiffs purchased at an auction-sale, held under a decree which had been obtained against the defendants, the

RAI CHARAN V. KANAI KAMAR.

mocurari tenant right of the village of Jhilimili.

The defendants Nos. 1 to 3 and another are tenants of the plaintiffs under a lease granted by the plaintiffs, dated 14th April 1892, in respect of the lands in the village, except 30 *bighas* of lands which the plaintiffs "kept in *khas*" and the trees hereinafter referred to. The defendants Nos. 4 to 6 are sub-tenants of defendants Nos. 1 to 3. In the action the plaintiffs ask for a declaration that the right of the plaintiffs as stated in the plaint may be declared in the trees in the land described in schedule (*ka*) in the plaint which, as I understand, include all the trees on the land demised by the plaintiffs, and for a permanent injunction restraining the defendants from opposing the plaintiffs in any way in their possession of the aforesaid trees and for a decree awarding Rs. 156, the value of lac grown on 13 trees.

As regards the last mentioned claim which was in the nature of damages, it was admitted by the learned Vakil for the appellants that the matter was not open to him as the lower Appellate Court had found against the plaintiffs on a question of fact.

The claim for the declaration and injunction, therefore, remained.

The plaintiffs wish to cultivate lac on the trees in question and allege that the defendants are threatening to oppose them in their possession of the trees in the *mouzah*. The lower Appellate Court has held that they are entitled to nothing more than a bare declaration of right in the trees and they are not entitled to *khas* possession or to a perpetual injunction against the defendants.

The question primarily depends upon the terms of the lease.

The lease, after providing that the plaintiffs have settled all the remaining lands on the lessees at an annual rent of Rs. 125 and that the lessees should enjoy the aforesaid lands in *jote* by tilling and cultivating it themselves and through their tenants, proceeded as follows:—

"Be it expressed here that all trees, large and small, that stand on the aforesaid land and that may grow in future belong to you (*i.e.*, the plaintiffs for the purpose of this case) in *khas*. We (*i.e.*, for the purpose of this case the defendants Nos. 1 to 3) shall be able to enjoy the fruits and flowers of the said trees only at your permission but on no account we shall be able to take the trees."

The original of this part of the *kabuliat*, and what I understand is a correct literal translation, are to be found at page 10 of the paper-book in the judgment of the learned Munsif. The effect of this clause, in my judgment, is to exclude the trees from the lease and that such trees remained in the *khas* possession of the plaintiffs; the lessees, however, being granted a license to enjoy the fruits and flowers of the said trees at the permission of the plaintiffs.

The first question which arises is whether such a license to enjoy the fruits and flowers of the said trees would include the right to carry on the artificial cultivation of lac on the trees and enjoy the results thereof.

Prima facie in my judgment this would clearly not be included in the license. 'Fruits and flowers' of the trees would in the ordinary meaning of the words include the natural products of the trees only; but it is argued that the circumstances existing at the date of the lease must be looked at for the purpose of construing the words.

The lower Appellate Court has found "from the evidence that the Santhals had been growing lac from before the date of the *kabuliat* on those trees" and that the words *phal phul*, in the absence of express reservation, embraced the taking of the produce of the trees generally and so included the growing of lac on the trees.

This Court is not in a position to review this finding of fact as long as there was evidence on which the lower Appellate Court could act, and I am not aware that it has been suggested that there was not such evidence. In view of this finding of fact, it must be taken that the parties to the

RAI CHARAN U. KANAI KAMAR.

lease were aware of the existence of the cultivation of lac upon the trees by the defendants or their tenants at the date of the lease, and consequently I think it is possible that the words *phal phul* may have been intended to have a wider application than the English words "flowers and fruits," and accordingly I am not prepared to dissent from the decision of the lower Appellate Court. I express no opinion as to whether the license above referred to is a revocable or irrevocable license, as the point has not been raised or argued before us.

In view of this conclusion it is not necessary to deal with the other points raised by the defendants; and I think the appeal should be dismissed with costs.

WOODROFFE, J.—The suit of the plaintiff is, when substantially regarded, a suit for an injunction restraining the defendants from interfering with his alleged right to cultivate shellac on trees standing on ground leased to the defendants, but the ownership of which trees was declared by the lease to be in the lessor subject to the right of the lessees to *phal* and *phul* in respect thereof. The grounds of the injunction are that the plaintiff cultivated lac on certain of the trees which was appropriated by the defendants. This has been found not to be the fact. But it is also alleged that the defendants threaten to oppose the plaintiff's alleged right in respect of other trees of the *mouza*. Formally, therefore, a case for an injunction is made out if the right claimed is established. This is on various grounds. The matter has previously been before four Courts which have decided favourably to the defendants, and the District Judge has found that the appellant before us, the plaintiff, having been punished for his attempt to break the lac grown by the Santhal defendants, has shifted his ground and set up a false story of having himself grown lac on other trees of the appellant's tenancy. He finds, and I think these facts are relevant to the matter before us, that the landlord did not grow lac as he claims to do, and that the defendants have grown lac for over 12 years and had been growing lac before the date of the *kabuliat* to the plaintiff. In construing the *kabuliat* it is permissible to look at

the circumstances under which it was executed. It has been found that the Santhals have been living throughout on cultivation and the produce of the forest, of which the plaintiff must be taken to have been aware. The good land was kept *khas* by the plaintiff and the defendants were set to reclaim the rest including the jungle land. According to the plaintiff they may not remove trees, large or small, and, therefore, the scope of the reclamation of the forest land is to that extent limited. At the same time he says they are not to live on the produce of the forest except the flowers and fruits of the trees, in the strict sense, which are of little value. They are not entitled, it is alleged, in particular to cultivate shellac or to take wild shellac and must permit him to do both. The Judge finds that the plaintiffs who are rich men were mere rent-receivers and the cultivating interest was made over to the defendants, subject to the terms of the lease. I would determine this question upon a construction of the lease only. I am not prepared to disagree from the view that *phal* and *phul* would include produce of the trees other than the particular flowers and fruits of the trees itself. This is the view of the District Judge and of the first Munsif who tried the case. The second Munsif was of opinion that *phal* and *phul* did not include cultivation of shellac, but he left open the nature of the license to take *phal* and *phul*: for instance, whether that included the right to take fire-wood, thus showing that in his opinion also it is possible that the word *phal* has wider meaning than that sought to be attached to it by the appellant. If this view taken by the Judge be the correct interpretation of these words, then shellac would be *phal*. But it is not necessary to base the case on this, for in the view I take, a transfer of property passes to the transferee the interest of the transferor, unless a different intention is expressed or necessarily implied. Now what was it that the lessor reserved? There is no doubt that the property in the trees was reserved, and the lessees were prohibited from taking them away. The exact terms of the lease are "all trees, large and

RAJA RAM SAHU v. JHANTI GOPE.

small, belong to you in *khas*," "we shall not be able to take them away." "We shall be able to enjoy the *phal phul* of the trees only at your permission." There is nothing unusual in this reservation of the trees. The lease means what it says, namely, that the trees themselves remain the property of the lessor notwithstanding the lease and, therefore, cannot be taken away. It does not say, and in my opinion does not mean, that the landlord was entitled to come on the land to pursue a regular course of cultivation of shellac on the property he had leased to the defendants. If this had been originally intended it would probably have been inserted in the lease, for, according to the evidence, from before that date lac had been cultivated by the Santhals: nor should we expect to find, as the District Judge finds, that there has been no user of the alleged right by the plaintiff-landlord and a user by the tenants for over 12 years. It is not improbable, therefore, that the claim now set up is an afterthought, when it was discovered that the tenants were making some profit from the shellac in the jungle. On the ground, therefore, that the lease did not reserve to the landlord the right of cultivation claimed, and that the reservation of the trees is not a reservation of such right to cultivation, I hold that the Judge is right in determining that the plaintiffs have not established the right claimed in the trees reserved. This ownership does not carry with it a right to go on the tenants' land to cultivate shellac on the trees reserved. It follows that the plaintiffs are not entitled to the injunction claimed. It is not necessary to determine the other points raised, in particular that of limitation or adverse possession or that which is said to arise under section 178 and other sections of the Bengal Tenancy Act. I would, therefore, affirm the decree of the District Judge and dismiss this appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2371 OF 1914.

April 17, 1916.

Present:—Mr. Justice Mullick.

RAJA RAM SAHU AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

JHANTI GOPE AND OTHERS—DEFENDANTS—
RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), as amended by Bengal Act I of 1907, s. 22—Landlord and tenant—Landlord's purchase of occupancy holding—Co-sharer landlords—Purchasing landlord, when can preserve non-occupancy rights.

The purchase by a landlord of an occupancy holding prior to 1908 is governed by the Bengal Tenancy Act VIII of 1885. [p. 76, col. 1.]

If the purchase was made by a co-sharer landlord on behalf of the other sharers, the whole tenancy is merged and the purchasing landlord cannot be heard to say that the non-occupancy right still subsists. In the case, however, of a purchase by a co-sharer landlord individually, the non-occupancy right can be kept alive by the purchaser. [p. 76, cols. 1 & 2.]

Ram Saran v. Mohomed Latif, 3 C. W. N. 62, followed.

Miajan v. Minnat Ali, 24 C. 521, explained.

Mr. Naresh Chandra Sinha, for the Appellants.

Mr. Laemi Narayan Sinha, for the Respondents.

JUDGMENT.—In the Record of Rights the land in suit has been entered as the holding of one Munshi, and the first party defendants have been entered as under-*rai-yats*. Plaintiffs are purchasers in execution of a decree against Munshi and sue, after service of notice, for ejectment under section 49 of the Bengal Tenancy Act. The lower Appellate Court has held that the first party defendants are not under-*rai-yats* but occupancy *rai-yats*, having been in possession of the land as such since 1888 when they obtained a settlement from Sanath Chowdhury, the proprietor, by a registered *kabuliyat*. The present second appeal has been made by the plaintiffs because their suit has been dismissed.

The learned Judge's finding that the defendants have been in possession as *rai-yats* under the landlord rebuts the presumption of the correctness of the Record of Rights and, therefore, the onus is shifted upon the plaintiffs to show that they have a title superior to that of the defendants. Now, the plaintiffs rely upon the title of Munshi and alleges that Munshi was a co-sharer landlord and that he purchased the occupancy

SURENDRA NARAIN V. JAGAL KISHORE GHOSE.

right of the original tenant Phatka Chamar. They contend that although by Munshi's purchase the occupancy right was merged, the non-occupancy right continued to subsist under section 22 (2) of Act VIII of 1885, which was the law applicable to the present case, and that, although under the present law, which amended Act VIII of 1885 in 1908, the learned District Judge's decision would be right, under the law as it stood at the time of Munshi's alleged purchase the learned Judge's decision is wrong. I think it is clear that the Tenancy Act as it stood before 1908 must be applied to the present case. But before the plaintiffs can succeed they must show that Munshi's purchase was previous to 1888, in view of the finding of the learned District Judge that the defendants have been tenants paying rent to Sanath Chowdhury since that date. The learned District Judge does not record any finding as to the date of Munshi's purchase. He does not even find whether the purchase was actually made, and it would seem that, as the purchase was admitted to have been made by a registered *kabala*, oral evidence of the purchase is not admissible. The *kabala* itself has not been produced and no reason has been assigned for the admission of secondary evidence.

Upon the findings, I must take it that the fact of the purchase has not been proved; much less has it been proved that the purchase, if made at all, was in Munshi's capacity as co-sharer. Clearly, if the purchase was made on behalf of all the landlords, the whole tenancy merged even under the Act as it stood before 1908. The learned Vakil for the appellants relies upon section 22 (1) of Act VIII of 1885 and contends that upon the language of that section, the entire body of the landlords were competent to keep alive the non-occupancy right in Phatka's holding. He relies upon the case of *Miajan v. Minnat Ali* (1). But the decision in that case did not rest upon the interpretation which the learned Vakil now desires to give to section 22 (1). Although the Judges there expressed an opinion that the non-occupancy right would continue to subsist, they held that it was not necessary to decide that point, because the plaintiff in the suit before them might be considered to have derived his title from the landlord by

(1) 24 C. 521.

the creation of a new tenancy by fresh settlement. They thought that the landlord was competent either to dispose of the old holding under its old name or to create a new holding. On the other hand a later case, namely, *Ram Saran v. Mahomed Latif* (2), is clear authority for the proposition that where a landlord purchases an occupancy holding and gives a lease in respect of it to another tenant, he brings the whole tenancy to termination and cannot be heard to say that the non-occupancy right still subsists. The learned Vakil for the appellants has not been able to show me any authority in support of his present proposition. All the cases which he cites relate only to the purchase of an occupancy holding by a co-sharer landlord, in respect of which it is settled law that under the old Tenancy Act the non-occupancy right would be kept alive by the co-sharer landlord purchaser. In the present case the learned Vakil admits that he is not able to prove that Munshi's purchase was on behalf of himself only. Again, if Munshi's purchase was after 1888 then admittedly the plaintiffs cannot possibly succeed.

The result, therefore, is that although the learned District Judge's view of the law applicable to this case is incorrect the decree made by him must be affirmed. The plaintiffs have not been able to show that they had under the law as it stood before 1908 a title better than that of the defendants. The result is that the appeal is dismissed with costs.

Appeal dismissed.

(2) 3 C. W. N. 62.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 367
OF 1914.

March 23, 1916.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Newbould.

SURENDRA NARAIN MAHATA—
PLAINTIFF—APPELLANT

versus

JAGAL KISHORE GHOSE AND OTHERS—
DEFENDANTS—RESPONDENTS.

Occupancy holding, non-transferable, purchaser of—

SURENDRA NARAIN v. JAGAL KISHORE GHOSE.

Landlord's withdrawal of decretal amount for rent deposited by purchaser, if recognition of transfer—Decrees, execution of, under Civil Procedure Code and Bengal Tenancy Act, difference between.

After the plaintiff's purchase in execution of a money-decree of a non-transferable occupancy holding, when a co-sharer-landlord in execution of a decree for rent against the original tenant proceeded under the Civil Procedure Code to sell the holding, the plaintiff deposited the decretal amount in the executing Court by an application, with a proviso that he was reserving his right to realise the amount so deposited by him from the tenant or his heirs, as he did not admit that the amount so deposited was payable by him, and the amount was then withdrawn by the landlord. In a suit by the plaintiff to establish his title to the occupancy holding:

Held, that the withdrawal of the money did not operate as a recognition of the plaintiff's right as a purchaser and he was not entitled to the holding as against the landlord. [p. 79, col. 1.]

Thomas Barclay v. Syed Hossien Ali Khan, 6 C. L. J. 601; *Nalini Behari Roy v. Fulmani Dasi*, 13 Ind. Cas. 487; 15 C. L. J. 388 at p. 391; 16 C. W. N. 421, distinguished.

There is a clear difference in the mode of executing decrees under the Civil Procedure Code and under the Bengal Tenancy Act. Under the latter Act if any person other than the judgment-debtor having an interest in any holding wishes to pay the landlord's dues he may make a deposit before the date of sale, by inviting a decision about his interest in the property to be sold. Under the Civil Procedure Code there is no objection to the decretal amount being paid into Court by any person before the sale, and the Court is not required to decide any question about his interest in the property, as provided in the Bengal Tenancy Act. [p. 77, col. 2.]

Appeal against the decree of the District Judge of Birbhoom, dated the 11th December 1913, reversing that of the Munsif of Dubraj-pore, dated the 30th September 1912.

Dr. Dwarka Nath Mitra and Babu Baikunta Nath Mitter, for the Appellant.

Babus Bepin Behary Ghose and Bankim Chandra Mukerjee, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for establishment of plaintiff's title to two occupancy holdings, but before us the question has reduced itself into his title to one of those holdings, namely, the one bearing a rental of Rs. 31-7-9. The plaintiff's case is that this holding was in the tenancy of one Lakhmi Narain Mondal, deceased, father of defendant No. 3, and that he purchased it in execution of a decree against Lakhmi Narain. The landlord defendant No. 2, then brought a suit, being suit No. 748 of 1904, for the recovery of arrears of rent due on the holding against the registered tenant and

obtained a decree. He sued as co-sharer landlord, but claimed the full rent, ■ having purchased the right of the other co-sharer. The decree was, however, obtained in favour of the landlord and his co-sharer. He then took out execution against the tenant as of a money-decree under the Civil Procedure Code, not under the provisions of the Bengal Tenancy Act. This was before the Amending Act of 1907, at a time when the law relating to the rights of ■ co-sharer landlord was not considered quite settled, having regard to certain decisions of this Court. It was then the general practice to execute such decrees as ordinary money-decrees. On the 1st February 1905, the plaintiff presented a petition (Exhibit 5) to the execution Court, saying that he had purchased the holding and in order to protect his rights he wanted to deposit the decretal amount in Court for payment to the landlord decree-holder. It appears that the money was deposited on or about 11th February 1905. No notice of this application appears to have been given to the Pleader of the landlord defendant No. 2. There is a clear difference in the mode of executing decrees under the Civil Procedure Code and under the Bengal Tenancy Act. Under the latter Act if any person other than the judgment-debtor having an interest in any holding wishes to pay the landlord's dues, he must do so before the date of the sale. He may make ■ deposit by inviting a decision about his interest in the property to be sold. Under the Civil Procedure Code there is no objection to the decretal amount being paid into Court by any person before the sale, and the Court is not required to decide any question about his interest in the property, as provided in the Bengal Tenancy Act. As soon as the amount is deposited the property is released from attachment and the decree is treated as satisfied. That was the order made in this case. It appears that the Pleader of the landlord defendant withdrew this money several days after it was paid into Court, and an agent of the defendant No. 2 received the money with other amounts due to him from the Pleader. It is contended before us that by withdrawal of the money as aforesaid, the landlord had recognised the right of the plaintiff as the purchaser of the tenure, and that the plaintiff was entitled to the holding as against him. The landlord, it is alleged

SURENDRA NARAIN v. JAGAL KISHORE GHOSE.

subsequently split up the two holdings into six, and fraudulently brought six suits for recovery of rent in respect of them against Lakhmi Narain's heir or his *benamdar*, that is to say, against the persons in whose names these *jotes* stood. He caused five of these decrees to be executed and defendant No. 1 became the auction-purchaser of, amongst others, the holding with which we are concerned in this appeal. The plaintiff's case was that there had been a valid transfer of the original holding to him, that is to say, he had acquired a valid right to it by his purchase. It has been found by the Appellate Court that there was no evidence "worth the name" showing that the occupancy rights in this *zemindary* were transferable by "custom or usage." That ground, therefore, fails. When execution was taken out by the landlord under the Code only the right, title and interest of his tenant in the holding could have been sold, not the holding itself. If the plaintiff had by his purchase acquired a right to the holding he would have not been affected by the sale in execution of the money-decree, yet he went to Court and deposited the amount due for rent in the execution proceedings. He stated in his petition that he had acquired a right to the holding by purchase, but it has been found that he had acquired none. It is now argued that inasmuch as the money was deposited by him and it was withdrawn by the Pleader on behalf of the landlord defendant, it must be considered to be a recognition of his right by the landlord upon the authority of *Thomas Barclay v. Syed Hossein Ali Khan* (1). In that case the holding was advertised for sale under the provisions of the Bengal Tenancy Act. The decretal amount appears to have been deposited by the purchaser and the decree-holder applied for payment of that sum to him. It was accordingly held that he was estopped from denying the purchaser's title later on. It was further held that it was the duty of the landlord in the circumstances to challenge the title of the purchaser under section 171 of the Bengal Tenancy Act and to deny that he had any interest in the tenancy advertised for sale, or that the interest was of a description which would be voidable upon the sale. The landlord's silence was held to be prejudicial

to the interest of the applicant purchaser and he was thus considered estopped from denying the latter's title. The learned Judges said, "where a party fails to make his rights known, where fairness and good conscience require that he should do so as to protect the interest of others, he cannot be heard as against them to assert such rights." It was found in that case that the purchaser *bona fide* believed that he had purchased a transferable holding. In this case, however, as we have already stated, the plaintiff has produced no evidence of any value that occupancy rights, such as he claims to have purchased, are transferable within this *zemindary*. His conduct also has been found by the Appellate Court to be other than *bona fide*. It appears that as soon as decrees in the six subsequent rent suits were obtained by the defendant landlord against his registered tenants, the plaintiff caused one of such tenants, defendant No. 3, who was also his ploughman, to institute a suit to set aside the decrees on ground of fraud. If the plaintiff had validly acquired a transferable interest, or if the plaintiff considered that the withdrawal of the deposit-money by the landlord had operated as a recognition of his title, defendant No. 3 could not have any possible title to the land, yet the plaintiff puts him up to institute such a suit. That suit was dismissed in September 1909. Those holdings were advertised for sale in execution under the provisions of the Bengal Tenancy Act in March 1910. The plaintiff allowed the sale to take place, although he had full knowledge of the decrees. He did not come in under section 170, clause (3), or section 171 of the Bengal Tenancy Act, nor did he deposit the rent claimed, which was admittedly due to the landlord under section 61. He did not tender the decretal amount and the defendant No. 1 became the purchaser of those holdings in execution of those decrees. The plaintiff now claims that he has been recognised as a tenure-holder and his rights have not been affected by the subsequent purchase of defendant No. 1. Under the Civil Procedure Code no notice to the landlord decree-holder was necessary or given. The execution proceedings ended in an order that the decree had been satisfied and the Pleader in due course withdrew the money. The circumstances of the payment do not show

(1) 6 C. L. J. 601.

UDHISHTER SINGH v. KAUSILLA.

that it can be said that the landlord had recognised, or must be considered to have recognised the plaintiff as tenant. The money was paid by the plaintiff with a proviso that he was reserving his right to realise the amount so deposited by him from Lakhmi Narain Mondal or his heir or the tenants on that holding, as he did not admit the amount so deposited was payable by him. An observation of Mr. Justice Coxe in *Nalini Behari Roy v. Fulmani Dasi* (2) has been relied upon, namely, "if the landlord withdraws the money, he is bound to recognise the transfer," but that was a case under the Bengal Tenancy Act, and the question was as to whether the landlord could contest the rights of a purchaser to make a deposit of the decretal amount if he disputed his right on the ground that the occupancy holding was not transferable. We are of opinion that defendant No. 2 cannot be said to have been estopped in this case. We do not see in what way his taking of the money has affected the position or interest of the plaintiff. He reserved the right to recover the amount he was depositing against the tenants of the holding. It was a payment made to protect his interest, but if he had acquired, as according to his case he had, a valid title to the holding, that right was not going to be sold in the execution sale, but only the right, title and interest of the tenants of the holding, which according to him were non-existent at that time.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

(2) 13 Ind. Cas. 487; 15 C. L. J. 388 at p. 391; 16 C. W. N. 421.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1844 OF 1914.

April 5, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

UDHISHTER SINGH AND ANOTHER—

APPELLANTS

versus

Musammât KAUSILLA AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 151 to 153, O. XXXIV, rr. 4, 5, interpretation of—Pre-

liminary mortgage-decree—Final decree—Court dealing with application for final decree, jurisdiction of—Mortgage, prior, not included in preliminary decree, if can be included in final decree—Courts, power of—Amendment of slips, mistakes, omissions—Jurisdiction—Appellate Court, power of.

Order XXXIV, rule 5, of the Civil Procedure Code, 1908, means that the mortgaged property which a plaintiff is under the particular circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither rule 4 nor rule 5 of Order XXXIV says anything about the specification of the mortgaged property. [p. 80, col. 2.]

A Court which deals with an application for a final decree is still the same Court of original jurisdiction to which the plaint in the suit was presented, and it is still seized of the entire suit. It is entitled to frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree. [p. 80, col. 2; p. 81, col. 1.]

In a preliminary decree drawn up under Order XXXIV, rule 4, of the Civil Procedure Code, 1908, the mortgagors were given an opportunity to pay off the plaintiffs-mortgagees, failing this the plaintiffs-mortgagees were given an opportunity of paying off a prior mortgagee and in the event of the plaintiffs-mortgagees doing so they were to be allowed to bring the mortgaged property to sale. The mortgagors failed to redeem and the plaintiffs-mortgagees did pay off the prior mortgagee. They then applied for a final decree to entitle them to bring to sale not only the property originally covered by their mortgage but the additional property included in the mortgage of the prior mortgagee.

Held, that under the circumstances of the case the Court of first instance had jurisdiction to pass a final decree for sale in the terms desired by the plaintiffs-mortgagees. [p. 81, col. 1.]

Per Walsh, J.—Sections 151, 152, and 153 of the Code of Civil Procedure, 1908, are just as applicable to Courts of first instance as to Courts exercising appellate jurisdiction. The powers conferred upon Courts by these sections are wide, salutary and intended to enable the Court, where necessary, to take what is called a short indirect cut, and by curing breaches of technical rules to give effect to the real rights of the parties and to prevent multiplicity of suits. [p. 81, col. 2.]

A Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties. [p. 82, col. 1.]

In all cases where it is clear to an Appellate Court that it was open to the first Court or any lower Court to have taken steps by way of amendments, the Appellate Court ought to do what the lower Court might have done. [p. 82, col. 2.]

Execution second appeal from the decision of the District Judge, Aligarh, dated the 28th May 1914.

Mr. Benode Behari, for the Appellants.

Mr. P. L. Banerjee, for the Respondents.

UDHISHTER SINGH v. KAUSILLA.

JUDGMENT.

Piggott, J.—In the litigation out of which this second appeal arises there were three parties. The appellants now before this Court were subsequent mortgagees. There were certain defendants who were the original mortgagors, and there was one Tika Ram who held mortgages prior in date to those of the present appellants. There were separate suits instituted by Tika Ram and the present appellants; but we are concerned at present only with the suit in which these appellants were the plaintiffs. It was a contested matter between them and Tika Ram as to whether the mortgages in favour of the latter had or had not priority; but this point was decided in favour of Tika Ram. A preliminary decree was then drawn up under Order XXXIV, rule 4, of the Code of Civil Procedure. The facts of the case were somewhat complicated, more particularly by the circumstance that the mortgages in favour of Tika Ram covered certain other property over and above that which was involved both in Tika Ram's mortgages and in the mortgage in favour of the appellants. The preliminary decree drawn up by the Court of first instance was clumsily drafted. In substance, however, it contained the provisions prescribed by the Statute: the mortgagors were given an opportunity to pay off the plaintiffs, failing this the plaintiffs were given an opportunity of paying off Tika Ram, and in the event of the plaintiffs doing so they were to be allowed to bring the mortgaged property to sale. There was appended to the decree a specification of the property in suit, and, of course, the property involved in that particular suit was that covered by the mortgage in favour of the plaintiffs only, and did not include the additional property mortgaged to Tika Ram. In the result the mortgagors failed to redeem and the plaintiffs did pay off Tika Ram. They then came into Court asking for a final decree under the provisions of Order XXXIV, rule 5, of the Code of Civil Procedure and they naturally claimed that this final decree should be so drafted as to entitle them to bring to sale, not only the property originally covered by their mortgage, but the additional property included in the mortgages in favour of Tika Ram, to whose rights they had been

subrogated in consequence of the payment made by them subsequently to the passing of the preliminary decree. That this was a proper and valid claim has been practically conceded in argument before us, and is beyond question. Nor has it been questioned in the order passed by either of the Courts below. The attitude taken up by the learned Subordinate Judge, who tried the suit in the first instance, and by the learned District Judge in appeal is that the plaintiffs are asking the Court to draw up a final decree for sale in terms inconsistent with the terms of the preliminary decree, and that this cannot be done. In fact a sort of *res judicata* is being set up against the present appellants. The contention is that they ought to have obtained in the preliminary decree itself a clear and specific statement that in the event of their paying off Tika Ram, they would be entitled to bring to sale not only the property covered by their mortgage, but the additional property already referred to. It is contended that they not only failed to do this, but they acquiesced in a decree which contained a specification of the mortgaged property, that this specification was limited in the manner already stated and that it cannot be added to or modified in any way in the decree absolute. Although these contentions have found favour in both the Courts below, it seems to me that they have no real force. So far as the terms of Order XXXIV, rule 5, are concerned these merely lay down that in a certain event the Court shall pass a decree that the mortgaged property or a sufficient part thereof be sold. The meaning clearly is that the mortgaged property which the plaintiffs are under the particular circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither rule 4 nor rule 5 of Order XXXIV says anything about the specification of the mortgaged property. It is, no doubt, right and proper that the mortgage-decree should contain such specification; but the question before us now is whether the Court was debarred from making the correct specification in its final decree under Order XXXIV, rule 5, by reason of anything it had done in the decree which it passed under Order XXXIV, rule 4. The Court which deals with an application for a final decree is still the same Court of original jurisdiction to which the plaint in the suit was

UDHISHTER SINGH v. KAUSILLA.

presented, and it is still seized of the entire suit. It is its duty to frame a proper final decree, determining correctly once and for all the respective rights and liabilities of the parties. No doubt it would be a questionable exercise of discretion for a Court to pass a final decree in terms clearly inconsistent with those of the preliminary decree; but so long as the Court is seized of the entire case, it seems to me that it is entitled to clear up any ambiguity existing in the preliminary decree, and I would go further and say that it is entitled to frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree. In the present case the preliminary decree simply directed that in a certain event "the mortgaged property" should be sold. The specification appended to the decree was simply that of the property mortgaged in the particular mortgage-deed on the basis of which the suit then before the Court was brought. The question whether, in the event of the then plaintiffs paying off Tika Ram, they would or would not become entitled to do something which they had no right to do under their own mortgage, namely, to sell the additional property mortgaged in favour of Tika Ram alone, had not been litigated before the Court and I do not think it can fairly be said that it was determined by the form of the preliminary decree. I am of opinion that the Court of first instance in the present case had jurisdiction, on the application made to it by the present appellants, to pass a final decree for sale in terms desired by the appellants, and I am further of opinion that it ought to have done so. I would, therefore, allow this appeal with costs in all three Courts, including in this Court fees on the higher scale, and direct that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale not only the property originally mortgaged to them as specified in the preliminary decree, but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

WALSH, J.—I entirely agree in the result and with the reasons given by my learned brother. Mr. Banerji on behalf of the respondents has argued this case with considerable skill, and the candour which might

be expected from him. It is only because he has been able to present such formidable arguments, and because two Courts have deliberately decided in favour of the view for which he has contended, that I think it desirable to say something in addition to my learned brother's reasons for allowing this appeal upon some broader and more important considerations, which to my mind are raised. I think it is high time that the attention of the lower Courts in this Province was again drawn to the powers conferred on them by sections 151, 152 and 153 of the Code of Civil Procedure. Those sections are just as applicable to Courts of first instance as to Courts exercising appellate jurisdiction. Without enlarging upon their scope it is sufficient to say that the powers conferred upon all Courts exercising jurisdiction in this Province by those sections are wide, salutary and intended to enable the Court, where necessary, to take what is called a short indirect cut, and by curing breaches of technical rules to give effect to the real rights of the parties and to prevent multiplicity of suits. I quite agree with what Mr. Banerji has said that a mere attempt by a Court to do what it is pleased to think "justice between man and man" without regard to form at all, is just as likely to produce a miscarriage of justice as a slavish adherence to rules of procedure and it is obviously difficult to hit as a general principle the dividing line between form and substance. But in this particular case there can be no question at all of difficulty in that matter. It was admitted by Mr. Banerji, and by a Counsel of his standing could not be disputed, that by law the appellants in this case were entitled to be subrogated in respect of this surplus piece of property which is in dispute to the rights of Tika Ram. Not only that; it was also admitted by him with equal candour that unless in some way or other they could assert and obtain recognition of those admitted rights in the proceeding now before us, they would be confronted in an independent suit, brought in order to assert them, with a plea of *res judicata*. In other words, the order of the Court below which we are asked to affirm was so to hold a party to the *t's* which he has crossed and the *i's* which he has dotted

UDRISHTER SINGH v. KAUSILLA.

as to deprive him of the actual rights admitted by the party opposed to him in the suit. It is in such cases, and such cases only, a Court is not only entitled but is bound in my humble judgment to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties. I desire to cite in support of the view. I hold in this matter what has been laid down and recognised for years in the Courts in England, upon which the principles of justice in this country are framed. The provisions of the English Law are to be found in Order XXVIII of the Rules of the Supreme Court, which correspond roughly with the First Schedule of the Code of Civil Procedure, and in sub-section 7 of section 24 of the Judicature Act of 1875, which was the great remedial legislation intended to get rid of the hypertechnicalities of the English administration of justice; the recognised principles upon which those provisions have been administered are contained in the sentences which I am going to quote from the judgments of recognised authority in the Court of Appeal at different epochs. "My practice," said Lord Bramwell, "has always been to give leave to amend, unless I have been satisfied that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission", said Lord Esher, "and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." "An amendment ought to be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided." Again, the Court of Appeal has said that under these provisions every Judge has full powers of his own motion (that means to say, when he sees that the party himself has not recognised the amendment which is necessary, but that an amendment is desirable) to make any amendment which he deems necessary for the purpose of determining the real question at issue between

the parties. I do not myself profess to have followed very closely what possible alternative might have been suggested to the Courts below for the purpose of correcting what was not an omission, but was in my view ■ want of foresight in the original drawing up of the provisional decree. It must be borne in mind that in drawing up such orders as this the priority of the mortgages in question, the contingency to arise in the event of the first mortgage being paid off either by the mortgagor or the subsequent mortgagee, and ■ variety of other details have to be considered and worked out, and Judges, officials and Counsel themselves would be more than human if mistakes were not made by even the most highly qualified person entrusted to carry out the work. It is of the highest importance for the administration of justice that when the real rights of the parties are clear and definite, as in this ■ they are admitted to be, the Court of its own motion without waiting for any application to be put in by ■ party should adopt the necessary course to give effect to such admitted rights. It is for that reason I have not referred to section 114 of the Code of Civil Procedure which gives the power of review. That is also a salutary provision; but having regard to the provisions relating to the procedure contained in Order XLVII, it involves a party who is suffering from a mistake the task of taking some fresh independent steps of ■ technical nature which may lead to some unforeseen difficulty. I think myself that the powers under the sections already referred to are sufficient for a Court and that they should be kept in mind by the lower Courts when such controversies arise as have arisen in this matter. It only needs to be added that in all such cases, where it is clear to an Appellate Court that it was open to the first Court or any lower Court to have taken such steps by way of amendment, the Appellate Court ought to do what the lower Court might have done.

By THE COURT.—The appeal is allowed with costs in all three Courts, including in this Court fees on the higher scale and it is ordered that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to

ASAD ALI v. MOHAMED HUSAIN.

sale not only the property originally mortgaged to them ■ specified in the preliminary decree, but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 31 OF 1916.

February 29, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

ASAD ALI CHOWDHURY AND OTHERS—
APPELLANTS

versus

Syed MOHAMED HUSAIN CHOWDHURY
AND OTHERS - RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 93 to 95
—*Proceedings for appointment of common manager—*
Interim appointment of Receiver—Order to be based on
evidence—Verified petition of party, whether sufficient
—*Civil Procedure Code (Act V of 1908), O. XL, r. 1.*

A Court can, pending the final appointment of a common manager under section 95 of the Bengal Tenancy Act, make an interim appointment of a Receiver if it appears to be just and convenient. [p. 83, col. 2.]

The order should be based on evidence establishing the necessity for the Receiver's appointment under Order XL, rule 1, Civil Procedure Code. The mere verified petition of a party filed in support of application for the appointment of a common manager, which does not set forth the sources of the petitioner's knowledge or belief, cannot be made the basis of the Court's order. [p. 83, col. 2.]

Appeal against the order of the District Judge of Backergunge, dated the 4th of January 1916.

Babu Mohendra Nath Roy, Moulvi Nuruddin Ahmed, Moulvi A. K. Fazl-ul-Haq and Moulvi Akram Haq, for the Appellants.

Babu Jogendra Nath Mukerjee, for the Respondents.

JUDGMENT.—An application was made on the 3rd January 1916 for the appointment of a common manager, on the allegation that the petitioner No. 1 who was a shareholder in certain properties had appointed Mr. H. C. F. Meyer as the manager of his share in the property, that the collection up to that time had been made jointly by joint Tahsildars, that Mr. Meyer dismissed certain Tahsildars for their oppres-

sion and misconduct and that certain other co-sharers with the help of these dismissed Tahsildars are preventing the Tahsildars appointed by Mr. Meyer from entering the joint Katchery-house and thereby not only stopping all collections of rents by them but that their conduct was likely to lead to a serious breach of the peace. These statements were not supported by an affidavit, but by a petition which was verified by the petitioners, who stated that the statements in the petition were true to the best of their information and belief. There is no statement as to the source of their information or which statement was upon information and which upon belief. In fact there is nothing in the verification which would enable the Court to bring to book any of the petitioners for making false statements. Upon this *ex parte* statement alone the learned Judge appointed a Receiver to take possession of the properties until he passed his final order for the appointment of a common manager, and directed the Receiver to receive 15 per cent. of the collection as his remuneration. We have held in a previous proceeding in connection with this case that in a proceeding under the Bengal Tenancy Act for the appointment of a common manager, it is competent to a Court to appoint a Receiver under circumstances under which it can rightly make the appointment. Order XL, rule 1, of the Code of Civil Procedure provides: "Where it appears to the Court to be just and convenient, the Court may by order (a) appoint a Receiver of any property whether before or after decree"; and "(c) commit the same (property) to the possession, custody or management of the Receiver"; and, etc. Now in order that an order of this kind should appear to the Court just and convenient, there must be evidence upon which the Court can come to a conclusion that it is just and convenient. In this case there was no evidence. The order of the lower Court must, therefore, be set aside.

If the Receiver has already taken over charge he must make over the charge to the proprietors. The matter has been somewhat delayed in consequence of several proceedings in this Court, but the proceeding for the appointment of a common manager should now be pushed on with as little delay as possible.

BENI RAI v. RAM PRASAD RAI.

This appeal is allowed with costs, hearing fee five gold mohurs.

Let the record be sent down at once.

Appeal allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 15 OF 1908-09 OF
GHAZIPORE DISTRICT.

December 3, 1909.

Present:—Mr. Porter, S. M., and
Mr. Baillie, J. M.

BENI RAI—PLAINTIFF—APPLICANT
versus

RAM PRASAD RAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Grove—Trees planted by occupancy tenant—Mortgage of grove—Death of mortgagor without heirs—Suit to eject mortgagee—Agra Tenancy Act (II of 1901), s. 58.

A transfer of a grove by means of a usufructuary mortgage is a perfectly valid transfer and vests the rights of the mortgagor in the mortgagee. [p. 84, col. 2.]

Where, therefore, on the death without heirs of an occupancy tenant, who had planted a grove on the land in his occupation and subsequently mortgaged the grove, the landlord sued to eject the mortgagee:

Held, that the mortgagee could not be ejected, for the right of the mortgagor to occupy the land so long as the grove lasted had been transferred to him by the mortgage. [p. 84, col. 2.]

Badri Prasad v. Bhim Sen, Selected Decision No. 2 of 1892, followed.

Application for revision of the order of the Commissioner, Benares Division, dated the 6th February 1909, confirming that of the Assistant Collector, Ghazipur District, in a case of ejectment.

JUDGMENT.

BAILLIE, J. M.—(October 15th, 1909).—The applicant-defendant in this case was the mortgagee of a grove, the mortgagor of which, an occupancy tenant, had died, apparently without heirs. The suit was for ejectment under section 58 of the Tenancy Act, on the ground that defendant applicant was a non-occupancy tenant of less than 12 years' standing. Two pleas are raised by applicant: (i) he denies the jurisdiction of the Revenue Court to entertain the suit on the ground that a grove is not land within the definition in the Tenancy Act; (ii) he alleges that he was in possession under a valid transfer and was not liable to ejectment as a non-occupancy tenant. The Commissioner, following the ruling in

Ram Sundar Koiri v. Jogi Khatik (1), decided that the suit for ejectment lay in the Revenue Court and that the tenant was liable to ejectment as a non-occupancy tenant. The question of jurisdiction is a difficult one and in the present case it appears unnecessary to re-open it, ■ it appears to me to be ample reason apart from this question for the revision of the Commissioner's order. The law in regard to ejectments from groves was very clearly and fully laid down in *Badri Prasad v. Bhim Sen* (2). This ruling laid down that the custom usual in regard to groves is that "subject to the delivery to the landholder of his share of the produce by the occupant, the latter should continue to occupy the land as long as the grove of trees continued to stand upon it. This condition is altogether apart from and independent of the question of the land having been cultivated by the tenant before the grove was planted, and of his having by previous occupation acquired ■ right of occupancy under the terms of section 8 of the Rent Act.....The tenure of persons having the status of tenants in a *mahal* upon groves of trees.....rests upon a contract, express or implied, as to the occupation of the land, to which contract section (8) is not necessarily applicable.....The right to dispose of the trees forming a grove is not uncommonly held by tenants.....The landholder cannot be allowed to eject the present groveholder by notice under section 36 of the Rent Act, on the ground that the grove-holder has not acquired a right of occupancy." These are Mr. Reid's words. Mr. Kaye says:—"I agree in the finding that, if the transfer made by the tenant was valid, the fact that his vendee had held for less than 12 years had no bearing on the question at issue; for the vendee would have the same rights as his vendor and would be entitled to occupy the land so long as it continued to be maintained as a grove. In the present case we are asked to order ejectment not on the ground that the transfer was illegal, but on the ground that less than 12 years had elapsed since the transfer was made."

This ruling, the correctness of which appears to me to be beyond doubt, has since 1892 been followed by all the Revenue Courts. It has in the present case been absolutely ignored

(1) Selected Decision No. 1 of 1908.

(2) Selected Decision No. 2 of 1892.

RAJAB ALI v. WAZIR ALI.

by the Commissioner. The effect is that the ejectment of the applicant has been ordered on grounds entirely irrelevant, grounds on which following the principle of the ruling quoted no suit lay: This appears to me to amount to material irregularity and to be ground for revision. I would cancel the order of the lower Courts and dismiss the suit for ejectment of the applicant as a non-occupancy tenant.

PORTER, S. M.—The grove in this case was planted, and the transfer to the present applicant took place, before the commencement of the Agra Tenancy Act. The rights of the parties are, therefore, governed by the Select Decision referred to in my colleague's order. On this ground I concur in the proposed order.

Revision allowed; Suit dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 473 OF 1914.

April 26, 1916.

Present:—Mr. Justice Chapman and
Mr. Justice Atkinson.

RAJAB ALI—DEFENDANT—APPELLANT
versus

WAZIR ALI—PLAINTIFF—RESPONDENT.

Muhammadian Law—Guardian and minor—Alienation of minor sons' property by mother, validity of—Right of sons to deal with property alienated—Limitation Act (IX of 1908), Sch. I, Art. 41.

Under Muhammadian Law the mother is not the natural guardian of her minor sons. Therefore, in the absence of an order of Court appointing her their guardian she cannot alienate their property; if she does, the alienation is void and Article 41 of Schedule I of the Limitation Act will not operate to defeat the sons' rights to dispose of their interest in the property.

Mata Din v. Ahmad Ali, 13 Ind. Cas. 976; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49, relied on.

Mr. Khurshed Hasnain, for the Appellant.

Mr. Mustafa Khan, for the Respondent.

JUDGMENT.

ATKINSON, J.—This is an action for a declaration of title by the plaintiff to the extent of a seven-annas share in two houses and for possession; and he bases his title on a document, dated 5th January 1912, made by the defendant No. 3 to him. The plaintiff's

claim for possession is met by the contention that defendant No. 1 had purchased the same interest in these two houses from the guardian of the defendant No. 3. Defendant No. 3, when his father died, was a minor, and he was a Muhammadian. He and his brother lived with their mother, and the mother purported in 1902-07 to dispose of the minors' interest in these two houses. The mother was not the duly appointed guardian of the minors and according to strict Muhammadian law, she is not the natural guardian of her children, and the question arises now whether or not the mother could validly assign and dispose of the minors' interests in this property as she purported to do by the deeds of 1902-07. In our opinion the mother not being the duly authorised guardian of the minors, and the Judge having found that the sale of these houses was not for the benefit or advantage of the minors, the sale or sales made by her to defendant No. 1 were void and that Article 44, Schedule I, of the Limitation Act does not operate to defeat the right of defendant No. 3 to sell and dispose of his interest in these houses to the plaintiff. Accordingly in our view, on the authority of the case decided by the Privy Council reported as *Mata Din v. Ahmad Ali* (1), we are of opinion that the conveyances made by the widow were void and the Statute of Limitation does not apply to this particular case. The learned District Judge having found as a fact that the deed which passed from defendant No. 3 to the plaintiff, dated 5th January 1912, was a deed for valuable consideration and that consideration did in fact pass, we consider his decree was right, and that this appeal must be dismissed with costs.

CHAPMAN, J.—I agree.

Appeal dismissed.

(1) 13 Ind. Cas. 976; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49.

UMAKUNTA SEN v. HIRA LAL ROY.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 161 OF 1913 AND
1 OF 1914.

April 4, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

IN No. 161 OF 1913

UMAKUNTA SEN CHOWDHURY

AND OTHERS—PETITIONERS—APPELLANTS

versus

HIRA LAL ROY AND ANOTHER—OPPOSITE
PARTY—RESPONDENTS

AND

IN No. 1 OF 1914

DURGA KUNTA SEN CHOWDHURY AND
ANOTHER—PETITIONERS—APPELLANTS

versus

KSHETRA MOHAN SAHA—

OPPOSITE PARTY—RESPONDENT.

Bengal Court of Wards Act (IX of 1879), ss. 13A, 51, 55—Management by Court of Wards under s. 13A—Execution sale of ward's property—Ward's right to set aside sale unrepresented by Manager—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—'Suit' in ss. 51, 55 of Act IX of 1879, meaning of—Release of estate pending appeal, whether empowers continuance of original application.

The word 'suit', in sections 51 and 55 of the Court of Wards Act (IX of 1879 B. C.) covers miscellaneous proceedings. [p. 88, cols. 1 & 2.]

Bhoopendro Narain Dutt v. Baroda Prasad Roy Chowdhry, 18 C. 500, followed.

A judgment-debtor whose estate is under the management of the Court of Wards under section 13A of the Court of Wards Act cannot apply to set aside an execution sale of his properties except through the Manager of the Court. The Court's failure to institute the necessary proceedings will not give the ward a right to apply in his own name. [p. 88, col. 2.]

Norendra Nath Pahari v. Bhupendra Narain Roy, 23 C. 374 at p. 385; *Tekait Krishna Prasad Singh v. Moti Chand*, 19 Ind. Cas. 296; 17 C. W. N. 637; (1914) M. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 Bom. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 140; 40 C. 635; 40 I. A. 140, distinguished.

The judgment-debtor cannot continue the original application even if the estate is released during the pendency of the appeal. [p. 88, col. 2.]

Appeals against the orders of the Subordinate Judge, 1st Court, Backergunge, dated the 11th January 1913 and 27th September, respectively.

FACTS of the case appear from the judgment and the arguments.

Babu Dwarka Nath Chakravarti (with him Babus Prokash Chander Mojmudar and Indu Bhusan Roy), for the Appellants, argued that the appeal was by the judgment-debtors arising out of an order made by the Court below rejecting an application to set aside a sale.

There was practically no trial on merits. The decree-holder obtained a decree against the present appellants on July 11th, 1911, for Rs. 500, and when the decree was obtained the estate was under the Court of Wards and some of the wards were minors. The Court of Wards represented the petitioners when the decree was obtained. The property was sold for Rs. 1,620, but within 30 days the Court of Wards did not take steps to challenge the sale. On the 15th May, the petitioners applied to set aside the sale on the ground of irregularity in conducting the sale and the consequent inadequacy of price. Later on one of the petitioners made an application as a major to set aside the sale. When some of proprietors became majors, the Court was bound to release their properties, *vide* sections 7, 8 and 11 of Act IX of 1879. In spite of this, the estate was not released until 14th June 1915. The Court did not enquire if the applicant was major when the sale took place. The Court of Wards had no authority to represent him at all. When the Court of Wards neglected to look after the interests of the minors, the Courts have held that natural guardians could legally apply in the interest of the minors. The Court rejected the application in spite of the fact that one of the petitioners was major at that time. The Court of Wards was now in charge without authority. The consent of the proprietor consequently must be taken, see rule 7, Board's Rules published in 1909. After the cessation of the applicant's disqualification, the Court of Wards cannot continue without his consent. If the Court of Wards were to continue in charge it must take the consent of the proprietor when he comes of age. The present petition for setting aside the sale was made by proprietors, some of whom were majors at the time. *Vide Norendra Nath Pahari v. Bhupendra Narain Roy* (1); *Krishna Pershad Singh v. Gosta Behari Kundu* (2); *Tekait Krishna Prasad Singh v. Moti Chand* (3). In the last case the mother of the minor was entitled to make an application when the Court of Wards did not take any steps to set aside

(1) 23 C. 374 at p. 385.

(2) 5 C. L. J. 434 at p. 436.

(3) 19 Ind. Cas. 296; 17 C. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 Bom. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 140; 40 C. 635; 40 I. A. 140.

UMAKANTA ■ v. HIRA LAL ROY.

the sale. So far as one is concerned he had the undoubted right to apply, as regards the others the Court of Wards was bound to protect their interests. So the case ought to be tried on the merits ■ the disability of minority has now ceased.

Babu Basanta Kumar Bose (with him Babu Bepin Chandar Bose), for the Opposite Party, purchaser in the 2nd case.— If the estate is indebted the Court of Wards is not bound to release, section 13A, Act III of 1907, Eastern Bengal Act. No consent is required in this case and there is no doubt that the estate was involved. According to section 55 of the said Act, without authority of the Court nothing can be done. If ■ suit is instituted by a Manager without sanction of the Court of Wards, it is ■ bad suit—*vide Dinesh Chunder Roy v. Golam Mostapha* (4). Sections 51, 55 13A prohibit any person from suing in his own name if he be a ward of the Court.

Babu Dwarka Nath Chakravarti, in reply.— I relied upon *Krishna Pershad Singh v. Gosta Behari Kundu* (2); *Tekait Krishna Prosad Singh v. Moti Chand* (3). The application was made when the Court of Wards continued in charge. Your Lordships would not dismiss the appeal on a mere technical ground.

[BEACHCROFT, J.—How can you say that the Court of Wards neglected its duty?]

The Court of Wards did not take any steps to set aside the sale nor did it make any investigation. Section 13A does not stand in my way. Section 13A does not repeal section 11, the amendment does not say that section 11 is repealed. In *Narendra Nath Pahari v. Bhupendra Narain Roy* (1) the cessation of disqualification was considered enough for directing an investigation on the merits.

JUDGMENT.

IN APPEAL FROM ORDER NO. 161 OF 1913.

The decree-holder obtained a decree for money against the judgment-debtors in 1911, when their estate was in charge of the Court of Wards. The decree not being satisfied by the Court the properties of the judgment-debtors, were sold on the 15th April 1912. The Court of Wards did not apply for setting aside the sale and the judgment-debtors after waiting for the Court of Wards to take action in the matter, made an ap-

(4) 16 C. 89.

plication for setting aside the sale under section 47 and Order XXI, rule 90, of the Civil Procedure Code. The Court below has rejected the application as incompetent in that it was not made by the Court of Wards Manager. This was on the 11th January 1913. This appeal was filed on the 11th of April 1913 and the estate was released by the Court of Wards on the 14th of June 1914. It is contended in appeal before us that the order of the Court below is wrong;—

(1) Because the judgment-debtors were competent to prosecute the application for themselves when the Court of Wards did not move in the matter.

(2) Because the judgment-debtor Bimal had already attained majority, being 24 years of age, and his share at least should have been released long before the application, so that he was a free agent in law and could maintain the application.

(3) Because in any case the estate having been released pending appeal we should allow the debtors to prosecute their original application.

It will be convenient to examine the provisions of the Court of Wards Act before dealing with these grounds.

Section 6 (Act IX of 1879) lays down who shall be held to be disqualified proprietors. Section 7 empowers the Court to take charge of the estate and person of disqualified proprietors in certain cases. Section 8 lays down that when a person ceases to be disqualified, the Court should be bound to release him and his property. Section 11 lays down that if one or more of several joint owners under the charge of the Court cease to be disqualified, the Court will release his share unless he consents to his share remaining in the hands of the Court until the still disqualified co-owners cease to be disqualified. Section 13A (introduced by amendment in 1907) lays down an exception to the preceding sections and provides that notwithstanding the provisions of the preceding sections, the Court may retain possession of an estate even after the disqualification ceases, if there is an unpaid debt to discharge. In the present case there were unpaid debts and the Court chose to retain possession even after some of the co-sharers ceased to be disqualified.

ABU MUHAMMAD MIAN V. MUKUT PERTAP NARAIN.

and it was within its rights in doing so. It cannot, therefore, be said that the Court retained possession of any share without legal authority. This disposes of the *second* ground. The other grounds are based on certain rulings of the Court and we have to see whether those rulings support those grounds. The first case referred to is that of *Norendra Nath Pahari v. Bhupendra Narain Roy* (1). There the Sub-Manager under the Court of Wards made an application for execution. There was no objection by the judgment-debtor who also was represented by the Manager of his estate under the Court of Wards. An objection was, however, made in the appeal for the first time and Banerjee, J., said that the objection was of a purely technical character and could not be entertained at that stage, especially as the defect might have been cured if the objection had been taken in the first Court and as at the time of the appeal the estate of the applicant was no longer in the hands of the Court of Wards. It is this last distinction which is strongly relied upon in this case, as here also the estate was released pending appeal. The objection, however, was taken in the Court of first instance.

The next case is that of *Krishna Pershad Singh v. Gosta Behari Kundu* (2). There the Court of Wards had not taken possession of the Gudigunde estate and it was not considered necessary to have the Manager as a guardian or next friend of the ward in a litigation respecting that property: besides the mother, having been recognised as a guardian *ad litem* of the minor, was entitled to act as such until she was removed. The last case relied on is that of *Tekait Krishna Prasad Singh v. Moti Chand* (3). Their Lordships held that the mother of the minor was competent to apply for setting aside the sale of Gudigunde as this property had not been taken possession of by the Court of Wards. Looking at the provisions of the Act itself we find that section 51 requires that in suits by or against wards the Manager of the Court of Wards must be the guardian or next friend of the wards, and section 55 lays down that no suit shall be brought on behalf of any ward by a Manager except by the authority

of an order of the Court. It has been held that the word 'suit' covers miscellaneous proceedings: *Bhoopendra Narain Dutt v. Baroda Prasad Roy Chowdhry* (5). The wards were, therefore, incompetent to prosecute the application in this case except through the Manager of the Court of Wards as their next friend.

The only matter that is left for consideration is the effect of the release of the estate pending appeal. The appellants were from the 15th June 1914 competent to act for themselves without the intervention of any Manager or guardian. They cannot, however, claim the benefit of section 7 of the Limitation Act as they were not minors at the time when the right to apply accrued. They were wards of the Court which assumed all their rights. There is no further provision of law which is relied on for giving them a fresh start. In any case we are unable to say that the lower Court was wrong in rejecting the application when it did reject it. Our powers of revision also are not available in favour of the appellants and we must dismiss the appeal without costs as the respondent did not appear; and Miscellaneous Appeal No. 1 of 1914 with costs, two gold mohurs.

Appeals dismissed.

(5) 18 C. 500.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 695 of 1914.

April 14, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

ABU MUHAMMAD MIAN—DEFENDANT
No. 1—APPELLANT
versus

Babu MUKUT PERTAP NARAIN AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148, O. XX, r. 14—Pre-emption decree—Extension of time for payment—Jurisdiction.

Under section 148 of the Code of Civil Procedure Courts have a discretion to extend the time fixed in a pre-emption decree for deposit of the pre-emption money. [p. 89, col. 1.]

Jai Kishu v. Bhola Nath, 14 A. 529; A. W. N. (1892) 106; *Jaggarnath Pande v. Jokhu Tewari*, 18 A. 223; A. W. N. (1896) 43, distinguished.

Second appeal from the decision of the Subordinate Judge of Saran, dated the 21st November 1913.

JUGUL KISHORE v. RAGHUBAR SINGH.

Messrs. *Krishen Sahai and Lal Mohan Ganguli*, for the Appellant.Mr. *Rajendra Prosad*, for the Respondents.

JUDGMENT.

ROE, J.—This is an appeal against a decree for pre-emption. The learned Subordinate Judge has arrived at final findings of fact that the necessary legal ceremonies were performed. The decree is open to criticism only on the ground that the learned Subordinate Judge directed that the money fixed as the price for the pre-emption should be deposited within one month of the date of the delivery of his judgment, that it was not so deposited, and that, therefore, under Order XX, rule 14, of the Civil Procedure Code the suit stood in fact dismissed from the date of the failure to make the necessary deposit. The actual facts of the case are, that on the last day fixed for the deposit of the money, the decree-holder made an application to the Court for an extension of time to make the deposit; that the application was granted, a month's time was given, and the deposit was made within that month. It is contended that the order granting this extension was made without jurisdiction, and should be set aside under section 115, the consequence of the setting aside of that order being that the right of pre-emption has not been exercised and the suit fails. I am of opinion that section 148 covers a case of this nature. The only authorities which have been put before us in respect of suits for pre-emption are to be found in *Jai Kishn v. Bhola Nath* (1) and *Jaggar Nath Pande v. Jokhu Tewari* (2). In neither of these cases were any applications made for extension of time, in neither of them was any extension granted. It is clear that these two cases are distinguishable from the case before us. Under section 148 discretion is vested in the Subordinate Judge to extend the time within which the act prescribed by his decree should be done. It may be that the discretion exercised in this particular case was unwisely exercised; it may be that the Subordinate Judge should have issued notice to the other side before granting the application; the fact remains that, under section 148, the Court has discretion vested in it to pass the order now under criticism. It is not possible for us to interfere under section 115. The appeal

(1) 14 A. 529; A. W. N. (1892) 106.

(2) 18 A. 223; A. W. N. (1896) 43.

is dismissed with costs. The Rule issued is discharged. We make no order as to the costs of the Rule.

SHARFUDDIN, J.—I agree.

Appeal dismissed; Rule discharged.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 401 OF 1914.

January 3, 1916.

Present:—Mr. Lindsay, J. C.

JUGUL KISHORE—DEFENDANT—

APPELLANT

versus

RAGHUBAR SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Alienation by father—Son's right to impeach only when purpose illegal or immoral—Inadequacy of consideration, whether ground for setting aside alienation—Manager, powers of.

Under the Mitakshara School of Hindu Law, the powers of a father are greater than those of the manager of a joint family, and one of those powers is to alienate the family property for the purpose of satisfying an antecedent debt contracted by himself, provided only that the debt is not tainted with illegality or immorality. [p. 90, col. 2; p. 91, col. 1.]

The property alienated out of the family can be recovered by the sons only on proof of the illegal or immoral purpose of such debt. [p. 90, col. 2.]

Inadequacy of consideration may be a ground for setting aside an alienation by the manager of a family, but it will not invalidate an alienation by a father, although he is manager of a joint family, or entitle the sons to sue for the recovery of the property alienated. [p. 90, col. 2.]

Appeal against the order of the District Judge, Gonda, dated the 3rd June 1914, upholding that of the Sub-Judge, Gonda, dated the 9th April 1914.

Mr. *St. G. Jackson*, for the Appellant.Mr. *Basdeo Lal*, for the Respondents.

JUDGMENT.—The two plaintiffs in this case, namely, Raghubar Singh and his minor son Mangal Singh are respectively the son and grandson of one Jhallu Singh, and the suit was brought in order to set aside a sale-deed which was executed by Jhallu Singh on the 2nd of May 1903 in favour of the defendant-appellant Jugul Kishore. Jhallu Singh who is still alive was for some reason or other, which is not explained, not made a party to the suit. The case for the plaintiffs was that Jhallu Singh was a member of the joint family to which they belonged,

JUGUL KISHORE v. RAGHUBAR SINGH.

that he was a man of licentious and extravagant habits and that this sale was liable to be set aside on the ground that it had been entered into for the purpose of discharging a debt which Jhallu Singh had incurred for immoral purposes. This debt, it may be mentioned, was incurred on the 6th of June 1887, when Jhallu Singh mortgaged the whole of his *mañal* to Pirthipal Singh and others as security for a loan of Rs. 11,000. The sale which was made in favour of the defendant-appellant was made with the object of paying off this mortgage. Jugul Kishore the purchaser was to get 10 annas of the mortgaged property and the remaining 1 annas after redemption was made over to Jhallu Singh himself. The Court of first instance found that there was no proof that this debt of 1887 had been incurred for illegal or immoral purposes. The learned Subordinate Judge, however, was pressed with a passage which is to be found at page 283 of Trevelyan's Hindu Law, and the argument put before him was that the sale was liable to be set aside inasmuch as the price for which the property was sold to Jugul Kishore was an inadequate price. The learned Subordinate Judge states in his judgment that this was the first time in his experience that he had been called upon to discuss a plea of this kind, but he came to the conclusion on the strength of the authority just quoted that the sale might be set aside if it were found that it had been made for an inadequate price. He examined into the question of price and having come to the conclusion that it was inadequate, he gave the plaintiff a decree. This decree has been upheld in appeal by the learned District Judge. The learned Judge in his judgment does not discuss the question of the illegality or the immorality of the debt which was incurred by Jhallu Singh in the year 1887, but with reference to the sale to Jugul Kishore he held that the price for which the property was sold was exceedingly small and that the inadequacy in the circumstances appeared to him to be conclusive proof of bad faith. In my opinion both the Courts below are wrong and this appeal must be allowed.

The law is very clear on this subject of alienation made by the father in a joint Hindu family. It is well settled that although according to the Mitakshara

system of law the father takes no greater interest than that of a son in co-parcenary property, he can pay his personal debts out of the income of such property and bind his son and grandson, whether they be minors or adult, by a charge or alienation of the co-parcenary estate or of any portion thereof for the purpose of paying such of his debts which he has incurred before the date of such charge or alienation, provided that such debts have not been incurred for an illegal or immoral purpose or consideration. This statement of law is taken from the work referred to by the Subordinate Judge, Trevelyan's Hindu Law (cf. pages 294 and 295). It is also settled that once the property has been alienated out of the family, the son or the grandson can only recover possession by proving that the particular debt for the discharge of which the property was alienated was contracted for an illegal or immoral purpose. In the present case there is no evidence at all to show that the mortgage-debt of 1887 was incurred for such a purpose and this being so, the debt is binding upon the sons and grandsons of Jhallu Singh. The alienation made in favour of the defendant-appellant in the year 1903 was made for the discharge of an antecedent debt. As to this there can be no question whatever, and these being the facts the plaintiffs' suit ought to have been dismissed. The only question which the Courts below had to consider was the nature of or the purpose for which the debt of 1887 was incurred and unless the plaintiffs could prove that this debt had been incurred for a purpose which was not binding upon them, the suit was bound to fail. With regard to the passage which the Courts below seem to have relied on and which is to be found at page 383 of Trevelyan's Hindu Law, that has no application to the present case. The statement is found in Chapter VII of the book just referred to, in which the author is dealing with the question of alienation by the manager in a joint family. The father in the joint Hindu family, although he may be the manager, has greater powers than an ordinary manager has and one of those powers is, as already stated, the power of alienating the joint family property for the purpose of satisfying an antecedent debt

BINDESHRI PERSHAD CHAND v. GIRDHAR DAS.

contracted by himself, provided only that the debt is not tainted with illegality or immorality. The Courts were, therefore, wrong in applying this statement of the law to the facts of the present case. The appeal is allowed and the order is that the plaintiffs' suit be dismissed. The defendant-appellant will get his costs in all three Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 5 OF 1915.

March 31, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

*Babu BINDESHRI PERSHAD CHAND
AND ANOTHER—PLAINTIFFS—
APPELLANTS*

versus

*Babu GIRDHAR DAS, MINOR, THROUGH
Babu BALRAM DASS AND ANOTHER
—DEFENDANTS—RESPONDENTS.*

Civil Procedure Code (Act V of 1908), s. 64—Attachment—Private sale of portion—Creditor, right of—Payment by one judgment-debtor—Charge—Contribution.

Where a portion of the property attached is sold privately by a judgment-debtor after the attachment and the decree-holder is unable to realize the amount of his decree out of the portion left unsold, he is entitled under section 64 of the Civil Procedure Code to proceed against the portion sold. [p. 9, col. 2.]

The fact that a judgment-debtor has paid more than his share of the decree does not create a charge in his favour on the property of his co-judgment-debtor. His right is to get a simple money contribution. [p. 91, col. 2.]

Second appeal from the decision of the Additional Judge of Gorakhpur, dated the 28th August 1914.

Messrs. Haribans Sahay and Lakshmi Narayan Tewari, for the Appellants.

Mr. Lakshmi Narayan, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed possession of a 2-annas share in the village of Gopalpur, in the alternative the plaintiffs claimed a decree for Rs. 764 to be realised by the sale of an 8-annas share in the village in the hands of the defendant No. 2. It appears that the plaintiffs and a brother

of theirs owned an 8-annas share in the village. The remaining 8-annas were held by one Debi Dayal Singh. The revenue of this particular village had been assigned to the *jagirdar* of Sikriganj by the Government. The *jagirdar* obtained a simple money-decree against the plaintiffs, their brother and Debi Dayal Singh. In execution of this decree the decree-holders attached the whole 16-annas of the village. In the meanwhile Debi Dayal sold his 8-annas to the defendant No. 1. Then 4-annas out of 16-annas were put up for sale in order to satisfy the decree. These 4 annas were also purchased by the defendant No. 1. The sale to the defendant No. 1 of the 8-annas is dated the 1st of June 1903. The date of the certificate of the auction-sale is the 20th of January 1905. The contention of the plaintiffs is that it must be assumed that at the auction-sale 2-annas belonging to Debi Dayal were sold and 2-annas belonging to the plaintiffs and their deceased brother. Under these circumstances the plaintiffs contend that they are entitled to possession of 2-annas and that the private sale was only effectual to the extent of 6-annas of Debi Dayal. We think that this contention is not correct. It is no doubt true that the sale by Debi Dayal in favour of defendant No. 1 was after attachment. But there was nothing to prevent Debi Dayal selling his share except the provisions of section 64 of the Code of Civil Procedure. This section is as follows: "Where an attachment has been made any private transfer contrary to such attachment shall be void as against all claims enforceable under the attachment." This means that if the decree-holders had been unable to realise the amount of their decree out of the shares left unsold, they would be entitled to proceed against the share of Debi Dayal notwithstanding the private sale to defendant No. 1. As to the alternative relief it has clearly no force. Assuming that the plaintiffs paid more than their share of the decree obtained against themselves and Debi Dayal, their rights were to get a simple money contribution from Debi Dayal. The fact that they paid more than their share of the decree could in no way create a charge in their favour on the property which was sold by Debi Dayal to defendant No. 1. The appeal

RAJANI KANTA MUKHERJEE V. YUSUF ALI.

fails and is dismissed with costs. The decree will not issue until the respondents have made good the deficiency.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3103, 3604 TO 3607 AND 3609 TO 3615 AND 3617, 3618 AND 3621 TO 3628 AND 3630 TO 3644 AND 3646 AND 3647 OF 1911.

March 17, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

RAJANI KANTA MUKHERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

YUSUF ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 5—Tenancy, character of, as shown by lease, if conclusive against sub-tenant—Renewal of lease, option of—Terms undefined, unenforceability of.

Per N. R. Chatterjea, J.—Where it is shown by a lease unambiguous in its terms that the land was originally acquired by the tenant as a *raiya*-holding, the character of the tenancy is not altered by the mere fact of the lessee subsequently letting out the land to others and the land may, as between the lessor and the lessee, be taken to have been acquired for the purpose as stated in the lease itself. [p. 93, cols. 1 & 2.]

But it is open to a sub-lessee, who was no party to the contract of lease, to show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease. [p. 93, col. 2.]

Promoda Nath Roy v. Asir-ud-din Mandal, 11 Ind. Cas. 262 15 C. W. N. 896, distinguished.

The fact that the terms of a lease and the papers of the landlord show that the tenancy was a *raiya* one, is not conclusive against the sub-lessees, who are entitled to prove from surrounding circumstances and other relevant facts that the interest of the lessee in relation to them was that of a tenure-holder. [p. 93, col. 2.]

The word "*jote*" does not necessarily mean the interest of a cultivator. [p. 94, col. 2.]

An option to the tenants of renewal on the expiry of a lease according to the terms on which the lessors will wish to lease out in future, is not enforceable, the terms being undefined and depending upon the will of the lessors. [p. 95, col. 2.]

Per Richardson, J.—*Quere.*—Whether a mere statement in a lease that the land is let out to the tenant for the purpose of being cultivated by himself or his servants, is conclusive even as against the landlord to show that the tenant is a *raiya*, whatever the area of the land may be or whatever may be done under the lease? [p. 95, col. 2.]

Appeals against the decrees of the Officiating District Judge of Noakhali, dated 12th June 1911, reversing those of the Munsif, 1st Court at Feni, dated the 23rd December 1910.

Babus D. N. Chakrabarty, Gunada Chandra Sen and Hit Lal Guha, for the Appellants.

Babus D. J. Kastgir and Biraj Mohan Mojumdar, for the Deputy Registrar, for the Respondents.

JUDGMENT.

N. R. CHATTERJEA, J.—These appeals arise out of suits for ejectment of the defendants, who were tenants under the plaintiffs, on the expiry of the term of their leases. The plaintiffs allege that they themselves are occupancy *raiya*s, and the defendants are under *raiya*s and are liable to be ejected under the provisions of section 49, clause (a), on the expiration of the term, of the written leases, and that, even if the defendants are non-occupancy *raiya*s, they are liable to be ejected under section 44, clause (c), on the ground that the term of their leases had expired, they having been admitted to occupation of the lands under registered leases.

The Court of first instance held that the status of the plaintiffs was that of *raiya*s, and the defendants were under-*raiya*s and even if the latter had a *raiya* right, they had not acquired a right of occupancy and accordingly decreed the suits. On appeal, the learned District Judge held that the plaintiffs are tenure-holders and the defendants are non-occupancy *raiya*s, but that they could not be ejected, *first*, because they were not admitted to occupation of the lands by the registered leases, and *secondly*, because the defendants were not offered the option of renewal mentioned in the leases. The suits were accordingly dismissed. The plaintiffs have appealed to this Court.

The lands are *chur* lands in a Government *khas mahal*, and the *ijaradars* under the Government granted a settlement of the lands to certain persons who, with the exception of one, were their relations. The original lease granted in 1888 was for 1,550 *bighas*. There was a fresh settlement in 1892-93 for 1,309 *bighas* with the same persons. The *chur* increased to about 7,000 *bighas* and the plaintiffs at one time obtained settlement of the whole *chur*. It appears that subsequently the settlement

RAJANI KANTA MUKHERJEE v. YUSUF ALI.

was limited to the original area, and litigation is going on in connection with the limitation of the area. The area settled with the plaintiffs in any case far exceeded 100 *bighas* and they are, therefore, to be presumed to be tenure-holders until the contrary is shown. Then again in the Record of Rights prepared in the last survey and settlement proceedings, the plaintiffs were entered as tenure-holders and the defendants as *raiya*s. Under section 103B of the Bengal Tenancy Act the entry is to be presumed to be correct until it is proved by evidence to be incorrect. There is, therefore, a double presumption that the plaintiffs are tenure-holders.

The plaintiffs, however, say that they are *raiya*s and they rely upon the statement in the lease granted to them, that the lessees were to hold and enjoy the land by tilling and cultivating the same at their own expense, as showing that they were *raiya*s, and they also rely upon the fact that in the rent receipts granted to them by the *ijaradars* and subsequently by the Government Khas Mahal Tehsildars as also in the certificates under the Public Demands Recovery Act for realizing rents from them, the tenancy was described as "non-occupancy *jote*."

The learned District Judge has held that the land was not taken for the purpose of cultivation by the plaintiffs, although it was so stated in the lease, that the plaintiffs were rent-receivers, and that having regard to the area of the land and other circumstances stated in the judgment he held that the plaintiffs are tenure-holders and the defendants are *raiya*s.

It is contended on behalf of the appellants that there being no ambiguity in the lease as to the purpose for which the land was acquired by the plaintiffs, the Court of Appeal below is wrong in relying upon the surrounding circumstances, and the fact that the lands were subsequently let out to tenants, in determining the question of the status of the plaintiffs. But although, where it is shown by a lease unambiguous in its terms that the land was originally acquired by the tenant for cultivating it by himself or by hired servants or by members of his family, the character of the

tenancy is not altered by the mere fact that the land was subsequently let out to tenants, and although in such a case the land may, as between the lessor and the lessee, be taken to have been acquired for the purpose as stated in the lease itself, it is certainly open to a person who is no party to the contract to show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease.

In the case of *Promoda Nath Roy v. Asir-ud-din Mandal* (1) upon which reliance is placed on behalf of the appellants, the question as to the nature of the tenancy of the tenant arose between the parties to the lease, and no question was raised that the purpose for which the land was acquired was wrongly stated in the lease. The only question considered by me was whether the nature of the tenancy was altered by the mere fact that the lands were subsequently let out by the tenant, and the question of the status of a tenant in relation to his sub-tenants was not considered.

The Court below has held that the real purpose for which the land was acquired by the plaintiffs was not cultivation by themselves or by relations, servants or hired labourers. It has arrived at that finding from the surrounding circumstances and the subsequent conduct of the parties, such as the large area of the land, the fact that the plaintiffs do not belong to the cultivating class, that they never cultivated any lands themselves or by hired labourers, that the land which was unreclaimed *chur* land, was reclaimed by the tenants who constructed *bunds* (apparently for irrigating the lands) and held the lands all along on payment of rent to the plaintiffs. The appellants rely upon the fact that in the *jamabandi* made by the Settlement Officer in 1893, he showed 65 out of 98 *bighas* of arable lands as being in the *khas* management of the plaintiffs and they say that even now there are over 100 *bighas* in their *khas* possession. The learned Judge, however, apparently does not believe that any land was in fact in the *khas* cultivation of the plaintiffs. He says: "Documents are not always what they seem, for the oral

(1) 11 Ind. Cas. 262; 15 C. W. N. 896.

RAJANI KANTA MUKHERJEE V. YUSUF ALI.

evidence on the side of the plaintiffs is very different. There is no suggestion that these *bhadraloques* or their relations or their hired labourers began the work of cultivation or even came near the place," and after referring to the evidence on the point observes: "The inference is obvious that there was no cultivation directly for the plaintiffs" and again, "I strongly suspect that the lands in the so-called *khas* possession were only lands for which definite *kabuliats* were not taken." Then the learned Judge observes:—"Then we have the fact that as soon as the lands became extensively fit for cultivation tenants were settled, and *kabuliats* taken from them at rents several times more than what they were paying."

It is true the fact that the plaintiffs are *bhadraloques*, does not by itself show that the lands were not acquired for the purpose of cultivation, as most *bhadraloques* in the villages in this country carry on cultivation by servants or labourers, but the learned Judge apparently does not believe that the lands were reclaimed or brought under cultivation by such agency. The findings of the learned Judge negative the contention that the defendants acted as labourers for the plaintiffs, in reclaiming and bringing the lands into cultivation in the expectation of getting settlement of the lands.

The statement in the lease itself as to the purpose for which the land was acquired, and the fact that the tenancy was treated all along by the Government as non-occupancy *jote*, are certainly in favour of the plaintiffs, but they are, as already stated, not conclusive against the defendants, and they have been considered by the Court below in coming to the finding that although the land was acquired ostensibly for the purpose of cultivation by themselves, the real purpose was not so.

The appellants also rely upon the *kabuliats* executed by the defendants themselves in favour of the plaintiffs as showing that the former admitted that the plaintiffs' tenancy was a *raiya* one. The *kabuliats* are described as "*ijara kabuliats*" and the plaintiffs are described therein as being

owners in possession of "without right *jote mahal*." It is stated, "you having agreed to let out the lands of the said *mahal* in *ijara* lease, &c., &c." The word '*jote*' does not necessarily mean the interest of a cultivator, but it is contended that the words "without right" mean that the plaintiffs were owners of a non-occupancy *jote*. If those words stood alone, that might be taken to be the meaning, but the word "*mahal*" is used in connection with the plaintiffs' right more than once, and that word is not used in connection with the interest of a *raiya*. The description in the *kabuliats*, therefore, is not clear to show that the defendants admitted that the plaintiffs were *raiya*s. Under the circumstances we are unable, in my opinion, to interfere with the finding arrived at by the Court of Appeal below, and must accordingly hold that the interest of the plaintiffs was that of tenure-holders in relation to the defendants, and that the latter are *raiya*s.

But although the defendants are *raiya*s, it has not been shown that each individual tenant really held the land in suit for a period of 12 years, and the Court below has accordingly held that the defendants are not settled *raiya*s or occupancy *raiya*s, but are non-occupancy *raiya*s. A non-occupancy *raiya*, where he has been admitted to occupation of the land under a registered lease, is liable to be ejected on the expiry of the term of his lease. The defendants executed registered *kabuliats*, but the Court below has held that they were not admitted into occupation of the lands by the *kabuliats* and were not, therefore, liable to be ejected. The finding of the Court below, however, is not clear that before execution of the *kabuliats* each individual *raiya* reclaimed and was in possession of the particular lands in respect of which a *kabuliats* was executed by him. The learned Judge observes: "It was the defendants who began reclaiming the *chur* by making *ails*, by grazing cattle and so forth and that at first they paid only a small rent. People acquainted with the *churs* know that this is done by a whole body of villagers joining together and we get indications

GUM SONE v. CASSIM DALLA.

of it from the report of the Settlement Officer in 1895, and it is these villagers who execute *kabuliats* later on when the lands become fit for cultivation." Further on, referring to the evidence of possession previous to the *kabuliats* he observes: "Take the case of Jadeb Ali..... It may be that Jadeb Ali was in possession of at first only a small bit of land and that later on he executed his *kabuliat* along with others for a larger area or for a different area. Jadeb Ali's previous possession, however, makes it clear that the fact relied on in these *kabuliats*, viz., that it was settlement of waste land for the first time, is untrue. The fact seems to be that these defendants reclaimed the lands and eventually when the lands became fit for cultivation they were distributed among them and they then executed *kabuliats* at a progressive rate of rent." If the defendants as a whole body of villagers joining together "reclaimed the *chur*" by making *ails*, by grazing cattle and so forth and the area in respect of which *kabuliat* was executed by a tenant was not the same as that which was in his possession prior to the *kabuliat* as indicated in the observation made by the Judge, it cannot be held that the defendant in each particular case was in occupation of the land in respect of which he subsequently executed the *kabuliat*. The finding is not clear on the point and I think, therefore, that the case should go back to the Court of Appeal below for a decision on that point.

The other ground upon which the Court below held that the defendants were not liable to be ejected is that in the *kabuliats* there was an option of renewal and this option was not given to the defendants.

In the *kabuliats* there is a clause that on the expiry of the term the tenant shall give up the land or take settlement of the land, "according to the terms on which the lessors wish to lease it out in future", by executing a *kabuliat* in favour of the latter and if he did not execute any *kabuliat*, he shall have no right to possess the land and the lessors would be able to dispose of the land according to their wish by bringing the same into their *khas* possession.

It will be seen that the fresh settlement on the expiry of the lease was to be "according to the terms on which the lessors wished

to lease it out in future." The terms, being undefined and depending upon the will of the lessor, cannot be enforced. Besides, the question of option of renewal was not raised in the written statement nor in the issues, and evidence was not gone into upon the point whether the plaintiffs offered to the defendants a renewal of the leases and whether the latter refused the offer. Having regard to the defence taken by the defendants, viz., that they were settled *rai-yats* of the village and were occupancy *rai-yats*, it is not likely that they were willing to accept a renewal of the lease. However that may be, I do not think the Court of Appeal below ought under the circumstances to have allowed the question of the option of renewal to be raised for the first time in appeal.

The result is that the cases will go back to the lower Appellate Court for a decision of the question, whether the defendant in each case was in occupation as tenant of the particular lands in respect of which he subsequently executed his *kabuliat*. If the question is decided in the affirmative the suits will be dismissed, if in the negative the decree of the Court of first instance will be restored. Costs will abide the result.

RICHARDSON, J.—I concur in the order which my learned brother proposes to make, but express no opinion on the question whether a mere statement in a lease that the land is let to the tenant for the purpose of being cultivated by himself or his servants, is conclusive even as against the landlord to show that the tenant is a *rai-yat*, whatever the area of the land may be or whatever may be done under the lease. On that question I should like to reserve my opinion.

Case remanded.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 149
OF 1915.

February 24, 1916.

Present:—Mr. Justice Maung Kin.
GUM SONE AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

CASSIM DALLA—DEFENDANT—
RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 6 (c)—

GUM SONE V. CASSIM DALLA.

Easement—Right of way, grant of, for consideration—Verbal grant—Registration, absence of, whether invalidates transaction—Creation and transfer of easements, distinction between.

Section 54 of the Transfer of Property Act relates to the transfer of easements, and not to the creation thereof. [p. 96, col. 2.]

The creation by grant of a right of way in favour of a person over the grantor's land is not a transfer of ownership that is required to be in writing and registered under section 54, because no existing right of easement is transferred but a new easement is imposed on the property of the grantor. [p. 96, col. 2.]

A right of way can, therefore, be created by a verbal agreement. [p. 97, col. 1.]

Bhagwan Sahai v. Narsingh Sahai, ■ Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871 and *Krishna v. Rayappa Shanbhaga*, 4 M. H. C. R. 98, relied on.

Mr. Wiltshire, for the Appellants.

Mr. Dantra, for the Respondent.

JUDGMENT.—The appellants were plaintiffs and the respondent-defendant in the Court of first instance.

The facts of the case as culled from the judgment of the District Court in appeal are as follows:—

"Plaintiffs sued for a decree for an injunction to restrain defendant from interfering with their enjoyment of the right of way over certain land. Their case is this. They are the owners of a rice and saw mill at Kanhla Tagale. Defendant is the owner of the land north of theirs. Plaintiffs' land originally belonged to Ah Lyaung and U Yan and defendant's land was originally owned by Maung Po Thin. Mg. Po Thin had a rice mill on his land and has caused a railway siding to be constructed thereon for conveying goods to and from his mill. An agreement was made between Ah Lyaung and U Yan on the one part and Maung Po Thin on the other part that in consideration of a sum of Rs. 1,500 paid by the former to the latter, the former would have the full and free use in perpetuity of that portion of the railway line passing through the latter's land and a permanent right of way over the same. Plaintiffs assert that the agreement is in full force and binding on defendant, who is a subsequent purchaser of Mg. Po Thin's land. It is alleged that defendant has endangered the running of the railway and has interfered with the proper use of the line by cutting away earth from the railway embankment passing through his land, by planting wooden posts and by putting up a notice board prohibiting all persons passing over his land.

Defendant admits having put up a notice as alleged by plaintiffs but states that he did nothing beyond his rights. He contests plaintiffs' right to the right of way claimed.

The Court of first instance found for the plaintiffs and passed a decree as prayed for.

The District Court held that the right of way in dispute in the case was in the nature of immoveable property and ■ such the sale of it could not be made without a registered instrument in accordance with the provisions of section 54 of the Transfer of Property Act, and that the plaintiffs had, therefore, no right of way as claimed.

According to the Allahabad High Court in *Bhagwan Sahai v. Narsingh Sahai* (1) the view of the District Court is wrong.

In that case there was an unregistered document creating a right to discharge water on to a neighbour's premises. It was contended that section 54 of the Transfer of Property Act did not apply and that the document had a binding effect. Tudball, J., observed:—"The argument is that the document now in question evidences, not the transfer of an easement, but the creation of that right: that prior to the passing of Acts IV and V of 1882, the law did not require the express imposition of an easement to be evidence by writing at all; *vide Krishna v. Rayappa Shanbhaga* (2); that Act V of 1882 made no change in the law in this respect; that section 54, Act IV of 1882, related to the transfer of an easement, and not to the creation thereof. Attention is called to section 6, clause (c) of that Act, which shows that an easement cannot be transferred apart from the dominant heritage and that the Act contemplates the transfer of ■ pre-existing easement, and not the creation of a new one. In my opinion, these arguments are well-founded." The learned Judge further observed:—"It seems clear to me that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by section 54 of the Act. Where under that section an easement is transferred, it must be so transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It

(1) 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871.

(2) 4 M. H. C. R. 98.

TARAP ALI v. KALIPADA BANDOPADHYA.

exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessitates the creation of ■■ easement being evidenced by writing."

Banerji, J., who took part in the decision remarked with reference to section 54 of the Transfer of Property Act as follows:—"That section contemplates the existence of a subsisting right of ownership in immoveable property and provides for the transfer of such right. It cannot apply to the creation of ■ right. By the document referred to above, no existing right of easement was transferred, but ■ new easement was imposed on the property of the grantor. Section 54 has, therefore, no application."

In my opinion, nothing can be said against the arguments of the learned Judges of the Allahabad High Court. I would, therefore, hold that a right of way can be created by a verbal agreement.

As to the question whether there was such ■■ agreement, Maung Po Thin and Ah Layung have given evidence on the point and there is nothing to contradict them.

Mr. Dantra for the defendant argued that his client had no notice of the agreement. I think the argument is hardly sound. The rails must have been staring, as it were, in the face of the defendant, when he inspected the property before buying it from Maung Po Thin.

For the reasons stated above, I allow the appeal setting aside the judgment and decree of the District Court and restoring the judgment and decree of the Court of first instance.

The respondent will bear costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 222
OF 1914.

April 12, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

Sheikh TARAP ALI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

KALIPADA BANDOPADHYA—PLAINTIFF
—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 29—
Agreement to pay produce rent and on default enhanced
money rent—Illegality.*

Where the money rent of an occupancy holding is altered, by a fresh agreement to ■ produce rent with a proviso that the rent exigible on default is to be in excess of the original rent, the agreement violates section 29 of the Bengal Tenancy Act and is unenforceable. [p. 99, col. 1.]

The defendant, an occupancy *raiyat* who had been occupying his holding at a money rent of Rs. 3-4-0, undertook, by ■ fresh *kabuliyat*, to pay ■ fixed produce rent of 12 *batwas* of paddy (priced at a *batwa* per rupee) and in default Rs. 12:

Held, that it was in effect a case of prohibited enhancement of rent under section 29 of the Bengal Tenancy Act and that the plaintiff was only entitled to rent at the original rate. [p. 99, col. 1.]

Ananda Chandra Roy v. Makram Ali, ■ Ind. Cas. 204; 10 C. L. J. 144; *Asar v. Surja Kumar Ghose*, 7 Ind. 842; 12 C. L. J. 649; 13 C. W. N. 219, followed.

Hassan Kuli Khan v. Nakchhedi Nonia, 33 C. 200; *Gobind Mandar v. Banarsi Prosad*, 21 Ind. Cas. 351; 18 C. L. J. 74 and *Fazal Imam v. Sukor Mahton*, 25 Ind. Cas. 442; 19 C. L. J. 333, distinguished.

Kishori Mohan Bose v. Sheikh Uzir, 6 Ind. Cas. 335; 14 C. W. N. 693; 37 C. 610, referred to.

Appeal against the decree of the Sub-Judge of Dacca, dated the 25th September 1913, reversing that of the Munsif, Munshiganj, dated the 28th of January 1913.

FACTS.—The facts material to the report will appear from the arguments and the judgment.

Babu Rajendra Chandra Guha, for the Appellants.—My submission is two-fold. First, the stipulation in the *kabuliyat* for payment of rent in kind at 12 *batwas* of paddy per annum is in contravention of section 29, Bengal Tenancy Act, and is consequently illegal and unenforceable. The test is whether the rent in kind is a share of the produce or is a fixed quantity of paddy or other produce, not liable to variation owing to flood, drought, etc.

The case reported as *Gobind Mandar v. Banarsi Prosad* (1) relied upon by the Court of Appeal below is entirely distinguishable, for that was a case of conversion of *nugdi* rent into *bhaoli* rent and the tenancy there was a non-occupancy one and the conversion would only take effect after the expiry of the term of the lease.

So also the case reported as *Hassan Kuli Khan v. Nakchhedi Nonia* (2) has no application to the facts of the present case. The decision of that case turned upon the interpretation of section 20 of the Cess Act, and had nothing to do with section 29 of the Bengal Tenancy Act. The head-note is

(1) 21 Ind. Cas. 351; 18 C. L. J. 74.

(2) 33 C. 200.

TARAP ALI v. KALIPADA BANDOPADHYA.

wrong. On the other hand the case reported as *Kishori Mohan Bose v. Sheikh Uzir* (3) supports my contention. There it was held that moneyrent could not be enhanced by addition of rent in kind.

The second part of my argument is this. The stipulation, under the garb of one for rent in kind, is really one for money rent at Rs. 12 per annum. This contention is supported by the case reported as *Afar v. Surja Kumar Ghose* (4). There the stipulation was for money rent for a part of the land, and an invariable rent in kind for the other part, in default for a money rent. It was held that the landlord was not entitled to recover the price of the produce that had been agreed to be paid as rent, but only the money rent to be paid in default.

Moreover, several cases have arisen under section 48, Bengal Tenancy Act, relating to the question as to whether similar stipulations were for rent in kind or for money rent. Under this section, it has been held in the case reported as *Ananda Chandra Roy v. Makram Ali* (5) that a similar stipulation is really one for money rent under the garb of rent in kind. On all these grounds the stipulation in question is unenforceable.

Babu Satish Chandra Ghose, (with him Babu Satish Chandra Bhattacharjee), for the Respondents.—The case of *Gobind Mandar v. Banarsi Prosad* (1) is really indistinguishable. The stipulation is one for the benefit of the tenant. The landlord would be bound to receive the rent in kind, if the tenant offered to pay it. The tenant having agreed to pay it, there is no reason why he, in his turn, should not be bound to pay it. There is no authority for saying that conversion of money rent into rent in kind would come within the purview of section 29 of the Bengal Tenancy Act. The wording of section 29 supports my contention, and the observations of the learned Judges in some of the cases cited by the other side also support my contention.

JUDGMENT.—This appeal arises out of a suit for rent in kind in terms of a *kabuliyat* executed in 1305 by the father of the defendant in favour of the father of the plaintiff. It is not denied that at least from 1292, the father of the defendant had occupied the

(3) 6 Ind. Cas. 335; 37 C. 610; 14 C. W. N. 693.

(4) 7 Ind. Cas. 842; 15 C. W. N. 249; 12 C. L. J. 649.

(5) 3 Ind. Cas. 204; 10 C. L. J. 144.

holding in question at a money rent of Rs. 3-4-0 per annum. In 1305 the father of the plaintiff obtained from the father of the defendant a *kabuliyat* by which he agreed to hold the same lands at a fixed produce rent of 12 *batwas* of paddy and Rs. 12 instead if he failed to deliver the produce. The Court of first instance held that this was a disguised violation of the provisions of section 29 of the Bengal Tenancy Act and gave a decree at the original rate of Rs. 3-4-0 per annum. The Court of Appeal below has reversed the decree of the 1st Court and upheld the *kabuliyat* rate on the authority of the case of *Gobind Mandar v. Banarsi Prosad* (1). It is contended in the second appeal before us that the lower Appellate Court is wrong and the case quoted has no application to the facts of this case. We think that this contention is right. It is not denied that the defendant is an occupancy *raiyat* and he was paying a money rent in 1305, when this new *kabuliyat* was taken from him. Section 29 of the Bengal Tenancy Act provides that the money-rent of an occupancy *raiyat* must not be enhanced, so as to exceed the rent previously paid by more than 2 annas in the rupee. The covenant in *kabuliyat* that the produce rent was not to be less on account of drought, etc., and that in default the *raiyat* would pay Rs. 12, makes it optional with the *raiyat* to deliver the paddy or to pay Rs. 12 instead. The enforcement of the *kabuliyat* would always have to be made in case of failure to deliver the paddy, i. e., by the recovery of Rs. 12 per annum. The practical effect is that Rs. 3-4-0 is increased to Rs. 12 under the cloak of a commutation. It is found by the Court of first instance that the average price of paddy for the last twenty years has been a *batwa* for a rupee. So that 12 *batwas* of paddy cannot be said to be the commuted form of Rs. 3-4-0. There is, therefore, no change of form but enhancement under a false description. The first case that deals with the question is that of *Hassan Kuli Khan v. Nakchhedi Nonia* (2). There the change was from *nugdi* into *bhaoli*; the learned Judges (Pratt and Geidt) said: "The conversion related to the medium by which rent was payable.....the produce would be a varying quantity and in years of drought it might be very little or nothing."

MA PWA v. YU LWAI.

In the present case there is no such uncertainty and the original rent and the rent that is exigible on default are both in money. The next case, that of *Gobind Mandar v. Banarsi Prosad* (1), was one in which a lease for 5 years with a cash rent provided that if the tenant held over, he was to pay *bhaoli* rent by dividing the crops equally with his landlord. There, in the first place, the payment of the *bhaoli* rent was agreed to be due in case the tenant held over so that the alteration in the rent was provided in the original contract. In the second place, there was the same uncertainty of produce as in the first case and in the third place, it was not the case of an occupancy holding. The next case, that of *Kishori Mohan Bose v. Sheikh Uzir* (3), was that addition to money-rent by paddy rent the value of which exceeds the proportion of 2 annas in the rupee is within the mischief of section 29. So far as it goes, this case seems to support the contention of the appellant. The case of *Fazal Imam v. Sukor Mahton* (6) was a case of enhancement of produce rent and has no application.

It was held in the case of *Ananda Chandra Roy v. Makram Ali* (5) that when under a *kabuliyat* an under-*raiyat* was liable to pay a certain quantity of produce and in the event of failure to do so to pay a fixed amount in cash, his rent is a money rent within the meaning of section 48 of the Bengal Tenancy Act. In the case of *Afar v. Surja Kumar Ghose* (4) also a similar view was taken of similar terms in a *kabuliyat*.

We think, therefore, that there has been a violation of the provisions of section 29 and we set aside the decree of the lower Appellate Court and restore that of the Trial Court with costs.

Appeal allowed.

(6) 25 Ind. Cas. 442; 19 C. L. J. 333.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 117 OF 1914.

January 17, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Parlett.

MA PWA—DEFENDANT No. 1—APPELLANT
versus

YU LWAI AND ANOTHER—PLAINTIFF AND
DEFENDANT No. 2—RESPONDENTS.

Buddhist Law, Chinese—Custom—Widow—Maintenance, right to, whether lost by refusal to live in family house—'Family house,' meaning of—Adoption, power of making—Consent of husband's nearest male relatives—Letters of Administration, grant of, to Administrator-General without his application or that of party—Illegality.

The expression 'family house', according to the ideas prevalent among Chinese Buddhists, means a house which has belonged to the paternal ancestors of a person or one which a man has started for his family and their male descendants, and in which the family has lived together continuously descending from father to son. [p. 102, col. 2.]

In the absence of a guide as to the prevalent custom among Chinese Buddhists in China, any rule that deprives a widow of her right to maintenance for her refusal to live in the family house should not be enforced, when the other members of the family have made themselves objectionable to her or rendered it impossible for her to live with them. [p. 102, col. 2; p. 103, col. 1.]

A Chinese Buddhist widow has power to adopt a son to her husband with the consent of her husband's nearest male relatives. [p. 103, col. 2.]

Letters of Administration should not be issued to the Administrator-General except on the application of that officer or of any of the parties concerned. [p. 103, col. 2.]

Mr. Clifton, for the Appellant.

Mr. N. M. Cowasjee, for Respondent No. 1.

Mr. Bonnerji, for Respondent No. 2.

JUDGMENT.

Fox, C. J.—The relief claimed in the suit was

(a) a declaration that the plaintiff is the adopted son of Wun Pain Wain, deceased, and his sole heir,

(b) a decree for the administration of Wun Pain Wain's estate by and under the directions of the Court, and for determination of the rights and shares of the parties in the estate,

(c) an order for accounts to be taken of the assets and liabilities of the estate,

(d) an order for appointment of a Receiver of the estate.

(e) costs and

(f) any further and other relief which might be proper.

MA PWA v. YU LWAI.

The plaintiff is the second son of Wun Pain Khain, the elder brother of Wun Pain Wain. He is a minor, and the suit is brought on his behalf by Ma Me, wife of Leong Shain Sway: she is a sister of Wun Pain Khain and Wun Pain Wain. Their father's name was Wun Shan Shoke and their mother's Ma Po. There is another brother Wun Pain Wa, who was a witness in the case.

The 1st defendant is the widow of Wun Pain Wain, having been his second wife. His first wife was Ma Phee who died in 1907. Wun Pain Khain died in 1909, leaving a widow Ma Ma and children. Wun Pain Wain died on the 10th January 1913. His mother Ma Po died in January of the following year. The 2nd defendant is a girl who is alleged in the plaint to have been adopted by Wun Pain Wain and Ma Phee. Although this adoption is denied by the 1st defendant in her written statement, she admitted it in her petitions to the elders whose assistance she sought, and it is clearly proved by Exhibit A. The 1st defendant denied the adoption of the plaintiff and adhered to the denial; the first issue in the case was "Was Yu Lwai, the plaintiff, the adopted son of Wun Pain Wain?" It lay upon the next friend of the plaintiff to prove affirmatively that Wun Pain Wain had adopted him.

The first question to be considered is the question as to what law is applicable to the parties. Wun Pain Wain's father was a Chinese who settled in Burma and married here: whether his wife was of mixed Chinese and Burmese blood does not appear. Their children were brought up to follow Chinese customs: funerals of members of the family have been according to rites observed by Chinese. The members who have given evidence profess to be Chinese Buddhists. The 1st defendant also professes to be a Chinese Buddhist: her father is Chinese. She herself has never indicated a desire to have any but the law applicable to Chinese Buddhists applied either on the question of adoption or inheritance, and the plaintiff's next friend claims to have that law applied. Under the circumstances I think the decision in *Fone Lan v. Ma Gye* (1) should be followed and the

Customary Law of Chinese Buddhists should be applied in both matters as far as it can be ascertained. A mass of evidence has been given in the case to show what the Customary Law in China is, and we have been referred to the works mentioned in the judgment of the Original Court.

Neither from the evidence nor from the works can an entirely confident conclusion be come to as to how the questions in issue would be decided in China.

According to Parker at page 4 of his *Comparative Chinese Family Law*, the Law Secretaries mentioned by Von Moellendorff are, whether provincial or metropolitan, the true and almost the sole depositaries in China both of the life of the law and the life of official language. They search out and supply the law in each case and draw up the records for submission to the Courts of Appeal at Peking.

It is evident that the customs as to adoption and inheritance have no connexion with Buddhism, Confucianism, or Taoism, but they appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the above religions appeared, and which still is the strongest influence with the majority of Chinese, whichever of the above faiths they profess.

Adoption of children by childless married couples would appear to be more prevalent in China than in Burma even. The dying out of a family appears to be regarded as disastrous. Jernigan says at page 124 of his work, *China in Law and Commerce*:—"The dying out of a family should be prevented, as by the desolation of the house the dead lost their religious honours, the gods of the family their sacrifices, the hearth its flame, and the forefathers their(?) amongst the living." Adoption is resorted to to prevent these calamities, and the most frequent case is the adoption of a nephew by a childless uncle. According to most of the authors the adopted son takes exactly the same position as a natural son. The adoption of females would not with certainty avoid the calamity of the family in the paternal line dying out, for on marriage a woman becomes a member of the family of her husband, and severs connection with the family of her father. If Wun Pain

(1) 2 L. B. R. 95.

MA PWA v. YU LWAI.

Wain was strongly imbued with the traditions and feelings of his father's race, one would certainly have expected him to have adopted the plaintiff who is the second son of his elder brother. It is remarkable, however, that his first adoption was of a girl, and that it was clothed with a prominent characteristic of one form of adoption amongst Burmese, namely, a declaration that the child should have rights of inheritance. This points to Wun Pain Wain not being so strongly imbued with the necessity of having a son as the ordinary childless Chinese married man is said to be. No doubt his elder brother had no second son in the year 1896 when the 2nd defendant was adopted, but the younger son or any one may be adopted, and it could scarcely have been difficult for a man of comfortable means to have parents willing to give him one of their sons in adoption.

If the entries in the Municipal Register of deaths relating to Ma Phee, Exhibit 4, are correct, she must have been 31 years of age in 1896 when she and Wun Pain Wain adopted the 2nd defendant. Her parents' names seem purely Burmese. It is remarkable that one who held himself out as a Chinaman should adopt the child of pure Burmese parents. This again tends to show that Wun Pain Wain had leanings towards the customs of the country in which he was born and bred. Years went by and Ma Phee remained childless. Not until 1905 at the earliest is Wun Pain Wain said to have adopted a son, so that for many years of a childless married life the anxiety of his dying without a son cannot have weighed heavily on Wun Pain Wain's mind. Leong Shaing Sway, husband of Ma Me, said at first that the adoption of the plaintiff took place in 1906, but as he afterwards said that it took place three or four months before Wun Shan Shoke's death, and Exhibit 5 shows that the old man died on the 19th June 1905, February or March 1905 must be intended to be put forward as the time when the alleged adoption took place. No special reason is assigned by any of the family for Wun Pain Wain having woken up to the fact that he must have a son. The account of what was done is bald. Wun Pain Wain and Ma Phee are said to have asked Wun

Shan Shoke and Ma Poto to allow them to adopt Wun Pain Khain's second son. The father sent for Wun Pain Khain, and he agreed and his wife also agreed. Wun Shan Shoke sent for the other brother Wun Pain Wa and E Lin Shin, a son of Ma Po by a former husband, and the family was informed about the adoption.

Possibly this assembly may be considered an assembly of agnates, which Parker refers to at page 24 of his Comparative Chinese Family Law as generally taking place when adoption of an agnate is made, but no entry in a genealogical register of the family is produced to confirm the fact of the adoption: according to Parker such an entry is usually made. No change whatever was made in the boy's life. He remained with his natural parents who at that time appear to have been living neither in the house in which Wun Shan Shoke lived, nor in the house in which Wun Pain Wain lived. This absence of change in the boy's surroundings and bringing up is sought to be accounted for by his being only about five years old at the time, but this does not adequately account for a husband and wife anxious to adopt a son leaving the child after the adoption with its natural parents. Ma Phee had already taken and brought up a child who was only four years of age when taken; if the plaintiff was a child of ordinary health at the time, his age alone could not have afforded any reason for his not being taken by the adopters to live with them. The plaintiff was first sent to school in 1907: the name, occupation and residence of the parent or guardian received into the school had to be registered. Exhibit 9 shows that Wun Pain Khain's name and residence were given. Two and a half years afterwards when the plaintiff was sent to another school his natural father's name and residence were again given. Wun Pain Wain is said to have paid all or contributed towards the school expenses of the boy, but there is nothing to support the statements, and even if he did so, the contribution by a well-to-do but childless brother to the school fees of one of his less well-to-do brother's many children would be by no means extraordinary. The fact, however, that it was not proved that from the time of the alleged adoption up to the time of his death Wun Pain Wain wholly supported the plaintiff, goes strongly against

MA PWA v. YU LWAI.

the truth of the story. Again, although there probably would be good reasons for an adopted boy of seven years of age remaining with his natural mother, after Ma Phee's death there could scarcely have been cogent reasons why he should remain with her after Wun Pain Wain married the 1st defendant. The latter was not a young inexperienced girl when they were married, and presumably she was quite capable of looking after a boy of ten years of age. Again Wun Pain Khain was not at all well off in his lifetime, and he is said to have died penniless. From Exhibit B it would appear that counting in Yu Lwai he had six children; if Yu Lwai had been adopted by his brother, is it likely that Wun Pain Khain and, after his death, his wife Ma Ma would not have insisted on the well-to-do brother bearing the whole cost of the feeding, clothing and other expenses of their son whom he had adopted?

These considerations appear to me to lead forcibly to the conclusion that the story of the adoption of the plaintiff is an invention.

The other evidence in support of it is the evidence of the plaintiff having been put to do what is usually assigned to a son at the funeral of his parents and at the after-ceremonies both at and after the funeral of Ma Phee and that of Wun Pain Wain. For those of the latter the sacraments were not made by the 1st defendant, but by the others, and even if Wun Pain Wain chose the plaintiff to perform the acts for his 1st wife, it by no means follows that he thereby acknowledged him to be his adopted son. Some one had to do the acts, and, in default of a son, a nephew would be the most suitable person. What is done in China can be done even by some one hired to do the acts.

Another piece of evidence offered in support of the adoption is the "Public Proclamation of Injustice," Exhibit D, which is in Chinese and bears a date corresponding to the 19th April 1913. It is not clear how it came to be drawn up and what instructions were given to the compiler. It contains a reference to the duty of the first defendant to properly look after and maintain the daughter left by Wun Pain Wain's previous wife, and also his adopted nephew (brother's son). The instructions to the writer are not proved to have come directly from the 1st defendant, and she does not know Chinese. I attach no

importance to the statement in the document. The earlier document in Burmese, Exhibit 7, dated the 28th February 1913, appears to me to be much more likely to express correctly what she wanted to express, and it appears also to have the ring of truth about it.

According to it Leong Shain Sway and Ma Me behaved to her very disgracefully when she was in a distracted state on the loss of her husband only a few months after the loss of her first and only child.

Some of the statements may be exaggerated, but there is likely to be substantial truth in the document considering that it was her appeal to the elders of her community to do justice as between her and her husband's family, and it was drawn up within six weeks of her husband's death in order to avoid litigation. This document contains no admission of a son having been adopted, but it mentions that the subject of adopting one of Wun Pain Khain's sons had been mooted, and that she herself wanted to adopt the youngest of them. On the whole evidence I am of opinion that the adoption of the plaintiff is not proved, and consequently I think that the appeal should be allowed and that the suit should be dismissed.

The judgment of the learned Judge disallowed the 1st defendant even the right to maintenance, on the ground that by leaving the family house she lost such right.

I cannot agree in this view, for it appears to me that the house occupied by the plaintiff and her husband was not the family house within the sense in which a house is regarded as a family house in China. I take it that what is referred to is a house which has belonged to paternal ancestors or one which a man has started for his family and their male descendants. The house according to Exhibit B was Ma Po's alone, and was not Wun Shan Shoke's; if it had been it would, on his death, have devolved upon his sons. At times the sons lived there but they did not do so always. The root idea of a family living together continuously for years in a house regarded as the family house descending from father to sons does not apply to the house in question. Moreover, in the absence of any guide as to what would be done in China if the other members of a family made themselves objectionable to a widow

MA PWA v. YU LWAI.

of a member, and made it impossible for her to live with them in the same house, I think that any rule, there may be, depriving the widow of maintenance unless she continues to live with her husband's relations, should not be enforced.

That some of her husband's relations did behave badly to her is evident. It is not likely that she would have given up the key of the box containing her husband's papers and valuables unless she was deceived. There could have been no honest reason for the removal of the box from what, according to the case for the plaintiff, was the family house. It was taken to the house of a man who was no relation and whose wife even was according to Chinese ideas not a member of Wun Pain Wain's ancestral family. Even if the plaintiff had been adopted, the 1st defendant had the right, according to Chinese custom, to administer her deceased husband's property during the plaintiff's minority, and she had the first claim to his guardianship, see page 578 and 602 of Alabaster. Yet Leong Shain Sway and Ma Me get hold of the property, assert that the jewellery which Wun Pain Wain admittedly had at one time had been given to Ma Me after his first wife's death, and one of them attempts to justify their conduct by saying that the estate was all handed over to them before Wun Pain Wain's death. Not content with this, Ma Me a few months afterwards applied for Letters of Administration of the estate valuing it at first at Rs. 15,070, which did not include the value of any jewellery. Even this valuation was too high for her subsequently, and by a further statement of the assets the value was brought down to Rs. 6,445. When the present suit was brought to assert the rights of a minor the person who comes forward as next friend is not one of the family of the deceased, but a sister of a deceased who had left his family and by marriage had entered another family. In no event could she have any possible claim to the guardianship of the plaintiff, and the facts give rise to the strong suspicion that she and her husband have been the moving spirits throughout, and that their object has been to obtain the property of the

deceased, not so much for the minor as for themselves.

The 1st defendant's application for Letters of Administration (Civil Regular No. 169 of 1913) was dismissed in consequence of the judgment in the present suit (Civil Regular No. 312 of 1913). On Ma Me's application for Letters the order was also one dismissing her application, but the learned Judge ordered that Letters should issue to the Administrator-General: in so doing he overlooked the fact that an order for Letters to the Administrator-General can only be made on the application of that official or of one of the parties concerned, and as no one had applied the order was *ultra vires*, nothing further has been done on it.

In view of the decision on this appeal Letters should issue to Ma Pwa if she again applies for them.

No decision can be now given on the rights of the 2nd defendant.

According to Jernigan at page 125 Ma Pwa has power to adopt a son for her deceased husband, but she should ask the consent of her late husband's nearest male relative, who is Wun Pain Wa. Should an adoption be made the right of the 2nd defendant to share in the estate would be abrogated.

I would order Ma Me, the next friend of the plaintiff, to pay the 1st defendant's costs of the suit and of this appeal, and would make no order as to the 2nd defendant's costs in either the suit or appeal.

The Advocates' fees in the suit should be allowed as settled in the Original Court, and on the appeal at 5 per cent on the amount Rs. 6,445, the value put on the suit and appeal, and a fee of 6 gold *mohurs* for each day after the first on which the appeal was heard.

PARLETT, J.—I concur.

Appeal allowed.

ALLA-UD-DIN HADI v. G. I. P. RY. CO.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 126 OF 1915.

April 7, 1916.

Present:—Sir P. C. Banerji, Kt.

Sheikh ALLA-UD-DIN HADI— PLAINTIFF

—APPELLANT

versus

THE G. I. P. RAILWAY COMPANY—

DEFENDANT—RESPONDENT.

*Railway—Goods consigned—Maund rate charged—
Consignment note—Waggon rate, if can be charged at
station of destination.*

The plaintiff consigned certain bundles of dry hides at A station to be delivered to him at C station both these stations being on the same Railway. The bundles were charged for at maund rates but on arrival at C station the defendant company charged an additional sum at waggon rates. The plaintiff paid under protest and sued for recovery of the said amount by way of damages. The consignment note gave the Company the right of remeasurement, reweighment, reclassification, and recalculation of rates at the place of destination:

Held, that this was not a case of remeasurement, reweighment, reclassification or recalculation and that the plaintiff was entitled to a refund from the Railway Company of the excess charge made. [p. 104, col. 2; p. 105, col. 1.]

Chunni Lal v. Nizam's Guaranteed State Railway Company, Limited, 29 A. 228; 2 M. L. T. 42; A. W. N. (1907) 21; 4 A. L. J. 80 (F. B.), followed.

Appeal against the decree of the Subordinate Judge, Cawnpore, dated the 8th June 1915.

Mr. Kailas Nath Katju, for the Appellant.

Mr. Ladli Prasada Zutshi, for the Respondent.

JUDGMENT.—This is an application for revision of a decree passed by the Judge of the Small Cause Court at Cawnpore, dismissing the claim of the plaintiff for damages brought under the following circumstances:—

The plaintiff consigned 67 bundles of dry hides at the Attarra railway station to be delivered to him at the Cawnpore General-ganj railway station, both these stations being on the same Railway, namely, the Great India Peninsula Railway. The bundles weighed 120 maunds and 29 seers and were charged for at maund rates, the amount charged being Rs. 73-12-0. The goods appear to have been despatched in four waggons. When these arrived at Cawnpore the defendant Company charged an additional sum of Rs. 124-8-0 at waggon rates. The plaintiff paid this amount under protest and brought the present suit for recovery of the said amount by way of damages, on the ground that the excess charge was illegally made. The defendant Company contended that under the terms of the con-

signment note they were entitled to make the additional charge realized from the plaintiff. On the back of the consignment note there are certain conditions which are headed "Notice to Consignors." One of these conditions, namely, No. 6, is as follows: "The Railway have the right of remeasurement, reweighment, reclassification and recalculation of rates, terminal and other charges at the place of destination, and of collecting, before the goods are delivered, any amount that may have been omitted or undercharged."

It is urged on behalf of the Railway that this condition authorized them to make the excess charge levied from the plaintiff. It is clear that this was not a case of remeasurement, reweighment or reclassification. There was no mistake in classification and admittedly there was no mistake in measurement and weighment. The question is whether this comes under the head of recalculation. The learned Vakil for the Railway Company relies on rule 57 of the General Rules of the Railway, which provides for the case of bulky articles fully occupying a waggon. I am of opinion that this is not a case of recalculation. The calculation according to the maund rates was correct. The contract with the plaintiff was a contract to carry the goods at maund rates, which were lower, in this particular instance, than waggon rates. Such a contract having been made cannot be altered. The case is fully covered by the ruling of the Full Bench in *Chunni Lal v. Nizam's Guaranteed State Railway Company, Limited* (1).

In that case as in this, the Railway Company relied on paragraph No. 51 of the Peninsula Railway goods tariffs, which were exactly in the same terms as clause 6 of the consignment to which I have already referred. It was held that the terms of this rule did not entitle the Railway Company to alter the contract and charge at destination different rates from the contract rate. In that case the contract made at the receiving station was at waggon rates and the claim made at the station of destination was at maund rates. It was held that the acting of the Great India Peninsula Railway Company in exacting maund rates instead of waggon rates was not covered by the words remeasurement, reweighment, recalculation.

(1) 29 A. 228; 2 M. L. T. 42; A. W. N. (1907) 21; 4 A. L. J. 80 (F. B.).

RAM NARAIN RAM v. PATI RAM TEWARI.

In view of this ruling the excess charge made by the defendant Company was not recoverable and the plaintiff was entitled to refund from the Railway Company of the excess charge made. I allow the application, set aside the decree of the Court below and decree the plaintiff's claim with costs in both Courts.

Application allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 961 AND 1105 OF 1913.

April 10, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

RAM NARAIN RAM AND OTHERS—
DEFENDANTS—APPELLANTS IN BOTH

versus

PATI RAM TEWARY—PLAINTIFF—
RESPONDENT IN S. A. No. 961 OF 1913.

LACHMI TEWARI AND OTHERS—
PLAINTIFFS—RESPONDENTS IN S. A. No. 1105 OF 1913.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 10, 16—Arbitration—Award 'recorded' by Court—Appeal—Agreement to abide by decision of majority—Refusal of minority to sign award—Award, validity of.

No appeal lies against the order of a Court recording an award.

Ghulam Khan v. Muhammad Hassan, 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 25 P. R. 1902, followed.

Where the parties to a suit refer the matter in dispute to arbitration, agreeing to abide by the decision of the majority, it is enough if the award is signed by the majority. The refusal of the minority to sign will not affect its validity if they were present throughout the proceedings and took part in the deliberations.

Kazee Syud Naser Ali v. Musammat Tinoo Dassia, 6 W. R. 95, relied on.

Second appeals from a decision of the Subordinate Judge of Arrah, dated the 22nd February 1913, confirming that of the Munsif at Arrah, dated the 14th March 1912.

Mr. Susil Madhab Mullick, for the Appellants.

Mr. Chandra Sekhar Prasad Singh, for the Respondents.

JUDGMENT.

Roe, J.—These are appeals from the order of the Subordinate Judge refusing to set aside an order of the Munsif recording an award made by arbitrators. In accordance with the terms of a decision in the case of *Ghulam*

Khan v. Muhammad Hassan (1) no appeal lies against the recording of the award. The proceedings of the learned Subordinate Judge in hearing the appeal were without jurisdiction. Inasmuch as the papers are on the table before us, we call for the record under section 115 and proceed to consider whether the action of the Munsif in recording this award was made with or without jurisdiction. There are two points urged before us on which particularly the Munsif had no authority to record the award. The *first* is that it was not properly referred to arbitration and the *second* is that the arbitrators named by the Munsif did not join in the proceedings. The *third* ground urged is that the learned Munsif exercised his jurisdiction without proper discretion in refusing to withdraw the case at an early stage from the arbitrators as soon as he discovered that two of them were connections of the plaintiff.

With regard to the *first* ground it is impossible for us to entertain the objection; it was not placed before the Munsif at all. We have no materials upon which we can say that there was no proper reference to arbitration.

With regard to the *second* ground, the Munsif has found as a fact that the evidence of two arbitrators given before him is true evidence and that the third arbitrator was present throughout the proceedings and only refused to sign the award, when he discovered that it would be against the plaintiffs. The learned Munsif has also set down as an undisputed fact, in his opening of the judgment, that the parties agreed in the first instance to abide by the decision of the majority. It is clear, therefore, that there has been a decision of the majority come to after full discussion by the whole body of the arbitrators, and that the applicant for revision before us is bound by that decision, even though it is not signed by the minority. This is in accord with the case reported as *Kazee Syud Naser Ali v. Musammat Tinoo Dassia* (2). The appeals are dismissed with costs. We note that there is no necessity to interfere under section 115.

SHARFODDIN, J.—I agree.

Appeals dismissed.

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 25 P. R. 1902.
(2) 6 W. R. 95.

JOGENDRA NARAIN ROY v. MANMATHA NATH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3288
OF 1912.

April 12, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

JOGENDRA NARAIN ROY CHOW.

DHURY AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

MANMATHA NATH CHATTERJEE AND

OTHERS—DEFENDANTS RESPONDENTS

Vendor and purchaser—Registration of sale-deed, whether passes property—Failure of consideration, effect of, on vendee's right to possession—Intention of parties—Burden of proof—Document in vendee's possession—Presumption—Suit for possession—False statement by vendee—Conditional decree—Equities.

The mere registration of a sale-deed does not necessarily indicate the transfer of property to the vendee, especially if it be not accompanied by delivery. [p. 107, col. 2.]

The non-payment of consideration in whole or in part, will not affect the vendor's right to possession, unless the intention of the parties was that ownership should not pass till the full consideration was paid. The burden of proving such intention is on the vendor. [p. 107, col. 2.]

If the deed is executed and registered and the vendee also gets the document, the non-payment of consideration does not affect the passing of the property. [p. 107, col. 2.]

Mauladan v. Rughunandan, Pershad Singh 27 C. 7 and Gostho Behary Ghosh v. Rohini Gowalini, 4 Ind. Cas. 541; 13 C. W. N. 692, referred to.

Where a vendee, in a suit for possession, makes a false statement that he has paid the full consideration while part of it is unpaid, the Court may make a conditional decree for possession to take effect only on his depositing in Court whatever is due under the purchase, interest thereon and costs and on such other appropriate terms as it thinks fit. [p. 108, cols. 1 & 2.]

Nil Madhab Parhi v. Haran Prosad Parhi, 20 Ind. Cas. 325; 17 C. W. N. 1161; 19 C. L. J. 146, followed.

Appeal against the decree of the Officiating District Judge, Khulna, dated the 31st July 1912, confirming that of the Subordinate Judge, Khulna, dated the 19th December 1908.

FACTS.—The facts of the case appear from the judgment.

Sir S. P. Sinha (with him Dr. Sarat Chandra Basak and Babu Narendra Chandra Bose), for the Appellants.—The Court of Appeal below is wrong in saying that the deed of sale leads to the inference that title should not pass until the consideration is paid. On the contrary, the construction of the deed and the evidence on the record go to show that the consideration for the *kobala* was both the with-

drawal from the suit and a payment of Rs. 1,500. As the suit was withdrawn, part of the consideration has already passed. The facts, therefore, constitute a valid transfer of the land in dispute and the vendor is only entitled to the unpaid purchase-money. Relies on *Baij Nath Singh v. Paltu* (1), *Velayutha Chetty v. Govindasami Naicken* (2), *Sagaji v. Namdev* (3), *Nil Madhab Parhi v. Haran Prosad Parhi* (4).

Babu Dwarkanath Chakravarti, (with him Babus Ram Chander Mozumdar and Bepin Chandra Bose), for the Respondents.—The case of the appellants has throughout been that the withdrawal of the suit formed the sole consideration, and they ought not to be allowed to succeed on a contention which never formed a part of their case.

The Court of Appeal below has found that the intention of the parties was that title should not pass until the consideration was paid in full, and this finding cannot be interfered with in second appeal. The finding is arrived at on evidence, documentary and oral, inasmuch as conduct of the parties was considered in arriving at the finding.

JUDGMENT.—In this case the plaintiffs, who are sons of Bhubaneswar Roy Chowdhury, sued to recover possession of certain immoveable properties on the strength of a conveyance, dated 18th April 1897, executed by Purna Chander Chatterji in favour of Behari Lal Mitter—the *benamidar* of the plaintiffs' father. Plaintiffs' case was that the Roy Chowdhury defendants, in collusion with their agent Purna Chander Chatterji, who was father of defendants Nos. 1 and 2, created two fictitious *nimosat howlas* and thus interfered with Bhubaneswar Roy Chowdhury's right in the lands in question. Bhubaneswar Roy Chowdhury brought a suit, No. 597 of 1896, in the Subordinate Judge's Court against Purna Chander Chatterji and the Roy Chowdhury defendants to recover possession in *howla* right and to have the fictitious *nimosat howlas* cancelled. That suit was settled through the intervention of Rakhal Das Bidyabhusan, the *gurn thakur* of both the parties. The conveyance in favour of

(1) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.

(2) 8 Ind. Cas. 304; 34 M. 543; (1910) M. W. N. 687; 9 M. L. T. 108.

(3) 23 B. 525; 1 Bom. L. R. 5.

(4) 20 Ind. Cas. 325; 19 C. L. J. 146; 17 C. W. N. 1161.

JOGENDRA NARAIN ROY v. MANMATHA NATH.

Behari Lal Mitter as *benamidar* for Bhubaneswar Roy Chowdhury was executed by Purna Chander Chatterji. By that conveyance an 8-anna share in the two *nimosat howlas*, which were for the purposes of that settlement taken as genuine, was conveyed to Behari Lal Mitter. The consideration named in the deed was the withdrawal of Suit No. 597 of 1896 and the payment in cash of Rs. 1,500. That conveyance was duly executed and registered and the suit was withdrawn. It appears that for some days after the execution and registration the deed remained with Rakhal Das Bidyabhusan and then came into the hands of the plaintiffs' father. The contention of the defendants is and has always been that the Rs. 1,500 was not in fact paid. In Suit No. 482 of 1900 which came up to this Court on second appeal (No. 1038 of 1901), Behari Lal Mitter was the plaintiff and Bhubaneswar Roy Chowdhury a *pro forma* defendant. In that suit, which was a suit for rent, the contention of Bhubaneswar Roy Chowdhury was that the Rs. 1,500 was actually paid. That contention was found to be false. In the present case, the allegations of the plaintiffs in paragraph 3 of the plaint are that the consideration for the *kobala* was only the withdrawal of Suit No. 597 of 1893, that there was no stipulation for the payment of any money consideration and that no such consideration in fact passed. It is alleged that the sum of Rs. 1,500 was really the value of the said suit and was mentioned under the wrong impression that it was necessary to state some money consideration in a deed of sale. Defendants in their written statement deny the payment of the Rs. 1,500; and with regard to the deposit of the deed with Rakhal Das, state that it was agreed at the date of the *kobala* that the *kobala* would be kept with Rakhal Das and that after the payment of the Rs. 1,500 Rakhal Das was to deliver the *kobala* to Bhubaneswar Roy Chowdhury. In paragraph 19 they further state that, on the ground that the *kobala* would remain in deposit until the receipt of the consideration, the name of the *guru thakur* was mentioned as the costodian in the ticket for the taking back of the *kobala*, that he took back the *kobala* from the registry office and that the plaintiffs' father Bhubaneswar Roy Chowdhury subsequently, by improper means,

induced the *guru thakur* to hand over the document to him. The questions of fact with regard to the payment of the Rs. 1,500 have been found against the plaintiffs; and the learned District Judge, on appeal, has declined to give the plaintiffs the relief that they claimed, on the ground that it would be inequitable to do so. Plaintiffs in this second appeal ask us to pass an order similar to that which was passed in the case of *Nil Madhab Parhi v. Haran Prosad Parhi* (4) offering to pay the Rs. 1,500 and all costs of this litigation. The only question before us is whether they should be allowed to do that.

No question of limitation arises in the suit, as the conveyance was in 1897 and this suit was instituted on 28th August 1907. It is unnecessary, therefore, to consider the allegation of the plaintiffs that they had been in possession and were dispossessed in 1899.

It has been argued before us for the defendants that it was really the intention of the parties that the ownership in the property should not pass until the Rs. 1,500 was paid. That is the sole point which has been made to meet the demand of the plaintiffs for possession under the deed of sale. It is now well settled that the mere registration of a document, especially if it be not accompanied by delivery, does not necessarily indicate the transfer of the property to the vendee. It may be the intention of the parties that the ownership should not pass until the consideration is paid. If, however, that is the contention of the vendor, the burden of proving it would lie upon him. Ordinarily speaking, if a document be executed and registered in favour of any person and that person also gets the document, the mere fact of non-payment of the consideration would not affect the passing of the property. We may refer to the cases of *Mauladan v. Rughunandan Pershad Singh* (5) and *Gostho Behary Ghosh v. Rohini Gowalini* (6). In the present case the learned District Judge makes the following remark: "I also think that from the circumstances of the case it was the intention of the defendants that title should not pass until the money was paid, and this would be a legitimate inference from the deed of sale itself." It is conceded that there was no evidence given at the trial of any such intention; nor is there anything

(5) 27 C. 7.

(6) 4 Ind. Cas. 541; 13 C. W. N. 692.

RAM CHARAN LAL v. RAHIM BAKHSH.

in the deed itself to indicate such an intention on the part of the vendor or the vendee. On the contrary, the deed says: "The right and interest of me and my representatives in the 5-anna share sold is extinguished from this date and the same has devolved on you. Neither I nor any of my heirs and representatives shall ever be competent to claim either in our own names or in *benami* of others any of the subordinate tenures of the said share." Nor, indeed, was this the case of the defendants as made in their written statement. We have set out above what they said with regard to the deposit of the document; and it is clear from the allegations in paragraphs 18 and 19 of the written statement that their case was that the document had been deposited with Rakhal Das Bidyabhusan in order to secure the payment of the Rs. 1,500 and for no other purpose. No issue was raised on this point nor any evidence led in respect of it. The remark, therefore, of the learned District Judge to which we have referred cannot be supported. It appears moreover to be somewhat inconsistent with the subsequent remark which he makes: "it would seem that the ownership of the land in dispute was transferred to the plaintiffs and they are consequently entitled to pray for delivery of possession subject to any equities which may exist in favour of the defendants."

There is a further point in this case which is in favour of the view that the property passed to the plaintiffs at the date of the deed of sale, and that is that the Rs. 1,500 was only part of the consideration and that the withdrawal of the suit, which was valued as about the same sum, represents about half of the consideration for the document. This being so, there appears to be no reason why the plaintiffs should not be allowed the relief which they ask for upon appropriate terms. The learned Counsel for the plaintiffs has not sought to minimize the impropriety of their conduct and that of their father in making false and contradictory statements about the Rs. 1,500. In the former suit they pleaded falsely that it had been paid. In the present suit, instead of bringing the amount into Court and asking for relief upon that basis, they maintained again falsely that the Rs. 1,500 formed no part of the consideration for the deed of sale. It is obvious, therefore, that the plaintiffs cannot be allowed a decree for possession except on the most

stringent terms which will save the defendants from all loss.

We think that an order similar to the one passed in the case of *Nil Madhab Parhi v. Haran Prosad Parhi* (4) will be the proper order to pass in this case. We accordingly pass a conditional decree in favour of the plaintiffs on the following terms: On the plaintiffs depositing in this Court Rs. 1,500 together with the costs of the contesting defendants in all the Courts (to be specified in the decree) within one month from the date on which the decree of this Court is actually signed, a decree will be drawn up in favour of the plaintiffs for recovery of possession of the lands in suit. No order for mesne profits can, of course, be made in their favour. Their Counsel expressly stated that the plaintiffs would make claim in that respect. If the Rs. 1,500 and the costs be not so paid, the decree will be that the appeal do stand dismissed with costs.

*Appeal allowed;
Conditional decree passed.*

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1386 OF 1914.
April 12, 1916.

Present:—Sir P.C. Banerji, Kt., and Mr. Justice Piggott.

RAM CHARAN LAL—PLAINTIFF—
APPELLANT

versus

RAHIM BAKHSH—DEFENDANT—
RESPONDENT.

Hindu Law—Succession—Mitakshara—Maternal uncle's son, if preferential heir to mother's sister's son.

A maternal uncle's son is a preferential heir as compared with the mother's sister's son. [p 111, col. 1.]

Appandai Vathiyar v. Ragubali Mudaliar, 5 Ind. Cas. 280; 7 M. L. T. 203; 20 M. L. J. 275; 33 M. 439; (1910) M. W. N. 44, not followed.

Gridhari Lall Roy v. Bengal Government, 12 M. L. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 15; 2 Sur. P. C. J. 382; 20 F. R. 408; *Mohandas v. Krishnabai*, 5 B. 597; *Tirumalachariar v. Andal Ammal*, 30 M. 406; 17 M. L. J. 285; 2 M. L. T. 357, referred to.

Second appeal from the decision of the District Judge of Bareilly, dated the 30th July 1914.

Mr. Sital Prasad Ghose, for the Appellant.

Mr. Gokul Prasad (with him Mr. Harmandan Prasad), for the Respondent.

JUDGMENT.—The question raised in this appeal is whether under the Benares School of the Mitakshara Law, by which the parties

RAM CHARAN LAL v. RAHIM BAKHS.

to this case are governed, the mother's brother's son succeeds as ■ *bandhu*, in preference to the mother's sister's son.

The question arises out of the following facts:—One Hori Lal, who is said to have originally owned the property in dispute, died many years ago leaving him surviving his mother, *Musammāt Jhamma*, who succeeded him and remained in possession till her death 7 or 8 years ago. *Musammāt Jhamma* had two brothers, *Kishun Lal* and *Jbanjhan Rai*, and two sisters, *Musammats Lachhminia* and *Behia*. *Narain Das*, a son of *Behia*, is admittedly alive but is not a party to this suit. Three of the sons of *Kishun Lal* sold three-fourths of what they alleged to be their interest in the property to the plaintiff-appellant. On the strength of the sale-deed executed in his favour the plaintiff brought the present suit for partition of ■ 9/20ths share, for possession of that share and for other reliefs. The respondent to this appeal and the connected appeal, No. 1387 contended that the vendors of the plaintiff did not succeed to the estate of *Hori Lal* in preference to *Narayan Das*, the son of *Hori Lal's* mother's sister, and that the plaintiff has consequently acquired no title under his purchase and has no right to sue. They thus set up the *jus tertii* of *Narayan Das*. They put forward other pleas also with which we are not concerned in this appeal. The Court of first instance held that the mother's brother's son had precedence over the mother's sister's son and overruling the other pleas raised by the defendants decreed the claim. The decision was reversed by the lower Appellate Court, on the sole ground that in its opinion the mother's sister's son was a preferential heir. It has followed the recent ruling of the Madras High Court in *Appandai Vathiyar v. Ragubali Mudaliar* (1).

The question is by no means free from difficulty and except the ruling to which we have referred there is, as far as we are aware, no case in which the point was directly raised and decided. And we have not been referred to any text, authoritative in the Benares School, in which the order of succession among *bandhus* of each class has

been clearly laid down. According to the *Mitakshara bandhus*, who succeed on failure of gentiles or *gotrajas*, are of three classes: (1) related to the person himself, (2) to his father and (3) to his mother. The author then refers to the following text which is attributed to *Satatapa* or *Bandhayana*:—
“The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered ■ his own cognate kindred” (*atma bandhus*). The same relations of his father and mother are mentioned as his father's *bandhus* (*pitri bandhus*) and his mother's *bandhus* (*matri bandhus*) respectively (*Mitakshara*, Chapter II, section 6, para. 1). In the following paragraph it is stated that “by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred: or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.” The order of priority among cognates (*bandhus*) of each of the three classes mentioned is thus clearly laid down but not among persons constituting cognates (*bandhus*) of each class. Had the enumeration of each class of *bandhus* been exhaustive, it might with much force be contended that the son of the mother's sister having been mentioned before the maternal uncle's son would take priority over the latter. But it has been held by their Lordships of the Privy Council in *Gridhari Lali Roy v. Bengal Government* (2) that the enumeration of *bandhus* in the *Mitakshara* is not exhaustive but only illustrative of the proposition that there are only three classes of *bandhus*, among whom one's own *bandhus* must be exhausted before those of other classes can come in. The enumeration not being exhaustive, it cannot be said that the three persons named as one's own *bandhus* (*atma bandhus*) take in the order in which they are named. In addition to the nine persons mentioned in the *Mitakshara* many others have been held to be *bandhus* and their place in the order of succession has to be determined otherwise than by reference to the list in the *Mitakshara* itself. The order of succession is not set forth in any of the Commentaries on the

(1) 5 Ind. Cas. 280; 33 M. 439; 7 M. L. T. 203; 20 M. L. J. 275; (1910) M. W. N. 44.

(2) 12 M. L. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 L. R. 408.

RAM CHARAN LAL V. RAHIM BAKHSH.

Mitakshara. The learned Judges of the Madras High Court who decided the case mentioned in an earlier part of this judgment relied on the Smriti Chandrika and the Saraswati Vilas, which are of high authority in the Madras Presidency but not in these Provinces, and the Vyavahara Mayukha, which is a high authority in the Western Presidency; but a reference to these authorities shows that in them also no order of succession was prescribed as between persons who come within each of the three categories of *bandhus*. All that they declare is that as between each class of *bandhus* one's *atma bandhus* take precedence over *pitri bandhus* and the latter over *matri bandhus*. In Chapter XI, section 5, paragraph 13, of the Smriti Chandrika what the learned author, Devananda Bhat, says, quoting Brihaspati, is that when there are many cognate kindred (*bandhawak*), "whoever is nearest of kin takes the wealth of him who dies without male issue." He then gives the same description of the *bandhuvahus* as is contained in the Mitakshara but does not lay down any order of precedence among *bandhus* of each class *inter se*. It is in the summary given at the end of the section that the translator, T. Kristnasawmy Iyer, gives among the nine *bandhus* mentioned in the Mitakshara list the mother's sister's son a higher place than the maternal uncle's son. It may be pointed out that this translation was first published in 1866 before their Lordships of the Privy Council decided the case of *Gridhari Lall Roy v. Bengal Government* (2) in 1868. The learned translator apparently considered the list to be exhaustive.

As for the Saraswati Vilas, the learned Judges themselves point out, as strange, that though in this treatise "there is a discussion and a decision in placita 597 and 598 as to the precedence of *atma bandhus* over *pitri bandhus* and of the latter over *matri bandhus*, there is none as to the order amongst the *bandhus* of each class." As regards the Vyavahara Mayukha the learned Judges of the Bombay High Court held in *Mohandas v. Krishnabai* (3) that by the text in the Vyavahara Mayukha that "the order of succession is even the order of the text" the author intended no more than is stated in the Mitakshara (Chapter II, section 6, placitum 2),

(3) 5 B. 597.

viz., that "by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred." It is thus manifest that none of the three authorities relied upon by the learned Judges of the Madras High Court supports their view that the order of succession among *bandhus* of each class should be that mentioned in the text of Satatapa quoted in the Mitakshara. In the case of *Gridhari Lall Roy v. Bengal Government* (2) the Judicial Committee of the Privy Council expressed the opinion that the Mitakshara only laid down the order of precedence among the three classes of *bandhus*, and the enumeration of each class of *bandhus* being only illustrative the maternal uncle, who was not mentioned by the Mitakshara, succeeded as a *bandhu*. In the Bombay case referred to above, the maternal uncle was held to take precedence over the mother's sister's son. The learned Vakil for the respondent referred to a passage in the Madanparijat which has been translated in Sarbadhikari's Tagore Law Lectures and in Setlur's Hindu Law. The two translations differ from one another, but in any view the author of the Madanparijat seems only to lay down, as the Mitakshara does, the order of priority among *bandhus* of each of the three classes of *atma bandhus*, *pitri bandhus* and *matri bandhus*.

There being thus an absence of authority among Sanskrit text writers and commentators as to the order in which *bandhus* of each class should take precedence among themselves, we have to follow the text of Manu "to the nearest *sapinda* the inheritance next belongs" and determine the order of precedence with reference to that text. The Mitakshara itself assigns the reason for preference to be nearness of affinity (Chapter II, section 6 placitum 2. We have, therefore, to see whether the maternal uncle's son is a nearer *sapinda* than the mother's sister's son. Mr. Mayne places the former before the latter on the ground of nearness of propinquity in the chart on page 810 of the 8th Edition of his well-known work. He points out, ~~in~~ indeed the whole scheme of the Mitakshara shows, that the Mitakshara gives preference to the male over the female line (page 811) and following this preference he assigns the 9th place to

RADHICA MOHAN ROY v. MANMOTHA NATH MITTER.

the maternal uncle, the 10th to his son, and the 11th to the mother's sister's son. Professor Sarbadhikari, in his Tagore Law Lectures on the Hindu Law of Inheritance, gives preference to the maternal uncle and his son over the mother's sister's son (see page 712) and so does Bhattacharya in his Commentaries on Hindu Law (page 460). The Madras High Court in *Tirumalachariar v. Andal Ammal* (4) expressed the opinion that "the general preference exhibited by the Mitakshara for the male over the female line may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link to that claimant who is separated from the stem by two such links." In this view the mother's brother's son, who is separated by only one female link, is to be preferred to the mother's sister's son, who is separated by two such links. The weight of authority, therefore, seems to be in favour of the proposition that the maternal uncle's son is a preferential heir as compared with the mother's sister's son and we are unable to agree with the decision of *Appandai Vathiyar v. Raghubali Mudaliar* (1). According to Mr. Golap Chandra Shastri (Hindu Law, page 295) these *bandhus* are of equal degree but we see no reason to agree with him. Even according to him the plaintiff's vendors would not be totally excluded.

We were asked to consider the question of religious efficacy and the recent ruling of the Privy Council in *Buddha Singh v. Lattu Singh* (5) was referred to. As we hold that the maternal uncle's son is of nearer consanguinity than the maternal aunt's son, the question of funeral oblations need not be considered. We may observe that the plea of superior efficacy of oblations was fully answered by the Madras High Court in the case of *Appandai Vathiyar v. Ragubali Madaliar* (1).

As the mother's brother's son is, for the reasons stated above, a preferential heir as compared with the mother's sister's son,

the Court below was wrong in dismissing the claim and its decree must be set aside and the case remanded for trial of other questions which were not determined by that Court. We, accordingly, allow the appeal, reverse the decree of the Court below and remand the case to that Court under Order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number and try the other questions which arise in the appeal. Costs here and hitherto will be costs in the cause.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 1566
OF 1915.

April 6, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

RADHICA MOHAN ROY—PLAINTIFF—
APPELLANT
versus

MANMOTHA NATH MITTER AND OTHERS
DEFENDANTS—RESPONDENTS.

Bengal Cess Act (IX of 1880), s. 47—Levy of cess, procedure for—Analogy to procedure for realization of rent—Contract between parties, effect of—Waiver of claim to interest on rent for a term, whether affects liability for interest on cess—'In the same manner and under the same penalties, etc.' meaning of.

Section 47 of the Bengal Cess Act lays down that the procedure for levy of cess shall follow that prescribed for realization of arrears of rent. [p. 112, col. 2.]

The provisions of the section are not restricted or controlled by any special contract existing between landlord and tenant as to payment of interest on arrears of rent. Hence, the waiver of a claim by the landlord to demand interest on arrears of rent for a term in virtue of a contract with the tenant will not absolve liability for interest on the cess for that particular period at the rate mentioned in section 47. [p. 113, col. 1.]

The expression 'in the same manner and under the same penalties as if the same were arrears of rent due to him' in section 47 of the Act has reference only to the procedure to be adopted and the consequences to follow in the recovery of rent, that is to say, the remedy would be by suit and the penalties would possibly be the sale of the holding or damages at 25 per cent. under section 68 of the Bengal Tenancy Act. [p. 112, col. 2; p. 113, col. 1.]

Appeal against the decree of the Additional District Judge of 24-Parganas, dated the

(4) 30 M. 406; 17 M. L. J. 285; 2 M. L. T. 357.

(5) 30 Ind. Cas. 529; 37 A. 604 (P. C.); 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 C. W. N. 1; 22 C. L. J. 481; (1915) M. W. N. 772; 42 I. A. 208.

RADHICA MOHAN ROY V. MANMOTHA NATH MITTER.

1st of April 1915, affirming that of the Sub-Judge of Alipore, dated the 24th of January 1914.

FACTS.—The facts of the case appear from the judgment.

Mr. B. Chakravarti (with him Babu Jogendra Narain Mozumdar), for the Appellant.—Interest on cess must be given whether this tenure was let out before the Cess Act or not, though the document is dated 1879, i. e., before the passing of the Cess Act and the Bengal Tenancy Act. The provision that no interest will be charged on rent does not apply in the matter of cess. Section 42 (3) of the Bengal Cess Act does not excuse the tenant from paying interest on cesses, what it means in this case is that the cess would be paid in the same three instalments as the rent under the *kabuliyat* of 1879. The cess here must carry interest.

Mr. S. R. Das (with him Babu Tarakeswar Pal Choudhury, for Babu Surendra Madhab Mullick, and Babu Jatindra Nath Sen), for the Respondent.—The provisions of section 47 of the Bengal Cess Act must be subject to the special contract between the parties made in the *kabuliyat*. In this case the application of section 47 is restricted by reason of the contract between the parties. Section 3, sub-section 5, of the Bengal Tenancy Act connotes that rent includes cess. The Bengal Tenancy Act treats cess as rent, i. e., arrears will be payable as under section 67 in the absence of any agreement. Moreover, in this case interest cannot run even after due date, as the Court was closed.

JUDGMENT.—This is an appeal by the plaintiff and relates to a sum of Rs. 2-3-6 interest on the cess payable for the *Assin kist*, 1320. Defendants are tenure-holders under the plaintiff and their rent is payable in three *kists* under their *kabuliyat*, which is dated 1879 before the passing of the Bengal Tenancy Act or the Cess Act. In that *kabuliyat* they undertook to pay any cesses which might be imposed by Government. The cess for the *Assin kist* admittedly amounts to Rs. 424-7-6. It became due on 1st Kartic 1320 (18th October 1913). On that day the Courts were closed. There had been correspondence between the parties and there had also been previous trouble in

the matter of the acceptance of the rent. Defendants accordingly informed the plaintiff that they would pay the amount into Court on the day the Court re-opened, which was 1st November 1913 (15th Kartic 1320). On that day the defendants made the deposit now in question, and later on the same day the plaintiff filed his suit for rent and cesses. The question is whether the deposit should have been made with interest at 12½ per cent. per annum for the few days which transpired between the cess becoming due and the deposit being made.

The *kabuliyat* provided in the case of rent that no interest should be chargeable on arrears of rent until the end of the Bengali year, the close of the month of *Chey*t. It was argued for the defendants and has been found by the learned District Judge, that the same would apply to the [redacted] and that no interest would be payable until the end of *Chey*t, that is to say, the defendants might be in arrears with their payment of cesses without penalty until the end of the Bengali year. We do not think that this is the right reading of the provisions of the Bengal Cess Act. Section 42 (3) provides: "Every holder of a rent-paying tenure and every cultivating *rai*yat shall pay the amount of road cess and public works cess due by him in instalments in the proportion of the instalments of rent payable in respect of the tenure or holding of such tenure-holder or *rai*yat." That means that in this case, the cess would be paid in the same three instalments as the rent under the *kabuliyat*. Section 47 says: "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per cent. per annum in the same manner and under the same penalties as if the same were arrears of rent due to him." For the defendants it is argued that this means that cesses are not to carry interest until the end of the year and that the provisions of section 47 must be subject to the special contract between the parties made in the *kabuliyat*. That is not how we read the section. We think that "in the same manner and under the same penalties as if the same were arrears of rent due to him" has

CHHOTY LAL v. FIRM LAKHMI CHAND.

reference only to the procedure to be adopted and the consequences to follow in the recovery of rent; that is to say, the remedy would be by suit, the penalties would be possibly the sale of the holding or damages at 25 per cent. under section 68 of the Bengal Tenancy Act. The provisions of section 47 of the Cess Act cannot be restricted in this way by reason of the contract between the parties in the matter of rent. We are of opinion that in this case the cesses became due at the dates of the three *kists* in which the rent was payable under the *kabuliyat* and that interest upon such cesses would be recoverable under section 47 from the dates on which they fell due.

At the same time in this particular case it was found that there had been for several years past trouble between the parties in the matter of granting receipts for the rent; and the Courts have held that the defendants were justified in making the deposit in Court. If this were so, they admittedly made the deposit on the first day possible after the cess had become due. They should not, therefore, in equity, be saddled with the further payment of interest because the Court was closed and so they were unable to make the deposit earlier.

We accordingly disagree with the opinion expressed by the learned District Judge with regard to the liability to pay interest under section 47 but, in the circumstances of this case, we consider that, the deposit having been made as it was on the first possible day, no interest was payable. We accordingly dismiss the appeal but without costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 23 OF 1916.

April 13, 1916.

Present:—Justice Sir P. C. Banerji, Kt.

CHHOTY LAL—PLAINTIFF—APPLICANT
versus

FIRM LAKHMI CHAND AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24 (4)—Court of Small Causes—Transfer of suit to Munsif—Procedure—Ex parte decree, setting aside of—Deposit of, or security for, decretal amount, necessity of—Provincial Small Cause Courts Act (IX of 1887), ss. 17, 25—Revision.

The 'Court of Small Causes' from whose file a suit may be transferred under section 24, Civil Procedure Code, includes Courts vested with the powers of a Small Cause Court. When a suit is transferred from that Court to another Court, the Court trying it is to be deemed to be a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. [p. 114, col. 2.]

Therefore, when such a suit is transferred to a Munsif and he passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of that amount. [p. 114, col. 2.]

Mangul Sen v. Rup Chand, 13 A. 324; A. W. N. (1891) 96, followed.

Sarju Prasad v. Mahadeo Pande, 29 Ind. Cas. 996; 37 A. 450; 13 A. L. J. 639; *Jagannath v. Chet Ram*, 28 A. 324; A. W. N. (1906) 93; 3 A. L. J. 318; *Sankarama Aiyar v. Padma Nabha Aiyar*, 17 Ind. Cas. 425; 23 M. L. J. 373; (1912) M. W. N. 1086; 38 M. 25, referred to.

Revision against the decree of the Munsif of Muttra, dated the 22nd of December 1915.

Mr. Gulzari Lal, for the Applicant.

Mr. Agarwalla, for the Respondents.

JUDGMENT.—This is an application for revision under section 25 of the Provincial Small Cause Courts Act. The suit out of which it arises was instituted in the Court of the Subordinate Judge of Muttra, who was vested with the powers of a Judge of Court of Small Causes. By an order of the District Judge the case was transferred to the Court of the Munsif of Muttra. The learned Munsif passed an *ex parte* decree on the 29th of September 1915, the defendant not having entered appearance. The defendant thereupon applied to have the *ex parte* decree set aside, on the allegation that he had been prevented by illness from attending the Court on the date fixed for hearing. He did not deposit with his application the amount of the decree, nor did he furnish security in respect of that amount as required by section 17 of the Provincial Small Cause Courts Act. The plaintiff objected to the hearing of the application, on the ground that no deposit had been made or security furnished. The learned Munsif overruled the objection, relying on the recent decision of this Court in *Sarju Prasad v. Mahadeo Pande* (1).

That case clearly had no bearing on the question before me. That was not a case in which a suit had been transferred from a Court vested with the powers of a Small Cause Court to the Court of a Munsif. The

(1) 29 Ind. Cas. 996; 13 A. L. J. 639; 37 A. 450.

CHHOTY LAL V. LAKHMI CHAND.

real question in this case is whether section 17 of the Small Cause Courts Act applies to the present case. For the determination of this question it is to be seen whether the learned Munsif who made the decree *ex parte* was to be deemed to be a Judge of a Court of Small Causes, and his procedure was to be governed by the procedure laid down in the Provincial Small Cause Courts Act. Section 24 of the Code of Civil Procedure provides in subsection 4 that the Court trying any suit transferred or withdrawn under the section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes. If the Court from which the suit was transferred to the learned Munsif was a Court of Small Causes within the meaning of the section, the Court of the Munsif was for the purposes of the suit to be deemed to be a Court of Small Causes and its procedure was to be governed by the procedure laid down in the Provincial Small Cause Courts Act. If that procedure applied to the case before me it was incumbent on the defendant, who applied to have the *ex parte* decree set aside, to deposit with his application the amount of the decree or to furnish security in respect of that amount. It was held by this Court in *Jagan Nath v. Chet Ram* (2) that the provisions of section 17 of the Provincial Small Cause Courts Act are mandatory and that unless the amount of the decree were deposited or security furnished, the application could not be entertained. Therefore, if section 17 applied to the case the Court below was wrong in entertaining the application, inasmuch as the defendant had not with his application deposited the amount of the decree or furnished security. It has been contended that the Court of Small Causes referred to in section 24 of the Code of Civil Procedure is a Court of Small Causes established under Act IX of 1887 and that the provisions of that section are not applicable to a Court which was vested with the powers of a Court of Small Causes. This contention is, in my opinion, untenable. Section 33 of the Small Cause Courts Act provides that a Court invested with the jurisdiction of a Court of Small Causes shall, with respect to the exercise of that jurisdiction, be deemed to be a different Court from the same Court with respect to the exercise of its jurisdiction

(2) 28 A. 470; A. W. N. (1906) 93; 3 A. L. J. 318.

in suits of a nature not cognizable by a Court of Small Causes. This clearly shows that a Court vested with the powers of a Court of Small Causes is to be deemed for all practical purposes to be a Court of Small Causes and section 24 of the Code of Civil Procedure empowers the District Court to transfer a case pending in such Court to any other Court. When such a transfer has been made, the Court trying the suit is to be deemed to be a Court of Small Causes and all the provisions of the Small Cause Courts Act should regulate the procedure of that Court in respect of the suit so transferred. In *Mangal Sen v. Rup Chand* (3) this Court held that a suit transferred from the Court of a Subordinate Judge vested with Small Cause Court powers was to be deemed to be a Small Cause Court suit when tried by a Munsif to whose Court it was transferred, and no appeal lay from the decision of the Munsif. The opinion expressed in that case as to the applicability or otherwise of section 35 of the Small Cause Courts Act to such a suit was no doubt dissented from in the case of *Sarju Prasad v. Mahadeo Pande* (1), but in so far as the Court held that a suit transferred from the Court of a Subordinate Judge vested with the powers of a Small Cause Court Judge to another Court was to be deemed to be a suit brought in a Court of Small Causes, the ruling was not disapproved of. A similar view was held by the Madras High Court in the recent case of *Sankarama Aiyer v. Padmanabha Aiyer* (4). I am of opinion that a Court vested with the powers of a Court of Small Causes is contemplated by section 24 of the Code of Civil Procedure and that when a suit is transferred from that Court to another Court, the Court trying it is to be deemed to be a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore, when such a suit is transferred to a Munsif and he passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of that amount. No deposit having been made or security furnished at the time of the presentation of the

(3) 13 A. 324; A. W. N. (1891) 96.

(4) 17 Ind. Cas. 425; 38 M. 25; 23 M. L. J. 373; (1912) M. W. N. 1086.

NANDA LAL v. ABDUL AZIZ.

application by the defendant in this case, that application ought to have been dismissed and the Court below was wrong in entertaining it. I accordingly allow this application for revision, set aside the order of the Court below and dismiss the application presented in that Court by the defendants on the 11th of October 1915. Having regard to the circumstances I make no order as to costs.

Application allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 29
OF 1914.

February 28, 1916.

Present:—Justice Sir Herbert Holmwood, Kt.,
and Mr. Justice Imam.

NANDA LAL ROY AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

Kazi Syed ABDUL AZIZ AND ANOTHER—
—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 3, 78—
'Gross negligence', what is—Notice, constructive—
Registration, if notice in Bengal—Unsuccessful search at
registration office—Presumption—Neglect to secure
title-deed by mortgagee from mortgagor, effect of.*

Section 78 of the Transfer of Property Act makes fraud 'misrepresentation' and 'gross negligence' quite disjunctive. One cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. It is not necessary that there should be fraud or something indicating fraud to bring a case within section 78 of the Transfer of Property Act. [p. 121, col. 2; p. 122, col. 1.]

Monindra Chandra Nandy v. Troyluckho Nath Burat,
2 C. W. N. 750, explained.

Oliver v. Hinton, (1899) 2 Ch. 264, 68 L. J. Ch. 583;
48 W. R. 3; 81 L. T. 212; 15 T. L. R. 450, referred to.

A mere omission on the part of a mortgagee to take and keep the title-deeds is not of itself 'gross negligence' which will secure a postponement of his mortgage to that of another subsequent mortgagee who secures them. The existence of gross negligence must be determined according to the circumstances of each case. [p. 122, col. 1.]

Hunt v. Elmes, 2 De G. F. & J. 578; 30 L. J. Ch. 255; 7 Jur. (N. S.) 200; 3 L. T. 796; 9 W. R. 362; 45 E. R. 745; 129 R. R. 204; *Walker v. Linom.* (1907) 2 Ch. D. 104; 76 L. J. Ch. 500; 97 L. T. 92; *Oliver v. Hinton,* (1899) 2 Ch. 264; 68 L. J. Ch. 583; 48 W. R. 3; 81 L. T. 212; 15 T. L. R. 450; *Colyer v. Finch,* 5 H. L. Cas. 905 at p. 924; 26 L. J. Ch. 65; 3 Jur. (N. S.) 26; 10 E. R. 1159; 101 R. R. 442; *Madras Building Company v. Rowlandson,* 13 M. 383; *Shan Maun Mull v. Madras Building Company,* 2 M. L. J. 95; 15 M. 268; *Rangasami Naikan v. Annamalai Mudali,* 31 M. 7; 3 M. L. T. 87; 17 M. L. J. 499; *Manji Karimbhai v. Hoorbai,* 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044, referred to.

Registration by itself does not amount to notice in Bengal. [p. 120, col. 1.]

The making of a search at the registration office for a document does not amount to, nor raise an irrebuttable presumption of notice in every case under section 3 of the Transfer of Property Act. It is open to a party making the search to show why he should not be saddled with notice. [p. 120, cols. 1 & 2.]

Akhoy Kumari Debi v. Kanai Lal Kundu, 16 Ind. Cas. 618; 17 C. W. N. 224, explained.

Neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and a suggestion that the purchase-money was required in cash and paid accordingly. [p. 123, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court of 24-Parganas, dated the 17th of September 1913.

Sir Rash Behary Ghose, Babu Dwarka Nath Chakravarty, Dr. Sarat Chandra Basak and Babu Heramba Chandra Guha, for the Appellants

Mr. Pugh, Counsel, Moulvi A. K. Fazlul Haq and Babu Haradhan Chatterjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to recover Rs. 15,000 odd on a mortgage from defendant No. 1 by postponing an alleged mortgage executed by defendant No. 1 in favour of defendant No. 2, on the ground that the defendant No. 2, the original owner of the property, had, by surrendering the title-deeds into the hands of defendant No. 1 and suppressing the mortgage to himself and making it appear that the sale to defendant No. 1 was for a cash consideration of Rs. 32,000, afforded defendant No. 1 opportunity to raise money on the property by second mortgage as unencumbered.

The defence was that the defendant No. 1 had not really borrowed Rs. 13,000 from the plaintiff and the plaintiff was fully aware of the circumstances under which defendant No. 1 purchased and mortgaged the property in suit. Search having been made in the Registration Office the plaintiff was saddled with notice of defendant No. 2's mortgage and the possession of defendant No. 2 was also notice to the plaintiff. The defendant No. 1 did not appear, but the Court below passed an *ex parte* decree against him and dismissed the plaintiff's

NANDA LAL V. ABDUL AZIZ.

suit as against defendant No. 2, on the ground that the plaintiff was not deceived by any of the recitals in the deed of sale, that he had constructive notice of the mortgage to defendant No. 2, and that there was no gross negligence on the part of defendant No. 2.

Against this decision the plaintiff has appealed and the points raised for our consideration are

1. Whether the defendant's mortgage is a real or fictitious one?

2. Whether the defendant is not estopped against the plaintiff by reason of certain recitals in the conveyance under which defendant No. 2 sold the property to defendant No. 1.

3. Whether defendant No. 2 has not forfeited his priority by reason of his having parted with the title-deeds and having been otherwise guilty of gross negligence so as to enable the defendant No. 1 to raise money on mortgage from the plaintiff on the footing that the property was unencumbered. It appears that the defendant No. 2, one Abdul Aziz, an old man of 70, purchased the property which consists of 12 cottaks, 5 chittaks, 10 square feet of land with an old masonry dwelling house upon it, known as 81, Karrya Road, Ballygunge, in the suburbs of Calcutta, but included within the Calcutta Corporation but not in the original jurisdiction of the High Court, for Rs. 22,000, in the year 1909.

The property not letting at its proper value the defendant No. 2 and his son, who is a *mohurri* in the office of the Superintendent of Political Pensions and was formerly Assistant Record Keeper in the Alipore Magistrate's Office, determined to sell it and, according to the sale-deed, to invest the cash proceeds in other property. The defendant No. 1 made an offer of Rs. 32,000 which was evidently accepted by the defendant No. 2 on the footing that the whole was going to be paid in cash, though the evidence on defendant No. 2's side is so conflicting as to what actually happened that it is difficult to assert anything in connection with it except that the defendant No. 2, his son and the Pleaders and other witnesses cannot all be speaking the truth.

The evidence of the Pleader Jiban Hari Mukerjee, who seems to have impressed the learned Subordinate Judge very much by

his ingenuous ignorance of law and his far too frank admissions of careless neglect of his client's interests, is of extreme importance in elucidating the very extraordinary transaction whereby the property passed under a registered *kabala* with full consideration to the defendant No. 1 and yet is said to have remained in the possession of defendant No. 2 under a mortgage, which purported to be a simple mortgage, for the major portion of the consideration to be paid in instalments.

This mortgage is sought to be varied by evidence of an oral agreement changing it into a mortgage with possession. The arrangement alleged by defendant No. 2's son is that the defendant No. 1 agreed to pay Rs. 2,500 in cash but being unable to do so he paid Rs. 500 only in cash, and gave a hand-note for Rs. 2,000. This hand-note is not forthcoming and the evidence regarding it is conflicting, some saying it was in favour of the defendant No. 2's son, others saying it was in favour of the father.

For the balance Rs. 29,500 the defendant No. 1 executed a mortgage on the house to be paid in instalments without interest. Both the sale-deed and the mortgage were registered on the same day, *viz.*, 26th July 1911, and they purport both to have been executed on the 25th July, but it is a curious and wholly unexplained fact that the sale-deed was executed in the Pleader Jiban Hari's office while the mortgage-deed was executed in the office which the defendant No. 2's son calls his office but is really a part of the Magistrate's office at Alipur, where the assembling of the parties for such a transaction must have been wholly unauthorised, and carried out in secret without the knowledge of Golam Mohiuddin's superiors.

The Pleader Jiban Hari now wants to make out that he drafted the passage about the consideration for the sale with full knowledge of the intended mortgage and that he did not mention the mortgage because the mortgagee was to remain in possession.

The passage in the sale-deed is marked (1) and purports to be the statement of Abdul Aziz. It runs as follows:—

"I, being in need of money for purchasing other property, notified to sell the said property, and you having agreed to purchase

NANDA LAL v. ABDUL AZIZ.

the same for a consideration of Rs. 32,000 (thirty-two thousand rupees), I sell the said property for the said consideration to-day and by executing this deed in your favour, I do hereby agree and promise that all rights, ownership and interest and title which I had in the property sold, do hereby devolve upon you from to-day."

This he says was drafted on the vendor's son's instructions. As regards the other curious recital contrary to the facts marked (B) in the mortgage-deed, he says that it does not represent the arrangement come to between the parties immediately before the execution of the conveyance and the mortgage-deed. In the mortgage-bond the defendant No. 1 mortgagor says: "The property is retained in my possession and I shall pay the Collectorate rent and the Municipal taxes, etc., from my own pocket. I deliver to you the documents mentioned in the schedule (ga) below as your title-deeds." Yet the Pleader says the arrangement immediately before the execution of the mortgage and the conveyance was totally different and that the deeds as they stand were drafted "2 or 3 or 4 or 5 days before the execution of the deeds". Nevertheless he did not think it necessary to make any alteration in the drafts which, whatever their legal effect may be, are certainly calculated to deceive a subsequent mortgagee or purchaser, and were fraud pleaded in a case like this, the recitals would certainly be evidence for what they were worth of possible fraud and would, therefore, perhaps come within the purview of the judgment of Jenkins, J. in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1), which we shall refer to more at length later on when we come to consider the question of "gross negligence". Now turning to the evidence of the old man Abdul Aziz it appears that he executed the sale-deed in Jiban Hari Pleader's office, which is near his dwelling-house in Kidderpur. He was not present when the mortgage-deed was executed and he says the hand-note for Rs. 2,000 was in favour of his son. All he got himself was Rs. 500 in cash and the registration receipt for the sale-deed to protect his mortgage. This, he would have us believe, he handed

over to defendant No. 1 because he wanted to make a copy of the sale-deed.

The loan was for 5 or 7 days, yet the defendant No. 1 was allowed to retain it for two months and eventually use it to raise money from the plaintiff, though a copy could easily have been obtained from the Registration Office at very small expense.

But still more curious is the making over of a large number of documents, most of them in no sense documents of title, to the defendant No. 1 by the vendor's son independently of his father on the same flimsy excuse. One may well ask what could he want with promissory on-demand notes and plans of proposed privies and other works never executed, when he was not to have a day's possession of the premises. The learned Counsel for the respondent suggests that the defendant No. 2 and his son are endeavouring to place their case too high when they say defendant No. 1 never had possession and that what probably happened was that they resumed possession when defendant No. 1 ran away in September 1911 leaving the mortgage instalments unpaid.

But if that is so, not only is the evidence of the defendant No. 2 and his son but that of the candid Pleaders on whom the Subordinate Judge relies rooted and grounded in falsehood.

The absence of defendant No. 2 at the execution of the mortgage, its secret preparation as an after-thought in a Government office, where such a transaction had no business to be carried out, the hand-note of Rs. 2,000 to the son, though the documents recite that it was in favour of the father, convince us that the father, having accepted Rs. 3,500 as earnest money and agreed to the remainder being paid in instalments on simple mortgage-bond without interest, was put off with a present payment of Rs. 500 and left the rest of the negotiation to the son. The whole transaction is full of suspicion and supported and excused by evidence much of which is deliberately false.

Not only is the mortgage with possession incapable of proof in face of the registered document, but the evidence which is given in respect of it by the four most

(1) 2 O. W. N. 750.

NANDA LAL v. ABDUL AZIZ.

important witnesses in the case, the defendant No. 2, his son and his two Pleaders, is, as we have seen, false and has almost to be admitted to be false by learned Counsel in order to get over the legal difficulty of the passing of the property by sale on full consideration.

He at first endeavoured to defend the retention of possession on the ground that the non-payment of Rs. 2,500 in cash justified it.

But the acceptance of a hand-note and a mortgage as full consideration negatives this and there was no attempt to support the Pleader witness's absurd contention that possession could be retained until the instalments of the mortgage were paid.

This is one point on which we find the defendant No. 2's case is damaged by false evidence, and another portion of the evidence which we cannot believe is the story of the receipt and documents being made over *bona fide* to the defendant No. 1 for taking copies. It is perfectly clear that the title-deeds were handed over to him on execution of deed of sale and that in the subsequent mortgage-deed executed in another place he undertook to return them.

By the most extraordinary carelessness the old man Abdul Aziz and his incompetent Pleader, Jiban Hari Mukerjee, left the receipt for the deed of sale in defendant No. 1's hands with all its false and misleading recitals and the question before us is, whether the plaintiff cannot plead an equity to postpone the mortgage to defendant No. 2 which appears to contain perfectly true recitals, though the defendant No. 2 and his witnesses have taken so much trouble to prove that they are false.

Now we have to ask ourselves what is the meaning of all this apparently foolish misrepresentation and false statement. Ordinarily speaking such conduct would be evidence of fraud, but it is difficult to see what object was sought to be attained by this chicanery and the plaintiff is of course unable to assign any fraud because he knows nothing of the secret dealings of the parties. But if there was no fraud, it is difficult to avoid the inference that there was gross and culpable negligence in fact, and the sorry figure cut by the Pleader

who is responsible for the documents in the witness-box lends colour to that inference.

On the facts proved by the evidence for the plaintiff we have no hesitation in holding with the learned Subordinate Judge that the plaintiff was induced to advance Rs. 13,000 to defendant No. 1, on the strength of the clear title in his hand and that the evidence, which is amply sufficient, is not recalled nor even impugned in cross-examination. The learned Counsel for respondent urges that both plaintiff and defendant No. 2 have been defrauded by defendant No. 1 and that defendant No. 1 stands to suffer a very heavy loss compared with plaintiff, who took a speculative mortgage with the usual risks. The defendant No. 2's mortgage on the other hand was consideration for a valuable property belonging to the defendant No. 2 and he should not be the loser by postponement. This is on the merits. But on the law he strenuously argues that there is no defect in form in the conveyance and that although the recitals in it might be a very good answer to a claim for an unpaid vendor's lien it is no answer to a valid registered mortgage. It is argued upon the authority of *Mohindra Chandra Nandy v. Troylockho Nath Burat* (1), to which we have already referred, that there must be fraud or something indicating fraud to bring the case within section 78 of the Transfer of Property Act, and that although the rule in this Court, contrary to the view held by the Bombay Court, is that registration is not *per se* notice, yet where there has been a search there is an irrebuttable presumption that the searcher had notice of the registered encumbrance, and for this the case of *Akhoy Kumari Debi v. Kanai Lal Kundu* (2) is relied on and the reasons given by Dart in his work on Conveyancing. A mere case of carelessness, such as it is argued occurred here, would not have such serious consequences particularly in a country where transfers of property are registered. Moreover the plaintiff, it is alleged, has been guilty of neglect of the plainest duties of a mortgagee in not demanding requisitions of title though he acted through a Calcutta Solicitor, in not searching the Municipal Registers and not seeking for an explana-

(2) 16 Ind. Cas. 618; 17 C. W. N. 224.

NANDA LAL V. ABDUL AZIZ.

tion of the absence of any express words showing payment of the consideration-money in cash. It was also argued, as we have seen, that possession is notice.

To deal with the last point first. It is now conceded that the right to possession passed absolutely to the vendee defendant No. 1 by the sale-deed and the plaintiff has, in our opinion, clearly established that when he went to see the property with a view to advancing money on it, the defendant No. 1 had the key, opened the door and showed the premises. From enquiries on the spot he came to know that defendant No. 1 was in possession. The Subordinate Judge is in error in saying that the plaintiff's deposition shows that he merely paid a flying visit for a few minutes and asked a casual neighbour who the owner was and came away. The whole incident of the broker and the key which is un rebutted is ignored by the learned Subordinate Judge. The defendant No. 2 has to admit through his learned Counsel that he must have given possession to defendant No. 1, otherwise he would be guilty of defrauding the defendant No. 1 by taking money and a hand-note from him and a mortgage wholly without consideration. That being so, the gravest suspicion falls on the whole transaction, the recitals in the documents being false, the evidence being false and the transaction being carried out in a most irregular manner at a most irregular place. The Pleader, who is the first witness to the mortgage-deed, admits that he was not present at its execution but signed it later on the admission of the executant. Whether the son of defendant No. 2 wanted to defraud defendant No. 1 and get Rs. 2,500 for an inoperative sale is not now before us inasmuch as defendant No. 1 does not appear, but it is quite clear that at that time defendant No. 1 had no fraudulent intention. His fraud, if any, had its first inception when his pecuniary difficulties pressed hard upon him and the negligence of the defendant No. 2 and his son gave him the opportunity of deceiving the plaintiff. Upon this it has been argued for the respondent that you cannot get damages for an innocent misrepresentation of Common Law.

Derry v. Peek (3) and in Appeal Cases (1902) in the House of Lords, Lord (3) 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33; 54 J. P. 148; 1 Meg. 292.

Halsbury is referred to as saying that it is not your duty to guard against criminal offences. It cannot be negligence to trust a person who can only take advantage of you by means of a crime. Now the answer to the first part of this contention is that no one is seeking damages for misrepresentation or negligence in this case. A purely equitable relief is sought for here and we have nothing to do with any question of damages or compensation at Common Law. In the same way the criminal act of fraud, if any, was committed by defendant No. 1 against the plaintiff and not against defendant No. 2. Defendant No. 2 was never deceived. He accepted full consideration for his sale and thought he had made a very good bargain. The agreement, if it had any force at all, would tell in the plaintiff's favour, but there is nothing to show that defendant No. 1 is amenable to the criminal law.

He did not seek out the plaintiff or make any representation to him. The plaintiff saw the property, satisfied himself as to the possession, placed the verification of title in the hands of his Solicitor and there is nothing on the record to show that the defendant No. 1 ever brought himself within the clutches of the Indian Penal Code. Indeed the respondent had to admit that it would be very difficult on the facts to get a verdict of cheating against the defendant No. 1. The defendant No. 2 had secured what he considered a very good bargain for his rather unprofitable property.

The Pleader Jiban Hari Mookerjee says both parties were his clients and the whole transaction was open and above board.

The son of defendant No. 2 says he had known the defendant No. 1 two years before the sale. He had a new *arat* of jute business at Munshigunj in Dacca District and a press and tailoring business in Calcutta. Nothing was then known of his being unable to meet his liabilities. Defendant No. 2 does not seem to have any very good case for sympathy on the merits. That being so, let us examine the legal contentions which arise on the Subordinate Judge's judgment.

We are not called upon to hold that the prior mortgage of defendant No. 2 was not a *bona fide* and valid document, through the circumstances under which it was created and the conduct of the defendant No. 2's

NANDA LAL v. ABDUL AZIZ.

son in respect of it are suspicious. The first important question of law is as to notice.

Section 3 of the Transfer of Property Act says: "A person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it." Now it is perfectly certain that plaintiff did not actually know that the property was mortgaged to within a few rupees of its nominal and greatly enhanced value. If he had, he would have been mad to have advanced Rs. 13,000 on it, and being a money-lender, it is not likely that he was blind to his own interest. The only way in which this substantial finding of ignorance in fact could be met would be by arguing, as it was argued, that defendant No. 1 was colluding with the plaintiff to rob defendant No. 2. There is no evidence of this and the Subordinate Judge has rightly held that there is strong evidence to the contrary, though he is wrong in saying that there are "a host of independent witnesses" on the point. If in fact, therefore, he did not know, how is he to be saddled with constructive notice? In two ways, it is argued: (1), because he had a search made in the Registration Office and (2) on the authority of *Akhoy Kumari Debi v. Kanai Lal Kundu* (2) that resulted in a presumption of notice of the contents of the book and it could not be rebutted by the mere statement that though a search was made it was unsuccessful.

We may accede to this narrow proposition, although it is based upon fresh decision by which, as the learned Judges point out, we are not bound. But it was sought by learned Counsel to erect this very simple presumption by way of caution against fraud into an irrebuttable presumption that the person who had a search made had notice in every case and if we held otherwise, we were strongly pressed to refer the decision cited to the Full Bench. In support of this contention we are referred to Dart on Vendors and Purchasers, page 901, where he says: "The duty of the solicitor being to inform the client of the defect in the title, the presumption that he has done so is *sui juris et de jure*, the danger of perjury being too great to admit of the presumption being rebutted by evidence." The passage in Dart

has, of course, no reference to this question of registration and search. That is, as the Judges in *Akhoy Kumari Debi v. Kanai Lal Kundu* (2) point out, a simple presumption of fact depending on the circumstances of the particular case.

We cannot put it better than in the words of the learned Judges themselves as to what was then before them. They say: "all that is said here is that a search was made but without success. There is no attempt made to explain this want of success, no suggestion of any special or qualifying circumstance which would justify the treatment of the case as exceptional."

Here very much the reverse is the case.

All the title-deeds were before the attorney and he approved the title. He was then instructed to search for encumbrances and he employed the managing clerk of the defendant No. 1's attorney to make the search. To excuse his conduct he states that this Haripado Chatterji is joint clerk of himself and Romesh Babu, the attorney of the common adversary defendant No. 1. He admits that the plaintiffs ordinarily search through their own man, Upendra Talukdar. He being away the attorney was asked to make the search and he admits that the responsibility for the search is theoretically his. When he employs the principal clerk of the attorney of defendant No. 1 who was strongly interested to see that the encumbrance was not discovered, we can easily see how easily this Haripado, who identified defendant No. 1 at the Registration Office on the 21st September 1911 and then described himself as managing clerk of Romesh Chandra Bose solicitor and nothing else, could be induced by defendant No. 1 to suppress the encumbrances. No man of the plaintiff was allowed to go with him though plaintiff has numerous men looking after his legal business.

The evidence in regard to this search is so suspicious that we are inclined to agree with the Subordinate Judge that it is extremely doubtful whether there was any search at all. At any rate no presumption can be raised against the plaintiff on a search made by the managing clerk of the enemy's attorney.

Secondly, it is said section 3 does not apply on account of gross negligence.

NANDA LAL V. ABDUL AZIZ.

Now this is alleged to be the non-inspection of the Municipal papers, not obtaining requisitions of title, and not requiring an explanation of the absence of express words to the passing of consideration.

The Municipal papers have been printed by the respondent in a separate book and they show nothing except that Abdul Aziz was registered in 1909, and that he paid the taxes for the quarter before the sale and for the quarter after, the house being admittedly unoccupied by a tenant. The sale was in the middle of the quarter and so was the disappearance of defendant No. 1. So that nothing would appear from the Corporation papers and the plaintiff was entitled to assume from the recent transfer from Abdul Aziz to defendant No. 1 in July that the name of Abdul Aziz would still appear during the quarter July to September, and the registers could show him nothing.

Requisitions of title are a matter for the solicitor. He was instructed to get them but informed the plaintiff on the title-deeds that the title was good.

The sale-deed was registered at a *mofussil* office and there is no practice outside Calcutta, and certainly no such presumption as that laid down by Dart for England, that the solicitor has made requisitions of title. In this case the fact remains that he had not, though he appears to have made the plaintiff believe that he had and appears to have been acting hand in glove with defendant No. 1's attorney to the detriment of the plaintiff. Neither the Attorneys for the plaintiff nor the Pleaders for the defendant No. 2 come very well out of the witness-box. As regards the recitals in the sale-deed, whatever may be the strict legal effect of such statements in England, we are unable to hold that the plaintiff was put upon any enquiry as to the consideration by reason of the absence of a memorandum of consideration. It may have been the duty of the Attorney Sailendra to look into the matter, but his evidence shows he clearly neglected his duty and makes light of his responsibility. We are of opinion that the words used were deliberately inserted to give the impression that the consideration had passed in cash, and we derive from Jiban Hari Pleader's evidence

that that was the original suggestion made to satisfy the old man, defendant No. 2.

It does not, therefore, matter whether the words according to strict English rules of conveyancing can bear that interpretation in law. The question is that the parties on the one side intended to be believed and the parties on the other side were induced to believe by the words used. On the whole, therefore, we are able to find as a fact that plaintiff had no notice of the defendant No. 2's prior encumbrance, that steps were taken throughout the transaction to keep that knowledge from the plaintiff and that he cannot be saddled with constructive notice by reason of any search improperly made by a man from the enemy's camp, or any omission to make enquiries which were infructuous in the one case, and on the face of the documents superfluous in the other.

The other main point of law on which the Subordinate Judge has held against the plaintiff is with regard to the application of section 78 of the Transfer of Property Act.

That section says: "Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

Now there is no allegation or proof of any actual fraud on the part of the prior mortgagee in this case, though his conduct is such as it is difficult to explain without assuming that he had the intention to deceive some one to his own or his son's advantage; nor is there any misrepresentation as defined in section 18 of the Contract Act, though there is a great deal of misrepresentation in the ordinary sense of the word. The question remains, is there any "gross negligence"?

Now whatever definition we take of the three ingredients in the section, fraud, misrepresentation or gross negligence, it is clear that the section makes them disjunctive and that one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. The ruling, therefore, in *Monindra Chandra Nandy v. Troylockho Nath*

NANDA LAL V. ABDUL AZIZ.

Burat (1), which was the decision of a single Judge sitting on the original side of this Court and governed more directly by English practice and precedents than we are, cannot be taken to mean as was argued by learned Counsel that there is no postponement apart from fraud. The learned Judge, who after holding the offices of Chief Justice of Bombay and of this Court has now been elevated to the Judicial Committee of the Privy Council, cannot be for one moment suspected of ignoring the clear distinction drawn by section 78 of the Transfer of Property Act between the three different kinds of conduct which raise an equity against the prior mortgagee.

It is true that the English cases which he cites not as authorities but guides do seem to import the idea of fraud, if only by implication, although the distinction drawn by section 78 is clearly made by Lord Justice Turner in *Hunt v. Elmes* (4), but all that is derived from those cases is that the mere omission on the part of the mortgagee to take and keep the title-deeds is not of itself gross negligence and the existence of gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration here is the fact that in this country a universal system of registration exists. Some remarks follow which might be construed to imply that the learned Judge was re-importing the Bombay view that registration is notice, into this Court which has always held to the contrary, but a careful consideration of the facts of that case precludes us from ascribing any such intention to the learned Judge.

The Maharani in that case was not the owner of the property. She took a mortgage after every proper enquiry and perfected her title by registration, and the only fact against her was that her agent followed the *mofussil* practice and returned the title-deeds to the mortgagor. Here the owner while transferring his property by sale took particular pains to conceal what the real consideration was, and though he registered the mortgage, deliberately suppressed all re-

ference to it in any statement of consideration and for some unknown reason made it appear on the face of the title-deeds that there was no such mortgage. His handing over the sale-deed to defendant No. 1 enabling him to give an equitable mortgage to plaintiff in Calcutta, where the parties reside, and actually inducing him to advance Rs. 13,000 on the strength of the title-deeds was, therefore, we think, gross negligence, and we are fortified in this opinion by the more recent case of *Walker v. Lincoln* (5), where Parker, J., as he then was, points out that the fraud mentioned in the older cases cannot have been such conduct as would justify a Judge or Jury in finding there had been actual fraud but such conduct would justify the Court of Chancery in concluding that there had been fraud in some artificial sense, just as in the case now before us it is difficult to account for the duplicity and concealment of the defendant and his son on any other supposition than that they intended to defraud some one, but at the same time on what we can only gather from the record there is nothing to show what that fraud was or in fact whether there was any fraud in the ordinary sense of the word at all.

Then, again, as regards the ridiculous story that the defendant No. 1 was allowed to keep the title-deeds for two months to make copies which he had undertaken to make in five or seven days, Parker, J., says: "There are subsequent cases which suggest that at any rate in cases of postponement based on no enquiry having been made for the deeds, fraud is not necessary. It is for example clear from the case of *Oliver v. Hinton* (6) that a purchaser obtaining the legal estate but making no enquiry for the title-deeds or making enquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, though perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate so as to deprive a prior incumbrancer of his priority."

(4) 2 De G. F. & J. 578; 30 L. J. Ch. 255; 7 Jur. (N. S.) 200; 3 L. T. 796; 9 W. R. 362; 45 E. R. 745; 129 R. R. 204.

(5) (1907) 2 Ch. D. 104; 76 L. J. Ch. 500; 97 L. T. 92.

(6) (1899) 2 Ch. 264; 68 L. J. Ch. 582; 48 W. R. 3; 81 L. T. 212; 15 T. L. R. 450.

BALDEO PERSHAD v. NARAIN HALWAI.

On that case Lindley, M. R., said that to deprive a purchaser for value without notice of a prior encumbrance of the benefit of the legal estate it is not essential that he should be guilty of fraud.

Here defendant No. 2 or his son, who did all his business for him, had full notice by default in the instalments that defendant No. 1 was not a good paymaster and might be unscrupulous in raising money for his needs, yet he persistently neglected to secure the return of the title-deeds, being put off with flimsy excuses that copies could not be taken owing to certain deaths in the family. As the learned author of Fisher on Mortgages points out at page 573, section 1122 of his work, Parker, J., reviews elaborately all the previous authorities and displaces the more narrow view previously held as to the necessity for fraud being shown.

The only other English cases we need refer to is that of *Colyer v. Finch* (7), where Campbell, L. J., says: "Cases are very different to deal with when you are obliged to use vituperative epithets (like 'gross') in order to enunciate a principle. What constitutes 'gross negligence' is always excessively difficult either to define, or, by way of anticipation, to illustrate, but it appears to me at present, that none of the cases, as far as I am aware of them, would entirely justify what was done by the mortgagee here" and under the circumstances of that case he held, as we must hold under the circumstances of this case, that the leaving of the title-deeds with defendant No. 1 was an act of gross negligence. Of Indian cases we have had cited before and considered the cases of *Madras Building Company v. Rowlandson* (8), the same case in appeal *Shan Munn Mull v. Madras Building Company* (9), *Rangasami Naikan v. Annamalai Mudali* (10), *Manji Karimbhai v. Hoorbai* (11) (the last on the question of notice). All these cases deal with the points on the particular facts and circumstances of those cases, but what we derive from them is

that, in a case like the present, neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds, is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and a suggestion that the purchase-money was required in cash and paid accordingly.

Further that registration not being in itself notice, a search made by the clerk of the solicitor to the vendee who has an interest to conceal the encumbrance from the second mortgagee cannot saddle the latter with notice of the encumbrance. These two findings dispose of the appeal, which must accordingly be decreed so far as the lower Court refused to give relief to the plaintiffs against defendant No. 2 and it will be declared that the mortgage-bond of the 25th July 1911 to the defendant No. 2 be postponed to that of the 21st September 1911 in favour of the plaintiffs, that this day six months be fixed as the time for the defendants Nos. 1 and 2 jointly or severally to pay to the plaintiff the sum due on his mortgage with interest and costs and if the amount is not paid on that date, the mortgaged property will be sold.

Appeal decreed in part.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1743 OF 1914.
April 20, 1916.
Present:—Justice Sir P. C. Banerji, Kt.
BALDEO PERSHAD—PLAINTIFF—
APPELLANT

versus
NARAIN HALWAI—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act I of 1908), s. 11—Res judicata—Previous suit for rent and of nature cog.

(7) 5 H. L. Cas. 905 at p. 924; 26 L. J. Ch. 65; 3 Jur. (N. S.) 25; 10 E. R. 1159; 101 R. R. 442.

(8) 13 M. 383.

(9) 15 M. 268; 11 M. L. J. 95.

(10) 31 M. 7; 8 M. L. T. 87; 17 M. L. J. 499.

(11) 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044.

BALDEO PERSHAD V. NARAIN HALWAI.

nizable by Small Cause Court—Title incidentally determined—Suit for title, if barred.

An incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title. [p. 124, col 2; p. 125, col 1.]

Inayat Khan v. Rahmat Bibi, 2 A. 97, followed.

Dwarkanath Ray v. Ram Chand Aich, 26 C. 428; 3 C. W. N. 266; *Sahadeb Dholi v. Ram Rudra Haldar*, 10 C. W. N. 820, referred to.

Dr. Sen, for the Appellant.

Mr. A. P. Dube, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the plaintiff's claim in respect of the southern section of the house in dispute is barred by the rule of *res judicata*. The plaintiff's allegation is that a house consisting of two sections belonged to one Paharu; that the northern section had been purchased by him and the southern section had been built by him; that the house passed from Paharu to Musammât Kachani and was occupied by the defendant as tenant upon agreement to pay rent at the rate of Rs. 17 per annum. Musammât Kachani is said to have made a gift of the house in the plaintiff's favour. The plaintiff issued notice to the defendant to vacate the house and he now seeks to eject him from it. It appears that Musammât Kachani made a usufructuary mortgage of the property in favour of one Debi Prasad. Debi Prasad brought a suit for arrears of rent against the present defendant. Musammât Kachani was added as a plaintiff to that suit. The defence was that the house did not belong to Musammât Kachani; that the defendant was not the tenant but was the owner of the house. The suit was decreed by the Court of first instance, which was the Court of the Munsif. An appeal was preferred to the District Judge. The learned Judge affirmed the decree, but in the course of his judgment he held that the southern section of the house was not included in the purchase by Paharu and did not therefore belong to Musammât Kachani and that agreement to pay rent was in respect to the northern house only. As the rent was in arrears the claim for rent was decreed. In the present suit it is contended that this decision of the learned District Judge which was passed on the 1st of August 1912, operates as *res judicata* in the present suit and precludes the plaintiff from setting up his title in respect of the southern house.

The Court of first instance decreed the northern portion of house, but on the ground of *res judicata* dismissed the claim in regard to the southern portion without trying it on the merits. This decision was affirmed by the lower Appellate Court. The learned Judge refers to the decisions of *Kali Krishna Tagore v. Secretary of State for India* (1) and *Magniram v. Mehdi Hossein Khan* (2) in support of his view that the matter is *res judicata*. Both the rulings have, in my opinion, no bearing on the present case. In both these cases the previous suit was a suit relating to title, so that any decision upon the question of title which directly arose in the previous suit would undoubtedly be *res judicata* in a subsequent suit upon the same question. In the present case the former suit was, as I have said above, a suit for arrears of house rent. It was a suit of the nature cognizable in a Court of Small Causes and would have been instituted in a Small Cause Court had one existed in the District of Mirzapur, where the property in suit is situate. The question which was substantially and directly in issue in the previous suit was the question, whether the defendant was the tenant of Musammât Kachani and was liable to pay rent. Any question of title which had to be considered in the former suit arose only incidentally and not directly. The decision upon the question of title cannot, therefore, have the effect of *res judicata*. No doubt the Appellate Court did go into the question of title and held that the southern house was not included in the purchase by Paharu, who was the predecessor-in-title of Musammât Kachani. It held that although the defendant was a tenant, he must be deemed to be the tenant of the northern house only, and as the plaintiff had no title to the southern house, the plaintiff could not claim rent in regard to that house.

This decision, as I have said above, was only incidental to the real matter in controversy, namely whether the relationship of landlord and tenant subsisted between the parties. In *Inayat Khan v. Rahmat Bibi* (3) it was held that the incidental determination of an issue of title in a suit for rent

(1) 16 C. 173; 15 I. A. 186; 12 Ind. Jur. 413; 5 Sar. P. J. 237.

(2) 31 C. 95; 1 C. W. N. 30.

(3) 2 A. 97.

K. Y. K. M. CHETTY FIRM v. S. N. V. R. CHETTY FIRM.

of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title. The same view was held by a Full Bench of the Calcutta High Court in *Dwarkanath Roy v. Ram Chand Aich* (4). The learned Counsel for the respondent has referred to the ruling of the same High Court in *Sahadeb Dholi v. Ram Rudra Halder* (5), which appears to have been followed in a subsequent case; but that case, so far as the present question is concerned, is apparently against the respondent. In my opinion the Courts below were wrong in holding that the matter is *res judicata* and that the question of the plaintiff's title to the southern house could not be determined in the present suit. I allow the appeal, discharge the decree of both the Courts below, so far as they relate to the southern section of the house in dispute, and remand the case to the Court of first instance under Order XLI, rule 23, Civil Procedure Code, with directions to re-admit it under its original number in the register and try it on the merits. Costs here and hitherto will abide the event.

Appeal allowed; Case remanded.

- (4) 26 C. 428; ■ C. W. N. 266.
(5) 10 C. W. N. 320.

Where there is a registered-deed of sale, which is not tainted by any fraud or the like, it passes the title and interest conveyed, although the purchase-money has not been paid. The vendee need not prove the passing of consideration ■ against third persons. [p. 125, col. 2; p. 126, col. 1.]

Krishnan Embrandri v. Murakkar, 1 M. L. T. 432, referred to.

Mr. Compagnac, for the Appellants.

Mr. Munshi, for the Respondents.

JUDGMENT.—This is an appeal from a portion of the judgment of the Divisional Court of Toungoo passing a decree against the appellants in respect of the land specified in paragraph 1 (a) of the plaint.

The property along with other properties had been attached by the appellants in execution of their decree against one T. S. Pillai. The respondents had applied for the removal of the attachment and failed. The respondents then sued to have the properties declared to be their absolute property under two deeds, Exhibits A and D. By Exhibit D T. S. Pillai purported to sell, among others, the properties in suit to S. N. Firm. Exhibit A is an instrument by which S. N. Firm purported to convey the same properties to S. N. V. R. Firm, the present respondents.

The defence was that the sale by T. S. Pillai to S. N. Firm was collusive and was not for any consideration. The learned Divisional Judge states in his judgment that he could not find any clear admission on the record, whether this sale was admitted by the appellant or not, and that he had not been able to obtain a satisfactory answer from his Pleader in his Court. He gathered that the Pleader did not wish to dispute the execution of the deed of sale, Exhibit A, but that he would not admit that it was for the consideration stated. The defence would seem to be as stated above by me.

The learned Divisional Judge held that the execution of the deed had been sufficiently proved and went on to hold on the authority of *Chinnan v. Ramachandra* (1) that it was not necessary for the respondents to prove that the consideration stated had passed. It seems to me to be a settled principle of law that where there has been a registered deed of sale, which is not tainted by any fraud or the like, the deed passes the

(1) 15 M. 54.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 53 OF 1915.

January 18, 1916.

Present:—Mr. Justice Maung Kin.

K. Y. K. M. CHETTY FIRM—APPELLANTS
versus

S. N. V. R. CHETTY FIRM—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63
—Right to sue for mere declaration—Specific Relief Act (I of 1877), s. 42—Sale consideration—Transfer of title.

The right of suit under Order XXI, rule 63, Civil Procedure Code, is not controlled by the provisions of section 42 of the Specific Relief Act and a claimant has a right to sue for a mere declaratory decree. [p. 126, col. 2.]

Kristnam Sooraya v. Pathma Bee, 29 M. 151; *M. Sappabadi Chetty v. Maung In*, P. J. L. R. 481, referred to and followed.

TAJ MUHAMMAD v. SAYAD MUHAMMAD.

title and interest conveyed, although the purchase-money has not been paid. See the case of *Krishnan Embrandri v. Marakkar* (2) and the cases therein cited.

In my judgment, if a third party alleges that the deed is fraudulent and collusive, the burden would be on that party. The passage quoted by the Divisional Judge from *Chinnan's* case (1) and what follows seem to support this view. The passage runs: "*Prima facie* when the execution of a mortgage or other conveyance is proved..... further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass, is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all."

In the present case, we have nothing on the side of the appellants to show that no consideration had passed for either of the deeds Exhibit A and D or that either of the transactions was made collusively with the judgment-debtor, T. S. Pillai, with intent to defeat the rights of his creditors or the appellants in particular. The appellants must, therefore, be held to have failed to make out their defence.

The next point raised by the memorandum of appeal is that T. S. Pillai was a necessary party. Whatever may be the value of the contention, it is not necessary to go into it, for, in my opinion, the non-joinder did not affect the merits of the case.

The last point raised by the appellants is that the respondents' suit should be held to be barred under section 42 of the Specific Relief Act, as they were admittedly out of possession and had not asked for consequential relief. The answer to this is to be found in the cases of *Kristnam Sooraya v. Pathma Bee* (3) and *M. Sappabadi Chetty v. Manny In* (4), where it was held that the right of suit under

section 283 (now Order XXI, rule 63) of the Code of Civil Procedure is not controlled by the provisions of section 42 of the Specific Relief Act and that a claimant would have the right to sue for a mere declaratory decree.

The appellants have failed upon all their grounds.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 590 OF 1913.

May 8, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Le Rossignol.

TAJ MUHAMMAD—PLAINTIFF—
APPELLANT

versus

SAYAD MUHAMMAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Custom or Personal Law—Arains of Jullundur City—Succession—Burden of proof—Alienation inter vivos and testation, powers of.

The power of alienation *inter vivos* and the power of testation go together, and if in a particular case the former is proved to be governed by custom, the latter is presumed to follow the same rule. [p. 127, col. 2.]

The Arains of the Jullundur City are governed in matters of testamentary and intestate succession by the ordinary Customary Law of the Province. [p. 127, col. 1.]

As a rule, the onus lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed; but the onus shifts on to the opposite party in the case of a tribe which is one of the dominant agricultural tribes in the Province and to which the ordinary agricultural custom is generally applicable. [p. 127, col. 2.]

Daya Ram v. Sohail Singh, 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907, referred to.

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 6th January 1912, varying that of the Subordinate Judge, 2nd Class, Jullundur, dated the 20th July 1912, dismissing the suit.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—One Mubarik Ali of the Jullundur City executed a Will, by which he gave his entire estate to the defendant Sayad Muhammad, a stranger to the family, subject to a life-interest in half of it in favour of his widow. The plaintiff, who is an heir *ab intestato* of the deceased Mubarik Ali, claims his share in the estate, alleging that under the Muhammadan

(2) 1 M. L. T. 432.

(3) 29 M. 151.

(4) P. J. L. B. 481.

TAJ MUHAMMAD V. SAYAD MUHAMMAD.

Law, by which the latter was governed, the testament executed by him is invalid, except to the extent of one-third of the estate. The Courts below have held that the family, to which the testator belonged, is of the Arain tribe, that it is governed by ordinary agricultural custom of the Punjab, and that the Will is valid, so far as the self-acquired property is concerned. Upon these findings the learned Divisional Judge has decreed the suit with respect to a share in one house, holding the same to be ancestral, and has dismissed it as regards the remaining property, which he has found to be self-acquired *qua* the plaintiff.

Against this decision the plaintiff has filed a second appeal, and upon the certificate granted by the learned Divisional Judge the only point for decision is whether custom as opposed to Muhammadan Law supplies the rule of decision. Now, the Courts below have, after a careful survey of the entire evidence on the record, reached the conclusion that the testator was an Arain, and that the original home of the family was Vairawal in the Amritsar District, from which they migrated to Jullundur. This is a finding of fact, and cannot be impeached on second appeal. The Arains being an agricultural tribe in the Province, we start with the initial presumption that the members of this family, like other agricultural tribes, are governed in matters of testamentary and intestate succession by the ordinary Customary Law; and this presumption is not rebutted, though its force is weakened, by the fact that Hidayat Ullah, the ancestor of the family, and his descendants, instead of adopting agriculture as their profession, became employees of sorts in the Kapurthala State and other places. The learned Judge of the lower Appellate Court is right in thinking that the members of the family at some remote time probably cultivated land, and that custom, rather than the Personal Law, was applicable to them at that time at any rate.

Further, it is sufficiently clear that the family does not follow Muhammadan Law as regards intestate succession. In fact, we have instances showing that the

widows in the family get only life-estates, that the daughters are excluded by the sons, and that the rule of representation is observed in practice. These instances have not been seriously contested by the learned Advocate for the appellant. In respect of alienations, the same remark cannot be made with equal certainty; but we are disposed to agree with the lower Courts that the oral and documentary evidence points to the conclusion that an alienation of ancestral property is liable to be controlled by a collateral of the alienor, descending from the common ancestor who originally owned it. If ancestral property cannot be disposed of by an alienation *inter vivos*, it follows that it cannot be transferred by a Will. Similarly, if self-acquired property can be validly alienated by a transaction to take effect in the alienor's lifetime, there is no valid reason why a different rule should apply, if the owner proceeds to give it away by Will. It is a well-recognized principle of law that the power of alienation *inter vivos* and the power of testation go together and we think that if in a particular case the former is proved to be governed by custom, the latter is presumed to follow the same rule.

We are fully aware of the abstract proposition of law laid down in *Daya Ram v. Sohail Singh* (1) that, apart from the particular facts of a case, the onus lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by Personal Law, and that it is not sufficient to show that in regard to certain other matters he is governed by custom. But the onus shifts at once, when we deal with a tribe, which is one of the dominant agricultural tribes in the Province, and to which the ordinary agricultural custom is generally applicable; more especially when we find that all the instances are in accordance with custom, and that in the matter of alienation *inter vivos*, which is so closely connected with the power of testation, the principles of Customary Law have been followed. In the conclusion reached by us we are fortified by the

(1) 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907.

RAM DHON DHOR v. SHARF-UD-DIN.

fact that there is not a single instance in the family showing that Muhammadan Law has ever been observed in any matter, whether succession or alienation.

For these reasons we are of opinion that the decision of the lower Courts on the only point in controversy in this second appeal must be accepted. We accordingly confirm the decree and dismiss the appeal with costs. The cross-objections have been expressly abandoned by the learned Counsel for the respondents, and are consequently rejected with costs.

Appeal dismissed; Cross-objections rejected.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 1 OF 1915.

February 14, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Twomey.

RAM DHON DHOR—PLAINTIFF—

APPELLANT

versus

SHARF-UD-DIN AND OTHERS — DEFENDANTS—
RESPONDENTS.

Probate and Administration Act (17 of 1881), ss. 90, 82—Alienation, administrator's powers of—Sanction of Court, strict compliance with terms of—Muhammadan Law—Alienation by some of the heirs of deceased, whether binds co-heirs—Alienation by administrators and some of the heirs, effect of.

An administrator appointed under the Probate and Administration Act has no power to make an alienation without first obtaining the permission of the Court under section 90 of the Act, and when such permission has been obtained, he is strictly bound by its terms. A permission to sell does not include a permission to mortgage; and where, after obtaining an order for sale, the administrator mortgages the property, the transaction is voidable under section 90 of the Act. [p. 129, cols. 1 & 2.]

The powers of an executor under a Will are far wider and the executor can do whatever is not expressly forbidden by the Will. [p. 129, col. 1.]

Seale v. Brown, 1 A. 710, distinguished.

The statutory provisions of the Probate and Administration Act apply to Muhammadan estates, overriding any rules of Muhammadan Law that are inconsistent with them. [p. 130, col. 1.]

An administrator, appointed to manage the estate of a deceased Muhammadan, is the only person who has authority to act as a representative of the estate and who can charge the estate for the debts of the deceased so as to bind the heirs, but this cannot be done unless he complies with the provisions of section 90 of the Probate and Administration Act. [p. 130, col. 1.]

Quære.—Whether some of the heirs of a deceased Muhammadan who are in possession of his estate, can alienate it for the debts of the deceased so as to bind the other co-heirs; and whether such an alienation will bind even the proportionate shares of the alienors when it is made in contravention of sections 82 and 90 of the Probate and Administration Act. [p. 129, col. 2.]

Mr. J. E. Lambert, for the Appellant.

Mr. Munshi, for the Respondents.

JUDGMENT.

TWOMEY, J.—There is no dispute as to the main facts in this case which I briefly as follows:—Wahid Ali Choudhry died in 1907 leaving seven heirs, including the four defendants-respondents. He left certain immovable property under mortgage. It had been mortgaged first in February 1903 (Exhibit C) to Chetty, *secondly*, to the same Chetty in May 1903 (Exhibit D) and *thirdly*, to other persons in June 1905 (Exhibit E) to pay off the Chetty's prior mortgages.

The 1st defendant obtained Letters of Administration to Wahid Ali Choudhry's estate in 1908. Subsequently on 4th July 1909 the first three defendants, that is to say, the administrator and two other heirs, mortgaged the property to the plaintiff (Exhibit A) and paid off Abdul Samad to whom the mortgage of 1905 had been assigned. These three defendants subsequently borrowed further sums from the plaintiff and allowed interest on Exhibit A to accumulate till 15th June 1913, when the amount due as interest on Exhibit A was Rs. 873.9.6, and this sum with further sums borrowed from the plaintiff altogether came to Rs. 2,650 for which sum, Exhibit B, further mortgage on the property was executed by these three defendants in favour of the plaintiff.

The mortgagee sued the first three defendants on the two mortgages of 1909 and 1913. The 4th defendant, who is another of the seven heirs of the deceased, was impleaded of his own request. He defended the suit on the ground that the 1st defendant as administrator had mortgaged without the previous permission of the Court as required by section 90, sub-section 3, of the Probate and Administration Act, 1881. He also pleaded that the 2nd and 3rd defendants under section 82 of the same Act had no power to bind the estate of the deceased so long as the Letters of Administration were

RAM DHAN DHOR v. SHARFFUD-UD-DIN.

in force. The first three defendants pleading their own wrong contested the suit on the same grounds as the 4th defendant.

The plaintiff-appellant relied on two orders of the Court permitting sales of a portion of the estate, and it was argued for the plaintiff that the permission to sell included permission to mortgage. The Court rejected this plea and decided that the two mortgages were effected in contravention of section 90. The Court decided, however, that, notwithstanding the grant of Letters of Administration to the 1st defendant, the mortgages by the 1st, 2nd and 3rd defendants held good to the extent of their own proportionate shares in the property. A decree was, therefore, given against the 1st, 2nd and 3rd defendants but the suit as against the 4th defendant was dismissed. The first three defendants have not appealed and the only question in this appeal by the plaintiff is, whether the District Court was right in holding that the mortgages did not bind the 4th defendant and the other heirs who were not parties to the mortgages.

It is argued in the first place that the lower Court was wrong in its decision under section 90. The Judge considered that the Allahabad High Court ruling in *Seale v. Brown* (1) furnished an authority for the view that an administrator who has permission to sell may, if he pleases, mortgage the property instead. That was a case in which executors under a Will mortgaged the estate as security for money borrowed by them to discharge the debts and they gave a power of sale to the mortgagee. The Will expressly charged the testator's debts on his estate. The majority of the Bench decided that the action of the executors was valid. But that case was governed by the Indian Succession Act of 1865, and section 269 of the Act gives unrestricted powers of disposal to executors and administrators. Under the Probate and Administration Act, 1881, an administrator must comply strictly with the provisions of section 90 of the Act. The executor's powers depend largely on the terms of the Will appointing him. He has power to sell or mortgage unless the Will forbids it. An administrator has no power to alienate at all without first obtaining the express permission of the

Court and he is strictly bound by the terms in which the permission is given. In the present case moreover, as the Judge points out, the 1st defendant, when applying to the Court for permission to sell, entirely concealed his mortgage transactions with the plaintiff and the Judge gives reasons for thinking that the Court would have refused permission to effect these further mortgages on the property if the whole facts had been disclosed. Moreover, there is no proof that any part of the sums borrowed on Exhibit B was really devoted to paying off interest which had accrued on Exhibit A. I think the decision that the two mortgages were voidable under section 90 is correct.

But it is further contended that under Muhammadan Law the three defendants had power to bind the other heirs in respect of alienations made for the purpose of paying off the debts of the deceased. The District Court has found that Exhibit A was executed to pay off debts of the deceased, and Abdul Samad, the assignee of the 1905 mortgage, Exhibit E, admits that it was paid off on 4th July 1909 when Exhibit A was executed. Exhibit B was executed ostensibly to pay off debts contracted by the mortgagors including Rs. 873-9-6 due for interest on Exhibit A. There is a conflict of authority among the Indian High Courts as to the effect of a decree against one of several Muhammadan heirs relative to debts contracted by the deceased owner of the estate. The Allahabad High Court has held that such a decree does not bind the other heirs who are not parties to it [*Jafri Begam v. Amir Muhammad Khan* (2)] and presumably the same principle would apply to voluntary alienation by one of several heirs. According to the decisions in Calcutta on the other hand, a creditor may sue any one of the heirs who is in possession of the whole or any part of the property without joining the other heirs as defendants, and the decree will bind not only the actual defendant's proportionate share but all assets of the deceased in his hands [*Amir Dulhin v. Baij Nath Singh* (3) and *Muttyjan v. Ahmad Ally* (4)]. But it appears to me that these divergent rulings have no bearing on the present case, which is distinguished from them by the fact that

(1) 1 A. 710.

(2) 7 A. 822; A. W. N. (1885) 248.

(3) 21 C. 311.

(4) 5 C. 370 10 C. L. R. 346.

RADHA SHAM BASAK v. SECRETARY OF STATE.

Letters of Administration to the estate of the deceased had been issued before the mortgages in suit were executed. The statutory provisions of the Probate and Administration Act apply to Muhammadan estates overriding any rules of Muhammadan Law that are inconsistent with them. It follows from section 82 of the Act that the 1st defendant, who is administrator, was the only person clothed with authority to act as representative of the estate, could bind the shares of the other heirs, and that the 1st defendant could not do so effectually unless he complied with the provisions of section 90.

The District Court has held that notwithstanding the provisions of section 82 the mortgages hold good so far as the proportionate shares of the first three defendants, that is to say, the actual mortgagors, are concerned. That decision has not been questioned in appeal and it is not necessary to consider whether it is correct or not. But, in my opinion, the appellant's claim as against the heirs who were not parties to the mortgages was rightly disallowed and I would, therefore, dismiss this appeal with costs.

Fox, C. J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE Nisi No. 1210 of 1915.

April 11, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

RADHA SHAM BASAK AND OTHERS—
PLAINTIFFS - PETITIONERS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—
OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 3 (6), 77, 140—Notice of claim against State Railway, on whom to be served—Notice to Government—Service on Collector, if sufficient—Consignment of goods—Non-delivery—Suit by consignor for compensation—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115.

Notice of a claim against a State Railway under section 77 of the Railways Act is effective if served on the Government. [p. 133, col. 2; p. 135, col. 1]

Section 140 of the Railways Act does not mean that the Manager is the only person on whom notice of action against a State Railway can be served, but that, if notice is served on the Manager, the only alternative being service on Government, it must be served on him in the manner provided. [p. 133, col. 2; p. 135, cols. 1 & 2.]

Per D. Chatterjee, J.—In such a case, the notice may be served on the Collector and the same will be treated as notice to Government. [p. 134, col. 2.]

Section 140 of the Railways Act has not the effect of cutting down the connotation of the words 'Railway Administration' as contained in section 3 (6). It only provides for the convenience of the party aggrieved that, if he were to serve the notice on the Manager of the State Railway or the Agent of the Railway Company, he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company, there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble, but it cannot take away his rights. [p. 133, col. 2.]

A suit by the consignor against a Railway for value of goods consigned, which were neither delivered to consignee nor returned to consignor and which the Railway Company denied having received, and for compensation therefor is governed by Article 115 and not by Article 30 or Article 31 of Schedule I of the Limitation Act. [p. 135, col. 1.]

Mohansingh Chawan v. Henry Conder, 7 B. 478; *Danmull v. British India Steam Navigation Co.*, 12 C. 477, referred to.

Article 31 seems to contemplate a suit by the party entitled to the delivery, namely, the consignee. [p. 135, col. 1]

Per Beachcroft, J.—*Quare*.—Whether the Collector is always the proper person to receive notice under section 77 on behalf of Government in the matter of claims against State Railways? [p. 135, col. 2.]

If Article 31 applies to such a suit, it is not barred in the absence of evidence as to when the goods should have been delivered. [p. 135, col. 2.]

Secretary of State v. Dip Chand Poddar, 24 C. 306, distinguished.

Great Indian Peninsular Railway Company v. Chandra Bai, 28 A. 552 at p. 553; A. W. N. (1906) 10; 3 A. L. J. 329; *Janki Das v. Bengal Nagpur Railway Company*, 13 Ind. Cas. 509; 15 C. L. J. 211; 16 C. W. N. 356 at p. 358; *Periannan Chetti v. South Indian Railway Company*, 22 M. 137, referred to.

Rule issued against the decision of the Judge of the Small Cause Court, Dacca, in Suit No. 1028 of 1915.

FACTS material to the report are as follows:—

On the 23rd of March 1914 the petitioners under the name and style of the firm of Mongal Chander Basak booked two bundles of cotton-thread weighing three maunds thirty-eight seers at the Dacca Railway Station on the Eastern Bengal State Railway, the goods being consigned to Gobinda Chander Dass at Narsingdih. But the said goods did not reach the consignee nor were they received back by the petitioners. On the 25th May 1914 the petitioners wrote to the District Traffic Superintendent, Eastern Bengal State Railway, Dacca, informing him of the non-delivery of the goods in question and asking him for an enquiry. On the 5th June

RADHA SHAM BASAK v. SECRETARY OF STATE.

1914 the petitioners served a notice upon the Traffic Manager, Eastern Bengal State Railway, Calcutta, stating that in spite of repeated demands they had not got delivery of the goods and that if the goods were not received within a week from that date they would bring a suit for the recovery of price. On the 1st August 1914 the petitioners served a notice upon the Secretary of State for India in Council demanding payment of Rs. 408-15, being the value of the goods, within two months from the day of the notice, failing which it was stated that a suit would be brought for the recovery of money. Then a correspondence ensued between the Traffic Manager of the Eastern Bengal State Railway, Calcutta, and the petitioners which, however, did not lead to any amicable settlement of the petitioners' claim; so they served another notice by way of reminder upon the Secretary of State for India in Council on the 28th January 1915, giving details of the claim and stating therein that they did not thereby waive the notice previously served upon the Secretary of State. On the 22nd April 1915 the petitioners filed the present suit in the Small Cause Court at Dacca and the Judge of the Small Cause Court, while he found that the defendant Railway had received the goods for despatch but had failed to deliver them to the consignee and the value of the goods was Rs. 3.2-15, dismissed the suit holding that the notice to the Traffic Manager was not sufficient under the law and that the notice to the Government was served more than six months after the delivery of the goods to the Railway. Against this decision of the Small Cause Court the petitioners moved the High Court under section 25 of the Provincial Small Cause Courts Act and obtained the Rule.

Dr. Sarat Chandra Basak (with him Babu Hemendra Kumar Das), for the Petitioners, contended that the notice upon the Traffic Manager was sufficient under the law. There is no officer of the Eastern Bengal State Railway under the designation of the Manager of the Railway, so the public are entitled to serve notice under section 77 of the Railways Act upon the Traffic Manager. In the Time Table issued by

the Eastern Bengal State Railway they invite the public to send their notices of claim to the Traffic Manager and they cannot with any consistency say that the notice upon the Traffic Manager was not effective under the law. In regard to the service of notice of claim substantial compliance with the law ought to be regarded sufficient, literal compliance is not necessary, *vide Union Steamship Company of New Zealand, Limited v. Melbourne Harbour Trust Commissioners* (1).

Moreover in this case notice was admittedly served on the Secretary of State for India through the Collector of Dacca within six months from the delivery of the goods to the Railway. The Small Cause Court was wrong in holding that this notice was not served within six months. Section 3 (6) says that Railway Administration in the case of a State Railway includes the Government, and there is no reason why a claim against the State Railway should not be enforced in the same way as a claim against the Government. He referred to *Secretary of State v. Dip Chand Poddar* (2) and *Great Indian Peninsular Railway Company v. Chandra Bai* (3). Section 140 of the Railways Act is not exhaustive and is to be construed as controlled by section 3 (6). See *Janki Das v. Bengal Nagpur Railway Company* (4).

Babu Ram Charan Mitter, Government Pleader, for the Opposite Party. — There is nothing to show that the notice served was a notice under section 77 of the Railways Act. The notice appears to be one under section 80 of the Civil Procedure Code. The decided cases of this Court as well as of other High Courts in India show that notice on the Traffic Manager is not sufficient. See *Secretary of State v. Dip Chand Poddar* (2); *East Indian Railway Company v. Jethmull Ramanand* (5); *Great Indian Peninsular Railway Company v. Chandra Bai* (3); *Nadir Chand Shaha v. Wood* (6); *Great Indian Peninsular Railway v. Ganpat*

(1) 9 A. C. 365; 53 L. J. P. C. 59; 50 L. T. 337; 5 Asp. M. C. 222.

(2) 24 C. 306.

(3) 28 A. 552 at p. 553; A. W. N. (1906) 101; 1 A. L. J. 329.

(4) 13 Ind. Cas. 509; 16 C. W. N. 356 at p. 358; 15 C. L. J. 211.

(5) 26 B. 669; 4 Bom. L. R. 495.

(6) 35 C. 194; 12 C. W. N. 450.

RADHA SHAM BASAK V. SECRETARY OF STATE.

Rai (7). *Janki Das v. Bengal Nagpur Railway Company* (4); *East Indian Railway Co. v. Madhu Mal* (8); *East Indian Railway Co. v. Ramgati Ram* (9).

[BEACHCROFT, J.—Do you mean to say that the only person on whom the notice can be served under section 77 of the Railways Act is the Manager?]

Yes. We must read sections 77 and 140 together and need not consider the definition in section 3. Section 140 distinctly lays down that in the case of a Railway administered by the Government the notice must be served on the Manager. It does not say that the notice may also be served upon the Government. If your Lordships hold that notice on the Government is sufficient under section 140, your Lordships will have to import into the section words that are not to be found there.

[D. CHATTERJEE, J.—In section 3 (6) it is said that Railway Administration includes the Government. Is not the meaning of Railway Administration extended thereby?]

Railway Administration has virtually been defined in section 140 which deals with the service of notice.

[BEACHCROFT, J.—Section 140 does not say that notice must be served on the Manager. It only says notice may be served on the Manager.]

The word 'may' there means 'must'—*vide Martin & Co. v. Fakir Chand Sahu* (10). Section 140 is imperative as to the manner of service as also to the individual to be served. I contend that the notice which was served was not at all a notice under section 77 of the Railways Act. It gave two months' time and evidently it was a notice under section 80 of the Civil Procedure Code; so that even assuming that the notice was served upon the proper person the plaintiffs' claim must fail as the provisions of the Railways Act have not been complied with.

Even if your Lordships hold that the notice served was effective, my next point is that the plaintiffs' suit is barred by limitation. It is true that the lower

Court did not dismiss the suit on the ground of limitation, but it is still open to me to show in this Court that the suit was really barred under the Limitation Law. Here the goods were consigned on the 23rd March 1914 and the suit brought on the 22nd April 1915. So the suit was obviously barred under Article 30 or 31 of the Limitation Act.

[BEACHCROFT, J.—Is there any evidence how long it would take the goods to arrive at its destination?]

In the ordinary course it would take three or four days. The plaintiff does not claim the goods but their value, so Article 30 will apply according to his allegation in the plaint, as he admits in the plaint that the goods have been lost.

Babu Hemendra Kumar Das, in reply.—Article 30 of the Limitation Act does not apply, ■ this is not a case of loss of goods but non-delivery of the goods. The defendant Railway also do not make out ■ case of loss of the goods. The defendant's case is that the goods were not delivered at all by the plaintiff to the Railway for despatch.

Article 31 has also no application. This Article would have applied if the suit were brought by the consignee. Even if Article 31 applies, the defendant must prove what time the goods would take to reach the place of destination. The onus is upon the defendant Railway, the fact is specially within their knowledge. The plaintiffs cannot prove when goods despatched from Dacca would reach Narsinghdih.

Article 115 is applicable to this suit, as it is ■ case of ■ breach of ■ written contract, *e. g.*, the invoice by the Railway which undertook by the contract to deliver the goods to the consignee but have not done so. Again, there are letters written by the Traffic Manager to the plaintiffs in answer to the plaintiffs' notice of claim and these letters amount to acknowledgment within the meaning of section 19 of the Limitation Act. He referred to *Danmull v. British India Steam Navigation Co.* (11); *Mohansing Chawan v. Henry Couder* (12).

(7) 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543.

(8) 19 Ind. Cas. 673; 16 C. L. J. 147; 17 C. W. N.

1124

(9) 23 Ind. Cas. 142; 19 C. L. J. 180

(10) 11 Ind. Cas. 241; 12 C. L. J. 14; 14 C. W. N. 888.

(11) 12 C. 477.

(12) 7 B. 478.

RADHA BASAK v. SECRETARY OF STATE.

JUDGMENT.

D. CHATTERJEE, J.—The petitioners on the 23rd of March 1914 consigned two bundles of cotton-thread at the Dacca Station of the Eastern Bengal State Railway for conveyance to one Gobindo at Narsingdih. The goods did not reach the consignee and information was given to the District Traffic Superintendent on the 25th of May 1914. On the 5th of June 1914, they gave notice to the Traffic Manager of the Railway at Sealdah that if they did not get delivery within a week they would bring a suit. The petitioners say that they gave this notice in accordance with the following rule printed and published in the Fare and Time Table of the Eastern Bengal State Railways:—“Reference regarding delay in transit to or loss of goods, parcels, luggage or other articles and claims for compensation and refunds should be addressed to the Traffic Manager, Calcutta.” They also say that the said Railway has no officer who is called the Manager but there is one called the Agent. On the 1st August 1914, they served a notice on the Secretary of State through the Collector of Dacca demanding payment of compensation and informing him that in default of payment a suit would be brought after two months. This notice was, it seems, sent over by the Collector to the Traffic Manager who wrote to the petitioners asking for details of their loss, and such details were duly supplied on the 4th of October 1914. On the 23rd December 1914 and 8th January 1915, the Traffic Manager wrote to them that the matter was under enquiry. The petitioners brought a suit for recovery of the price with compensation. The defendant, the Secretary of State, pleaded: (1) that the suit was not maintainable as no notice had been given to the Agent of the Railway under section 77 of the Railway Act, (2) that the suit was barred by Articles 30 and 31 of the 1st Schedule to the Limitation Act, (3) that no goods were in reality consigned by the plaintiffs who brought the suit in collusion with the servants of the Railway.

The learned Judge in the Court below held that the goods had been really consigned but must have gone astray at Dacca instead of being loaded in the proper wagon,

but as no notice had been served on the Agent within six months he dismissed the suit with costs.

The petitioners obtained this Rule from this Court and it is urged at the hearing that the learned Judge was wrong in his decision on the question of notice.

Section 77 of the Railways Act provides that notice must be given to the Railway Administration within six months of the delivery of the goods for carriage by the Railway. Section 3 (6) says that “Railway Administration” in the case of a Railway administered by Government means the Manager of the Railway and includes the Government, and in the case of a Railway administered by a Railway Company means the Railway Company. Section 140 provides that any notice required to be served on a Railway Administration may be served in the case of a Railway administered by the Government on the Manager, and in the case of a Railway administered by a Railway Company on the Agent of the Company in India.

It is contended by the learned Vakil for the petitioners that the service of the notice, dated the 1st of August 1914, on the Secretary of State through the Collector of Dacca was sufficient to meet the requirements of section 77. The learned Vakil for the Secretary of State contends that section 140 is imperative and no notice but on the Manager is acceptable. I think section 140 has not the effect of cutting down the connotation of the words Railway Administration as contained in section 3 (6). It only provides for the convenience of the party aggrieved that, if he wants to serve the notice on the Manager of the State Railway or the Agent of the Railway Company, he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company, there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble but it cannot take away his rights. I think the clause “includes the Government” has the effect of extending the meaning of the words Railway Administration, as the said words might not mean the Govern-

RADHA SHAM BASAK V. SECRETARY OF STATE.

ment when there was a Manager. A number of cases have been relied on in this connection by either side, but I do not think that any of those cases contradicts the above view. The case of the *Secretary of State v. Dip Chand Poddar* (2) is, however, the only case which had reference to a State Railway. The notice to the Collector there was beyond six months from date of delivery and, therefore, of no avail, the other notice was to the Traffic Superintendent within six months and the case was sent back for a finding whether it reached the Manager within the required time. This case, if it helps any side, seems to help the petitioners, for it was held in effect that it was not necessary to serve notice both on the Collector and the Manager for if it were the opinion of the Court that the Railway Administration meant both the Manager and the Government and notices were required to be given to both, the case would have been disposed of at once as the notice on the Collector was out of time.

All the other cases referred to in the argument are Railway Company cases and have hardly any bearing on the point at issue before us. Some of them, however, do indicate the opinions of the learned Judges who decided them on the point and may be referred to in this connection. The case of the *Great Indian Peninsular Railway Company v. Chandra Bai* (3) held that a notice to the General Traffic Manager was not a notice to the Agent and was, therefore, insufficient. The learned Judges, however, say in one part of their judgment: "the notification of a claim prescribed by section 77 may, therefore, be given either to the Railway Administration as defined in section 3 (6) or in any other way." In the case of *Janki Das v. Bengal Nagpur Railway Company* (4) it was held that a notice to the Goods Superintendent is not a valid notice under sections 77 and 140. Sir Lawrence Jenkins, C. J., says in his judgment, however: "the method of service permitted by this section (140) has not been followed, nor has it been shown that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77." The Madras High

Court also expressed a similar opinion in the case of *Periannan Chetti v. South Indian Railway Company* (13). The learned Judges say: "We do not think that section 140 precludes a claimant from showing that the notice required by section 77 did, in fact reach the Agent, within the time limited, though not in one of the modes prescribed in section 140." This view is in accordance with what was held in this Court in the case of *Secretary of State v. Dip Chand Poddar* (2). I am aware of a note of dissent from the Madras case expressed in the case of *Nadir Chaud Shaha v. Wood* (6), but that case must be read by the light of its own facts and besides the authorities quoted do not seem to support the opinion, which was expressed in terms rather too general. Furthermore that was a Company case and the point now before us was foreign to the enquiry. I think, therefore, that these cases do not support the contention of the opposite party and the notice that was served in this case upon the Government through the Collector within six months was sufficient to satisfy the requirements of section 77. In this view of the case it is not necessary to consider whether the notice to the Traffic Manager was a valid notice. I think it right to state, however, that the position taken by the learned Government Pleader in this respect also is very debatable. He says the notice ought to have been to the Manager of the Railway, but there is no officer having that designation on this Railway. Then he says the notice ought to have been served on the Agent, but the law does not require the notice to be given to the Agent in a State Railway and if a notice had actually been given to the Agent it could have been argued that it should have been given to the Manager. Then again there is no evidence that the Agent is the Manager or that the Traffic Manager is not the Manager.

On the other hand the Time and Fare Table of the Railway, which is presumably issued by the authority of the Railway Administration, directs the public to give notices to the Traffic Manager. I think that it is the duty of Government to throw more light on this point and inform the public that the Manager of the Railway for the purpose of serving notices is either the Traffic Manager or the Agent or somebody else.

NUR MUHAMMAD v. KHUDA BAKHSH.

The next question is that of limitation under Article 30 or 31 of the 1st Schedule to the Limitation Act. The goods were delivered to the Railway on the 23rd of March 1914 and the suit was brought on the 22nd of April 1915, about a month over one year after. Article 30 does not apply, as the plaintiff's case was not for the loss of the goods and the defendant did not plead or prove any loss. On the other hand the defendant pleaded that no goods had been delivered at all. Article 31 applies to suits against a carrier for compensation for non-delivery of or delay in delivering goods and the time for suit is one year from the time when the goods ought to be delivered. I think this Article also has no application. In the first place this Article seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. In the second place it would be for the Company to show when the goods ought to have been delivered - that fact being presumably within its knowledge—but there is no evidence on the point: on the contrary the case of the defendant being that no goods were in reality delivered, he could hardly prove when the goods should have been delivered. Narsingdih is not a place on the same line but has to be reached after transshipment at Naraingunge, so that one cannot even by guess say that the goods should have reached within a month. Apart from this consideration, however, I think that this is a case of a breach of a written contract and Article 115 of the Schedule governs the case. It was so held in a similar case, *Mohansing Chawan v. Henry Conder* (12), which was followed by Garth, C. J., and Wilson, J., in the case of *Danmull v. British India Steam Navigation Company* (11). This being so the suit was not barred by limitation. The learned Judge says he would have decreed the suit for Rs. 392-15 only if it were maintainable. I would, therefore, decree the suit for Rs. 392-15 with costs. The petitioners are entitled to their costs in this Court, three gold mohurs. The Rule is accordingly made absolute.

BEACHCROFT, J.—I agree that, in view of the definition of the words "Railway Administration" in section 3 (6) of the Act, the notice under section 77 is effective if served on the Government and that section 140 does not mean that the Manager is the only person on whom notice can be served, but that if

notice is served on the Manager, the only alternative being service on the Government, it must be served on him in the manner provided.

Whether the Collector is the proper person to receive notice under section 77 on behalf of Government when notice is served on Government and not on the Manager, I express no opinion, but as the learned Government Pleader did not suggest that he was not, except in so far as he argued that under section 140 notice must be served on the Manager alone for the purposes of this Rule, I accept the position that notice to the Collector is notice to the Government. As regards the question of limitation, it is sufficient to say that I agree that Article 30 does not apply, and that if Article 31 does there is no evidence when the goods ought to have been delivered.

I agree in decreeing the suit.

Rule made absolute; Suit decreed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1912.

May 20, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.
NUR MUHAMMAD—DEFENDANT—

APPELLANT

versus

KHUDA BAKHSH, LEGAL REPRESENTATIVE
OF NUR BAKHSH, DECEASED—
PLAINTIFF—RESPONDENT.

Custom or Personal Law—Succession—Parachas of Makhad, Attock District—Widow's estate—Presumption—Evidence in favour of certain rule of succession, value of.

In matters of succession, the *Parachas* of Makhad in the Attock District follow custom rather than Personal Law. [p. 137, col. 1.]

Where a widow in the Punjab takes the whole of her late husband's estate there is a presumption that she takes only for life. [p. 137, col. 2.]

Muhammad Anwar-ul-Haq v. Habibul Rahmon, 74 P. R. 1902; *Muhammad Hussain v. Sultan Ali*, 54 P. R. 1903; *Mir Haidar v. Muhammad Ali*, 10 Ind. Cas. 855; 14 P. R. 1911; 88 P. L. R. 1911; 44 P. W. R. 1911, followed.

Where there is a respectable body of evidence in favour of a rule of succession in controversy, the fact that in other matters connected with succession, the parties appear to follow such custom is certainly some support to the party relying on custom. [p. 138, col. 1.]

NUR MUHAMMAD V. KHUDA BAKHSH.

Daya Ram v. Sohail Singh, 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907, referred to.

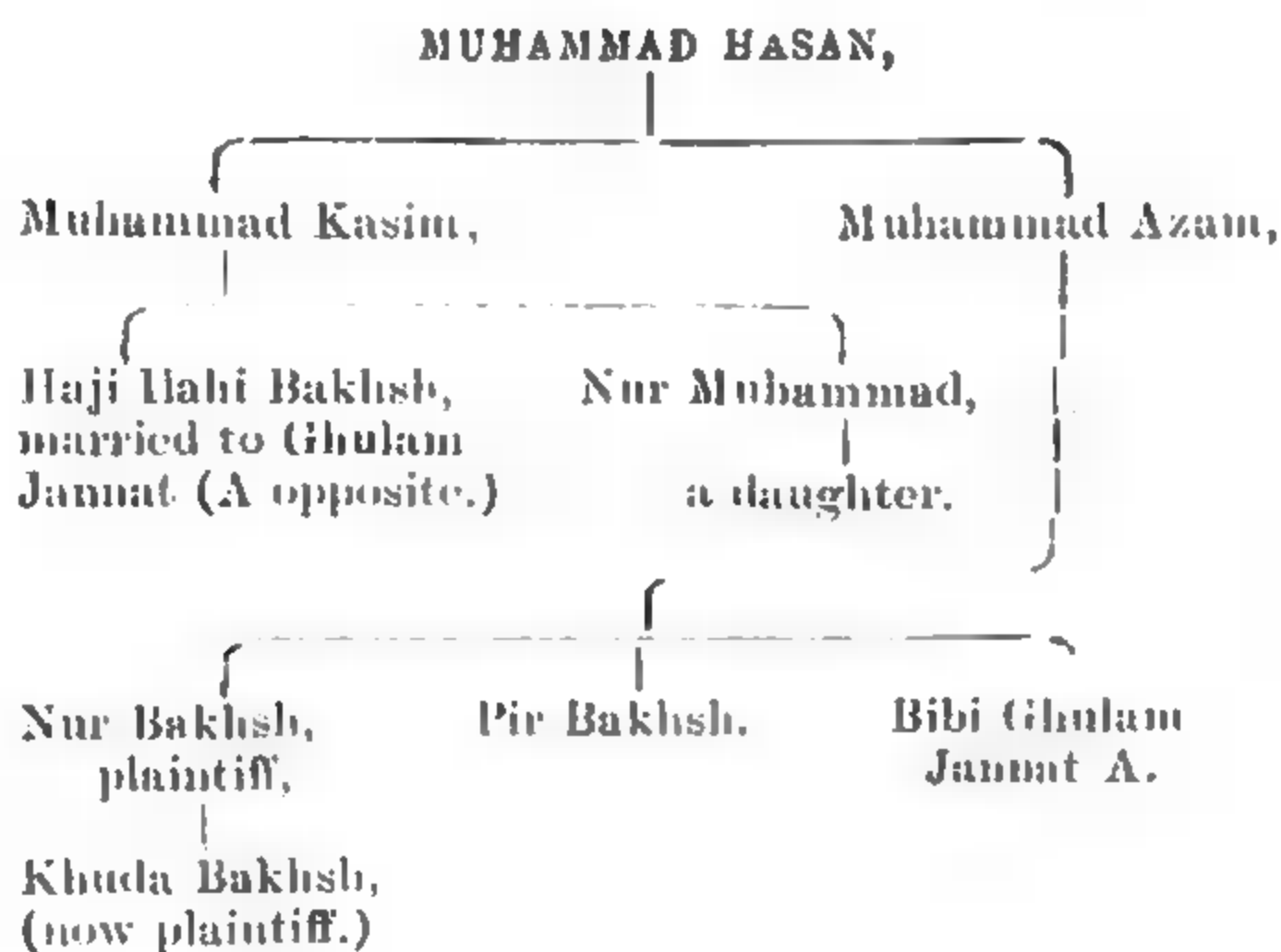
First appeal from the decree of the District Judge, Attock, dated the 29th November 1911, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and *Mirza Jalal Din*, for Khuda Bakhsh Respondent.

Pir *Tai-ud-Din*, for *Musammal Basran*, widow of Nur Bakhsh, Respondent.

JUDGMENT.—A brief pedigree-table will help to make our judgment intelligible:—



The large property in suit belonged to *Haji Ilahi Bakhsh*, who died leaving a widow *Ghulam Jannat*, sister of Nur Bakhsh, original plaintiff, who claimed that he was sole heir of his sister, who was entitled under Muhammadan Law to $\frac{1}{4}$ th of her late husband's estate, and who has died, and so prayed for a decree for $\frac{1}{4}$ th of the late *Haji's* property. He made Nur Muhammad, sole brother of the late *Haji*, his defendant on the ground that the latter was in possession of the whole of that property.

Defendant, on the other hand, pleaded

(a) that the late *Haji* had divorced *Musammal Ghulam Jannat*;

(b) that the parties do not follow Muhammadan Law in matters of succession but follow a custom, under which widows of sonless men (like the *Haji*) take their husbands' estates on a life-tenure and on the widow's death the property goes to the late husband's heirs;

(c) that there was an oral agreement by *Musammal Ghulam Jannat*, whereby she

took the sum of Rs. 3,000 and renounced her right;

(d) that a written deed of compromise was drawn up embodying the above, signed by Khuda Bakhsh (now plaintiff), son of Nur Bakhsh, original plaintiff, as *mukhtar-i-am* of Nur Bakhsh, in the course of litigation between the *Haji* and Pir Bakhsh (see pedigree-table).

Plaintiff met these pleas by reiterating his original case, and by contending (i) that there was no such oral agreement by the lady, (ii) that Khuda Bakhsh had no power to compromise as he did, (iii) that the compromise required registration, and, being unregistered, cannot be received in evidence, the property being admittedly over Rs. 100 in value.

Issues were drawn on all these points, and the lower Court found finally for plaintiff. That Court held that the alleged divorce was not established; that the parties follow Muhammadan Law; that the lady never renounced her rights; that Khuda Bakhsh entered into the compromise on behalf of Nur Bakhsh without proper authority and that the latter, therefore, is not estopped from bringing this claim; that the compromise did not require registration; and that plaintiff Nur Bakhsh was entitled to a decree in full with costs.

Defendant has appealed. We first heard Mr. Shafi on his behalf on all the points found against him by the lower Court, which Mr. Shafi thought it right to contest. He dropped the allegation of divorce, with which we are, therefore, no longer specially concerned at present; he urged that the parties follow custom and not Muhammadan Law; while waiving the question whether the lady directly renounced her rights, he contended that Nur Bakhsh was bound by the aforesaid compromise, and that still more was Khuda Bakhsh so bound, now that he has become plaintiff *vice* Nur Bakhsh, who had died during the pendency of this appeal; and finally he asked for dismissal of the suit. On the other side we have heard Mr. Sheo Narain on all the issues in the case, and Mr. *Taj-ud-Din* (who appears for *Musammal Basran*, widow of Nur Bakhsh, made a respondent) on the questions of Custom *versus* Personal Law, and of abatement of appeal (on the ground that his

NUR MUHAMMAD v. KHUDA BAKHSH.

ient was not made a respondent within the 6 months allowed by law). In reply we asked Mr. Shafi to take up the question of custom first, and, having heard him, found that he had made good his contention that the parties follow a custom under which Nur Bakhsh and his son, Khuda Bakhsh, have no title whatever to succeed to any part of the late *Haji's* estate in the presence of appellant, the *Haji's* own brother. This finding disposes of plaintiff's claim, and, therefore, the questions regarding the compromise, estoppel, Khuda Bakhsh's authority, exclusion of the compromise by the law of registration, and so forth, need not be discussed at all.

The parties are *Parachas* of Makhad, a large village or small town on the Indus in the Attock District. They are known as enterprising traders, travelling on business into Central Asia and other foreign places. They claim to be Arabs by origin and to have been Musalmans from the beginning, while Mr. Shafi's instructions are that they were once *Khatris*, resident in the Punjab, and were converted to *Islam*. This is a controversy, which we have no means of settling; and in our opinion it is not very important, for we have on the record abundant evidence of actual recent practice in matters of succession, and it is on this after all that the appeal must be decided.

A good deal of evidence has been recorded, and Mr. Shafi claims, with reason, that all through it practices emerge that are opposed to the Muhammadan Law of succession, while not a single instance of division of a dead person's estate according to that law has been sworn to by any witness. He claims that the record establishes

(1) that widows are always excluded entirely by sons;

(2) that, where there is no son but only other relatives, the widow always takes the whole property;

(3) that, where there are more widows than one and one dies, the others take by survivorship, the deceased lady's own heirs not coming in;

(4) that sons entirely exclude daughters;

(5) that daughters entirely exclude agnates;

(6) that on a widow dying and leaving property of her late husband, her brother never succeeds;

(7) that, when a man dies leaving a mother but no son or widow, the mother succeeds to the whole estate of the son, to the exclusion of all who would come in under Muhammadan Law;

(8) that, when a widow remarries, she forfeits her late husband's property.

In the present instance, the concrete question is whether *Musammât Ghulam Jannat* on the death of her husband became full owner of any part of his estate, so that the next heir after her death would be her brother, Nur Bakhsh; and it is, therefore, clear that of the above points only (2), (3), (6) and (8) are directly relevant. We think it will suffice if we shew that these points are fairly established. Thus, as regards (2), there is authority to the effect that in the Punjab, where a widow takes the whole of her late husband's estate, there is a presumption that she takes only for life. [*Muhammad Anwar-ul-Haq v. Habibul Rahman* (1); *Muhammad Hussain v. Sultan Ali* (2); *Mir Haidar v. Muhammad Ali* (3).] As regards (3) under Muhammadan Law the surviving ladies would have no right to take by survivorship, but the deceased lady's own heirs would succeed. Point (6) is identical with the question in this case; if it has been established, plaintiff's claim fails, but in establishing it defendant is entitled to call in the aid also of points (2), (3) and (8). As to (8), under Muhammadan Law remarriage of a widow makes no change whatever in her rights to property she has inherited; if in this tribe remarriage works forfeiture in favour of her late husband's heirs, it follows that widows in this tribe take only an ordinary *Punjabi* widow's life-estate.

Taking each of the four points in turn, as regards (2), we think the following pieces of evidence in the printed paper-book support Mr. Shafi, namely,

1. *Ghulam Nabi's* case, page 32, line 16.
2. *Azizullah's* case, page 41, last line.
3. *Muhammad Azam's* case, page 42, line 23.
4. *Muhammad Hasan's* case, page 43 bottom and page 44 top.
5. *Muhammad Said's* case,

(1) 74 P. R. 1902.

(2) 54 P. R. 1903.

(3) 10 Ind. Cas. 855; 14 P. R. 1911; 89 P. L. R. 1911; 44 P. W. R. 1911.

JOGESH CHANDRA v. BAMA SUNDARI DEBI.

Muhammad Azam's case is rather differently described by another witness at page 33, line 11, but the witness at page 42 himself took a share *after the widow's death* and is more likely to have stated the facts correctly; and see page 34 top.

As to (3), we have only the case of the widows Bakht Bhari and Bhag Bhari, page 33, line 17.

As to (6) we have Musammat Faizana's case, page 34, line 12; Musammat Sataran's case, page 37, line 7; Musammat Aishan, page 39 bottom; Musammat Bhag Bhari's case, page 44, lines 10-20; Hafiz Nur Muhammad's widow's case, page 44, line 30; page 45, line 8 (Musammat Shahana's case).

And there are several instances of point (8), *e. g.*, page 35, line 11; page 35, line 25; page 35, line 27; page 41, first line; and so forth. Repeatedly witnesses of both sides have to admit directly or indirectly that remarriage of a widow works forfeiture.

Now it is quite true that all these instances are supported by oral testimony; but in the practically complete absence of rebuttal we are disposed to allow them much weight. We find it hard to hold that, in a case in which the apologists of Personal Law can give, even through the mouth of a witness, virtually not a single instance of obedience to that law, it is right to find the parties to be governed by that law. Again, though such rulings as *Datta Ram v. Sohail Singh* (4) warn us against finding that because a certain rule of Punjab agricultural custom is found to exist in a tribe, it follows that a certain other distinct rule of such custom must also be followed, we think that, where there is a respectable body of evidence in favour of a rule of succession in controversy, the fact that, in other matters connected with succession, the parties appear to follow such custom, is certainly some support to the party relying on custom.

Mr. Sheo Narain quotes *Ghulam Hassan v. Fazal Din* (5), as shewing that, even where it is shewn that sons exclude daughters, it is rash to conclude that other rules of custom in suppression of Personal Law have been adopted; but here we find for appellant without touching

(4) 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907.
 (5) 1 Ind. Cas. 453; 15 P. R. 1909; 35 P. L. R. 1909; 23 P. W. R. 1909.

point (4), of which there are some dozen instances on the record.

Finding, then, that plaintiff is not heir upon the death of his sister Musammat Ghulam Jannat, inasmuch as she had no legal right to the $\frac{1}{4}$ th share in the *Haji's* estate, which plaintiff claims for her, but was at most entitled to a mere life-estate, we hold also that Musammat Basran, the newly made respondent, has no rights whatever and was not a necessary party to this appeal. We, therefore, accept the appeal, but, in view of the fact that defendant has failed in his plea of divorce, we allow him no costs. Plaintiff's suit is dismissed. Parties to bear their own costs.

Appeal accepted; Suit dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2522
OF 1913.

April 7, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

JOGESH CHANDRA CHAKRABUTTY—
PLAINTIFF—APPELLANT

versus

BAMA SUNDARI DEBI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 43, 44—Joint promisors, dismissal of suit against—Appeal, non-joinder of some of defendants in—Relinquishment of claim—Maintainability of appeal—Right to proportionate relief.

When a suit against a number of joint promisors or joint contractors has been dismissed, the plaintiff cannot prosecute an appeal against some only of them, renouncing his claim against the rest, or their legal representatives. [p. 140, col. 2.]

Such an appeal cannot be sustained either on the footing of the promisee's right to release any of the promisors under section 44 or of a joint and several liability under section 43 of the Contract Act, because, if the appeal is allowed, the respondents on record cannot, by reason of the decree of the Trial Court, which is conclusive in favour of the respondents not impleaded, sue the latter for contribution. [p. 140, col. 2; p. 141, col. 1.]

The plaintiff cannot, in appeal, be awarded, in the alternative, the shares of the respondents on record as the same cannot be determined in the absence of the respondents who have been given up. [p. 141, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 3rd Court, Mymensingh, dated the 16th of April 1913, affirming that of the Munsif, 2nd Court at that place, dated the 30th of March 1912.

FACTS material to the report will appear from the judgment.

JOGESH CHANDRA V. BAMA SUNDARI DEBI.

Babu Broja Lal Chakerbatty (with him Babu Gopal Chandra Chackerbutty) for the Respondent.—I have a preliminary objection to the hearing of the appeal. The *kabuliyat* on which the suit for arrears of rent was based was alleged to have been executed by the several defendants, against whom the suit was brought. The lower Court found in favour of the defendants and held that the *kabuliyat* was ■ sham. Defendant No. 3 died and his legal representatives have not been brought on the record. So in the absence of one of the alleged joint contractors the suit cannot go on. See *Basir Sheikh v. Fazle Karim* (1).

[D. CHATTERJEE, J.—There the decree was in favour of persons, some of whom were not before the Court.]

The principle is just the same. The *factum* or validity of a contract cannot be decided in the absence of some of the parties to the contract. *Pyari Mohun Bose v. Kedarnath Roy* (2) shows that all the parties must be before the Court in the case of a joint contract; it does not matter whether they are joined as plaintiffs or defendants. Here the defendant No. 3 was made a party to the suit and she got a decree in her favour in both the lower Courts. As the appeal against her has been given up in the High Court the lower Court's decree in her favour has become final and conclusive. So that any decree that might be made in the High Court in this appeal would not affect the position of defendant No. 3. The defendants who are on the record would not be able to get a decree for contribution against the heirs of the defendant No. 3. The position of the plaintiff-appellant has become worse by not substituting the legal representatives of the defendant No. 3 than if he had not made defendant No. 3 originally a party to the suit. It has been found that the defendant No. 3 is not liable at all and so long as the decree of the lower Court stands, she cannot be made liable to any extent in a contribution suit by the other defendants on the record.

Babu Gunada Charan Sen, for the Appellants.—If the liability is joint and

several, the landlord can get a decree for the whole rent against any one of the joint tenants.

[BEACHCROFT, J.—Can such ■ tenant sue for contribution the other tenants?]

Yes, he can; right to contribution does not depend upon the question whether the others were sued or not. See *Chamatkarini Dasi v. Triguna Nath Sardar* (3). Each one of them was liable for the entire rent and the landlord is entitled to realise the whole rent from any one of them.

[D. CHATTERJEE, J.—By excluding from this appeal defendant No. 3 you have made it impossible for the other defendants to bring a suit for contribution against her.]

That is not a matter to be considered here; these defendants defaulted in paying rent which they undertook to pay by the *kabuliyat*. Whether they will get contribution from the defendant No. 3 or not is a matter with which the landlord is not concerned at all. The landlord is entitled to enforce the liability of these defendants, irrespective of the question whether their right of contribution against another is prejudiced or not.

[D. CHATTERJEE, J.—The result of acceding to your contention will be that your default in not substituting the legal representatives of the defendant No. 3 will act to the injury of the other defendants.]

If I had the right to bring a suit without joining defendant No. 3 as a party, I must have the right to proceed with the appeal after excluding defendant No. 3 from the category of respondents. I can release some of these defendants who are joint contractors from their liability and then proceed against the others. *Vide Contract Act, section 44*. If a release cannot affect my right I do not see why a decree should.

[D. CHATTERJEE, J.—The defendant No. 3 has now got a final decree against you.]

Could she be in a better possession than if I had given her ■ release? Because she had got a decree in her favour which might have been challenged by me, her position is not rendered better than if it had been by a release granted by me.

(1) 28 Ind. Cas. 703; 19 C. W. N. 290.

(2) 26 C. 409 (F. B.); 3 C. W. N. 271.

(3) 19 Ind. Cas. 969; 17 C. W. N. 633.

JOGESH CHANDRA V. BAMA SUNDARI DEBI.

[D. CHATTERJEE, J.—The very idea of release signifies that you had the right which you gave up, whereas the decree and the judgments of the lower Courts show that you had not the right at all.]

At any rate I am entitled to a decree proportionately to the shares of the defendants that are on the record.

[BEACHCROFT, J.—Are the shares known?]

No. But if shares are not specified the presumption would be that they are equal. But even I am prepared to take a decree in the form that my suit will be decreed to the extent of the shares of the present respondents; what those shares are might be determined in the execution proceeding.

Babu Broja Lal Chackerbatty, in reply.—The question in the lower Courts was not so much as to whether a certain sum was due from the defendants but whether there was any relationship of landlord and tenant, and it has been found by the Court of Appeal below that there was no such relationship. As regards the contention of the appellant that he is entitled to a decree proportionately to the shares of the present respondents, my answer is that that would be making a new case altogether. It is not an ordinary case of creditor and debtor, but the case is virtually one for the special performance of a contract embodied in the *kabuliyat* by which the relationship of landlord and tenant was created. Refers to *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (4) and *Pramada Nath Roy v. Ramani Kanta Roy* (5). The suit was under the Bengal Tenancy Act to get a decree for rent. The plaintiff cannot now in second appeal convert the suit into an ordinary money suit by excluding some of the tenants.

A suit on a contract cannot be maintained in the absence of some of the contracting parties. *Vide Pillay v. Robinson* (6).

JUDGMENT.—This appeal arises out of a suit for arrears of rent upon a *kabuliyat* said to have been executed by defendants

Nos. 1, 2, 3, 4 and the predecessor-in-title of defendant No. 5. The suit was dismissed by both the first and second Courts. The said Courts held that the *kabuliyat* which was the basis of the suit was a fictitious one.

Pending the appeal to this Court, one of the defendants, namely, defendant No. 3 died and her heirs were not substituted in proper time. The appellant has subsequently given up the heirs of defendant No. 3. The appeal now is one against defendants Nos. 1, 2, 4 and 5.

The decision of the Courts below in favour of defendant No. 3 having become final by reason of the appeal failing against her, a preliminary objection is taken by the respondent that this appeal cannot be maintained.

It is contended by the learned Vakil for the appellant on the basis of section 44 of the Contract Act that he is entitled to give a release to one of the joint contractors and to proceed against the others for the entire claim; and *secondly*, that if he is not entitled to do so, he can proceed against the defendants on the record for their shares only.

Taking it for granted that so far as defendant No. 3 is concerned there is a final decree between the parties, we think that neither of these contentions can be maintained.

Section 44 of the Act speaks of a release of one of the joint promisors. In this case, we cannot speak of a release, because so far as defendant No. 3 is concerned, the contract was found to have been illusory and of no effect. Therefore, there is a determination by a competent Court that the defendant No. 3 is not liable. This is not a case of a release. That being so, the plaintiff is not entitled to rely upon section 44.

It is further contended that as joint tenants or joint contractors, he is entitled on the principle of section 43 to sue for the entire rent against any of the joint contractors. That might be so, but in this case the plaintiff did choose to bring a suit against all the joint contractors and the contest proceeded on the basis of a joint contract. The result of what has taken place is that defendant No. 3, one of the joint contractors, is out of

(4) 27 C. 417; 4 C. W. N. 107.

(5) 35 C. 331; 12 C. W. N. 249; (P. C.), 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43; 35 I. A. 73.

(6) 20 Q. B. D. 155; 57 L. J. Q. B. 54; 58 L. T. 110; 36 W. R. 269.

ABDULLABHAI LALJI & EXECUTIVE COMMITTEE, ADEN.

the action: and if we were to give a decree against the other defendants, it would work injustice upon them, in that supposing they were jointly liable, they would not be entitled to have a decree for contribution against defendant No. 3 who has, by the decision of a competent Court, been declared to be not liable.

Then, as regards the alternative contention that the plaintiff is entitled to a share for the shares of the defendants on the record, that also is not practicable; for, then the shares of the defendants among themselves will have to be determined, and in this case, in the absence of defendant No. 3 who is out of the record, that cannot be done.

The appeal, therefore, cannot be maintained and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 9 OF 1915.

February 23, 1916.

Præsent:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

ABDULLABHAI LALJI AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

THE EXECUTIVE COMMITTEE, ADEN—
DEFENDANTS—RESPONDENTS.

*Aden Settlement Regulation (VII of 1900)—
Rules for assessment and collection of taxes—Provision
regarding finality of rateable value—Rule—Ultra
vires.*

It is doubtful if rule 12 of the rules for assessment and collection of taxes made under the Aden Settlement Regulation (VII of 1900) makes the decision of the Judge of the Resident's Court in a rating appeal final, and assuming that it does make the decision final it would amount to the creation of a jurisdiction which the Legislature withheld, and thus would be *ultra vires*. [p. 143, cols. 1 & 2.]

Reference made by the Political Resident at Aden.

Messrs. Inverarity, Setalvad and Mulla, with them Mr. Ratanlal Ranchhodas, for the Appellants.

Mr. Jardine (Advocate-General) and Mr. Strangman, for the Respondents.

JUDGMENT.

SCOTT, C. J.—This is a reference under section 8 of the Aden Act II of 1864 for the decision by this Court of the following questions:—

1. Whether the lower Court (*i.e.*, of the Assistant Resident) did not act irregularly and illegally in declining to hear the plaintiffs' case as a whole and raising a certain preliminary issue and deciding the same without taking any evidence as to the merits of the case.

2. Whether the decision of the lower Court on the said issue was not erroneous. And

3. Whether the lower Court was not wrong in dismissing the plaintiffs' suit.

The nature of the plaintiffs' suit and the circumstances under which the preliminary issue, the subject of the reference, was raised are stated in the judgment of the Assistant Resident as follows:—

"The plaintiffs, in 1909, obtained a lease from Government of certain lands in the Sheikh Othman District of Aden for the purpose of constructing salt works thereon and the manufacture of salt therein. The plaintiffs pay a rent of Rs. 7,000 per annum for this land, plus a royalty of eight annas per ton on all salt exported by them. The defendants, the Executive Committee of the Aden Settlement, constitute the Municipal authority of the Aden Settlement, within the area of which is comprised the land upon which the plaintiffs' salt works are situated.

"As stated in the plaint, the Political Resident at Aden, in exercise of powers conferred upon him by the Aden Settlement Regulation (No. VII of 1900), had published two Notifications, dated 26th March 1909, levying certain taxes and laying down rules for the assessment and collection thereof. Included among the taxes so levied were a House and Property Tax and a General Sanitary Tax, both taxes to be assessed on the *rateable value* of the property taxed.

"By these Notifications, the defendants were charged with the duty of assessing and collecting the said taxes in accordance with the rules therein embodied.

"The defendants, acting on the powers thus conferred on them, fixed the rateable

ABDULLABHAI LALJI v. EXECUTIVE COMMITTEE, ADEN.

value of the aforesaid leasehold lands of the plaintiffs at Rs. 7,000, that being the amount payable by the plaintiffs as annual rent for the lands. This was done in the year 1909, when the salt works had only just begun to be constructed and no salt had as yet been produced. In the year 1911, when production had commenced, the defendants adopted a new mode of assessment, and fixed the rateable value of the property at one-half the value of the salt exported by plaintiffs during the year, less ten per cent.

"The plaintiffs state that they protested against this new mode of assessment, but their protest was overruled by defendants, who continued in the following years to assess the taxes on the new basis in spite of protests from plaintiffs on each occasion. The plaintiffs urge that this new method of assessment is wrong in principle and oppressive, as well as being illegal and unauthorised, and they ask for a declaration of the Court to that effect. They ask further for a declaration that the correct method of assessing the taxes is to make the fixed rental Rs. 7,000 or at most such sum plus the royalty payable by plaintiffs on salt exported as the rateable value of the lands and to assess the taxes on such rateable value. They ask finally for a decree for the refund of the excess sums over the amount legally payable recovered by defendants during the three years 1911-1914.

"Now the first point to be noted is that in their plaint the plaintiffs make no mention whatever of the fact that in three successive years they made three appeals to the Court of the Resident, in the manner provided in the rules, against the defendants' decisions of which they complain, and that all these appeals were rejected by the Court. This is a fact to which great importance is, not unnaturally, attached by the defendants, who maintain that these decisions in appeal are final and that this Court cannot interfere. In the circumstances it has been necessary to frame a preliminary issue:—Whether this Court has jurisdiction to interfere with the assessment fixed by the defendants, and confirmed by the Appellate Authority? If the decision on this issue be found in the negative, this Court can have no option but to dismiss the suit".

The plaintiffs *inter alia* contended that the rules providing for appeals against over-assessment were not passed by the Legislative Council and, therefore, have not for the purposes of the present case the force of law.

The Aden Settlement Regulation, 1900, made under the Government of India Act, 1870 (33 Vic., C. 3), provides for the establishment of an Executive Committee for the Municipal Government of Aden to be appointed and controlled by the Resident which shall have such authority, discharge such functions and exercise such powers within the area to which the Regulation extends as the Resident may by any rules under the Regulation direct. By clause 13 the Resident is authorised, subject to the previous sanction of the Local Government, to make rules to provide for certain specified matters which include "the assessment and collection of any toll, cess, tax or other impost imposed under the Regulation."

By clause 11 the power to impose such tolls, cesses, taxes and other imposts as are necessary for the purposes of the Regulation is vested in the Resident, who may fix the taxes and modes of levying or recovering the same.

On the 26th March 1909, the Resident imposed *inter alia* a House and Property Tax and General Sanitary Tax, and on the same day issued rules purporting to be for the assessment and collection of the House and Property Tax or General Sanitary Tax.

They provided *inter alia* for the preparation of an assessment list containing "the annual letting value or other valuation on which the property is assessed", for complaints to the Executive Committee where any property was for the first time being entered in the list or in which the entered rateable value has been increased, and for appeals against any rateable value to the Judge of the Resident's Court.

Rule 12 provides that after appeals, if any, are decided and the results noted in the assessment list, all rateable values so entered in the list shall be final subject to such action as may be necessary under rules 17 and 18 to amend the list from time to time.

ABDULLABHAI LALJI v. EXECUTIVE COMMITTEE, ADEN.

It may be observed that the rules contain no rules for assessment but only directions for the entries to be made in the assessment book after the property has been assessed.

This point can be made clear by reference to the City of Bombay Municipal Act (Bombay Act III of 1868), which is expressly referred to in the Notification of Taxes of the 29th March 1909.

Sections 146 to 153 of the Bombay Act provide for the persons to be made liable. These sections are adopted by reference in the Notification of Taxes but sections 154 and 155, which provide for the mode of assessment, have no counterpart in either the rules or the Notification of the Resident.

The provision of rule 12 regarding the finality of the rateable value is apparently taken from the first and the last lines of section 219 (1) of the Bombay Act, but there is no counterpart to the Bombay provision that the decision of the Judge in an appeal against such value shall be final.

It is, however, assumed by the Assistant Resident's judgment that the provision that the rateable value shall be final, is equivalent to a provision that the decision of the Judge in the rating appeal shall be final.

If this was the intention it is curious that the Bombay Government, whose previous sanction to the rules was necessary, should have sanctioned the omission of the provision that the decision of the Judge in a rating appeal shall be final. It is curious for the reason that the corresponding provision in section 219 of the Bombay Municipal Act was found to require validation by an Act of the Governor-General, viz., Act XII of 1888.

It is just as probable that the provision that the decision should be final was omitted in order not to prevent suits for refund of disputed rates in the Court of the Resident, in which suits a case might be stated under the Aden Act for the decision of the High Court as they can be stated by the rating appeal Court in Bombay under the Act XII of 1888, or because there was a doubt as to the legality of limiting by rules the ordinary jurisdiction of the Resident's Court.

We will, however, dispose of the reference now before us on the assumption that the rule 12 is intended to make the decision of the Judge of the Resident's Court in a rating appeal final. On this assumption we think the rule is *ultra vires*.

It is well established that a distinct unequivocal enactment is required for the purpose of either adding to or taking away the jurisdiction of a Court. The Resident's Court had already jurisdiction under the Aden Act of 1864 to hear and determine all cases of whatever value. The rule 12 read as it has been by the Assistant Resident amounts, to use the words of Lord Watson in *King v. Henderson* (1), to "the creation of a jurisdiction which the Legislature withheld." It would, if valid, force the aggrieved rate-payer to accept a final decision by a procedure in which appeal by way of case stated to this Court would not be open. No one disputes that such a result may be obtained by legislative enactment by a competent authority, but authority to achieve such a result by the subordinate legislation of rules cannot be implied, for the presumption is the other way.

We are, therefore, of opinion that there is no valid objection to the trial on its merits of the suit instituted by the plaintiffs.

We answer the questions put as follows:—

- (1) In the affirmative.
- (2) The decision of the lower Court was erroneous.
- (3) The lower Court was wrong in dismissing the plaintiffs' suit.

Costs consequent on the reference to be costs in the suit.

Reference answered accordingly.

(1) (1898) A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 14 T. L. R. 490; 47 W. R. 157 (P. C.).

RATAN LAL v. BIBA KUNRIA.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 698
OF 1915.

April 17, 1916.

Present:—Justice Sir P. C. Banerji, Kt.

RATAN LAL—DECREE-HOLDER—
APPELLANT

versus

Musammatt BIBA KUNRIA AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 22—Execution—Interest claimed in previous application for execution—Objection, no opportunity of—Subsequent application—Objection, if barred.

Where in a previous application for execution of a decree by the transferee of the decree interest was claimed but there was no occasion to issue a notice to the judgment-debtor to show cause as required by Order XXI, rule 22 of the Civil Procedure Code, 1908, and the judgment-debtor had no opportunity of raising any objection as to the interest claimed:

Held, that the judgment-debtor was not debarred from contending in a subsequent application for execution of the decree that he was not liable for the amount claimed. [p. 145, col. 1.]

Ghulam Muhammad Khan v. Narain Das, A. W. N. (1901) 32; *Kalyan Singh v. Jagan Prasad*, 30 Ind. Cas. 523; 13 A. L. J. 828; 37 A. 589, referred to.

Execution second appeal from the decision of the District Judge of Aligarh, dated the 30th January 1915.

Mr. Mohan Lal Sandal, for the Appellant.

Mr. Agha Haidar, for the Respondents.

JUDGMENT.—The appeal arises out of execution proceedings and the question, is whether the decree-holder-appellant was entitled to charge interest on the amount alleged by him to be due. The decree in this case was passed on the 5th of April 1906 under section 88 of the Transfer of Property Act in favour of one Sita Ram. It was for a sum of Rs. 1,481 and provided that future interest would be payable at the rate of 6 per cent. per annum. An order absolute under section 89 of the Transfer of Property Act was passed on the 14th of September 1907, but this order contained no provision as to payment of future interest.

On the 2nd of October 1907 the decree-holder and the judgment-debtor entered into a compromise and under this compromise it was agreed between the parties that the decree-holder would be entitled to a sum of Rs. 1,200 and no more. There was no provision in the compromise that interest would be payable upon the aforesaid sum of Rs. 1,200.

This compromise took the place of the decree and from the terms of the compromise it is clear that there was no agreement between the parties that beyond the sum of Rs. 1,200 any further sum would be payable in the shape of interest. The decree was assigned to the present applicant for execution on the 20th of July 1908. He took no steps until the 14th of March 1910, when he applied to have his name substituted for that of the original decree-holder. In that application in calculating the amount of the decree he included interest. This application was dismissed for default on the 11th of June 1910. He made a further application on the 16th of that month for the same purpose. A notice was issued to the original decree-holder and the judgment-debtor and on the 17th of September 1910, the name of the transferee was ordered to be substituted for that of the original decree-holder. On the 14th of February 1911, the transferee of the decree applied for execution. As more than one year had not elapsed from the date on which the last application was disposed of, no notice, such as is required by Order XXI, rule 22, was issued. The decree was transferred to the Collector for execution. The judgment-debtor made some payment and took time and the record was returned to the Court by which it had been transmitted to the Collector. On the 25th of September 1913, the present application for execution was presented and in it the applicant included interest on the amount which he sought to recover. The judgment-debtor raised an objection to the effect that interest was not payable under the terms of the compromise. The Court of first instance overruled the objection, but the lower Appellate Court allowed it. In this appeal it is contended that interest ought to have been allowed. The learned Vakil for the appellant has put forward two reasons for his contention. He urges that if the terms of the decree and the compromise be properly construed, it must be held that it provided for the payment of interest. It is next urged that as upon the application for execution dated the 14th of February 1911 no objection was raised by the judgment-debtor as to the claim for interest, the matter has become *res judicata*. In my opinion both con-

SATIS RANJAN DAS v. NASARADDI PATWARI.

tentions must fail. I have already said that the compromise has taken the place of the decree. If the order absolute had stood alone it might, with some force, have been urged that as that order only made the original decree absolute and as the original decree provided for future interest, the decree-holder was entitled to interest in spite of the omission to provide for interest in the order absolute subsequently passed; but in the present case the parties entered into a compromise, and the only amount which under that compromise the decree-holder was entitled to recover was, according to the agreement of the parties, Rs. 1,200. There was no mention of interest. On the contrary the terms of the compromise show that the decree-holder gave up everything except Rs. 1,200. Therefore, under the compromise the judgment-debtor is not liable to pay interest.

As regards the *second* point it is admitted that there was no adjudication between the parties when the application for execution, dated the 14th of February 1911, was made. There was no occasion to issue a notice to show cause as required by Order XXI, rule 22, and, therefore, the judgment-debtor had no opportunity of raising any objection as to the interest claimed by the transferee of the decree. The learned Vakil for the appellant has referred to the decision of a Bench of this Court in *Ghulam Muhammad Khan v. Narain Das* (1). In that case it was held that as the decree-holder had made several applications for execution in which he had included interest and the judgment-debtor raised no objection and the Court ordered execution to issue, it must be held that there was an adjudication by the Court adverse to the judgment-debtor and the same question could not be raised in subsequent proceedings. In the present case the only application for execution in which interest was included was the application of the 14th of February 1911. As regards that application no notice was issued to the judgment-debtor to show cause why execution should not issue and no such notice was necessary. The judgment-debtor, therefore, had no opportunity of raising an objection as to the amount claimed be-

fore execution was granted. It is true that a notice was issued for settling the matters referred to in Order XXI, rule 66, but that was not a notice relating to execution of the decree. In a recent case, namely, *Kalyan Singh v. Jagan Prasad* (2), it was held by a Bench affirming the decision of a learned Judge of this Court that the fact that a judgment-debtor did not on a previous application for execution take exception to the amount set forth in it as being due, did not preclude him from afterwards raising the question of his liability. In the present case there was, as I have said above, no order which might be deemed to be equivalent to an adjudication as between the parties in regard to the amount payable under the decree. Therefore, the omission of the judgment-debtor to contest the amount claimed upon the previous application of 1911 did not debar her from contending in the present case that she was not liable for the amount now claimed. In this view the decision of the Court below is right and this appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

(2) 30 Ind. Cas. 523; 13 A. L. J. 828; 37 A. 589.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 166 OF 1914

March 27, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.SATIS RANJAN DAS AND OTHERS—
DECREE-HOLDERS—APPELLANTS*versus*NASARADDI PATWARI AND OTHERS—
RESPONDENTS.*Bengal Tenancy Act (VIII of 1885), Sch. III,
Art. 6—Decree for arrears of rent after cessation of
landlord's interest, execution of—Limitation.*

The special law of limitation prescribed by the Bengal Tenancy Act for the execution of rent-decrees does not apply to a decree in a suit for arrears of rent brought by a landlord after he has parted with his interest as landlord. The decree-holder in such a case is entitled to execute his decree under the general law of limitation. [p. 146, col. 2.]

Arthur Henry Forbes v. Maharaj Bahadur Singh, 23 Ind. Cas. 632; 41 C. 926; 18 C. W. N. 747; 15 M. L. T. 380; (1914) M. W. N. 397; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1959, followed.

Appeal against the order of the Additional District Judge of Bakargunge, dated the 17th of January 1914, affirming that of the

(1) A. W. N. (1901) 32.

SATIS RANJAN DAS v. NASARADDI PATWARI.

Munsif, 2nd Court at Bhola, dated the 23rd of September 1913.

FACTS.—The material facts will appear from the following judgment of the Additional District Judge, Bakargunge:

"This is an appeal against the dismissal of a rent execution case on the ground of limitation under Article 6, Schedule III, of the Bengal Tenancy Act. The decree-holder appeals and the learned Pleader on his behalf contended (1) that as the decree-holder before obtaining the decree had ceased to be the landlord of the tenant, this decree cannot be regarded as one under the Bengal Tenancy Act, and (2) that the execution petition was not barred as it was brought within three years from the last execution case.

I think that these contentions must fail. The suit was certainly a suit between landlord and tenant under the Bengal Tenancy Act, as it was by a sole landlord.

The relationship subsisted during the period for which rent was claimed.

As regards limitation I think the view taken by the Court below is perfectly correct. This application was more than three years after the decree and the main fact that two previous execution petitions, although time-barred, had not been objected to, cannot save limitation in the case of this application. The principle laid down in *Mungul Pershad Dicht v. Grija Kant Lahiri* (1) has no application here and I think the view taken in this connection by the Court below is right.

The result is that the appeal is dismissed with costs, Pleaders fee Rs. 5."

Babu Brojo Lal Chakravarti (with him Babu Bimal Chandr. Das Gupta), for the Appellants.—*Firstly*, I submit that the decree in this suit is not a decree under the provisions of the Bengal Tenancy Act, for the provisions of section 65, Bengal Tenancy Act, do not apply in this case. The suit for rent was brought after the plaintiff had transferred the land by sale and his interest in the property thereby ceased.

Secondly, the suit was not between landlord and tenant to whom only the provisions of the Tenancy Act apply. At the time of the suit the plaintiff had ceased to be the landlord as he had no longer any interest in the

property. Refers to *Arthur Henry Forbes v. Maharaj Bahadur Singh* (2).

Hence the special limitation of three years does not apply and the case is governed by the general law.

JUDGMENT.—Two points have been argued in this case. The *first* is that the decree-holder, having parted with his interest as landlord in the property in respect of which arrears were claimed by him, was not a landlord of defendant at the time when he brought his suit and that, therefore, the suit was not one between a landlord and tenant within the meaning of Article 6, Schedule III, of the Bengal Tenancy Act; and, *secondly*, that even if the Article applied, the judgment-debtor, not having objected to previous executions after the expiry of three years under the special law of limitation, was precluded from taking that objection again.

Upon the *first* point, we think that the learned Vakil is right in his contention and he is supported by the decision of the Privy Council in the case of *Arthur Henry Forbes v. Maharaj Bahadur Singh* (2). The decree-holder, having parted with his interest as landlord before he brought his suit for arrears, cannot be held to have been suing as a landlord in respect of arrears of rent from his tenant. The special law of limitation, therefore, does not apply and the decree-holder was entitled to execute his decree under the general law of limitation, according to which his application is not barred.

This being our view on the *first* question, it is not necessary to investigate the *second* point taken by the learned Vakil.

This appeal is decreed with costs, two gold mohurs.

Let the record be sent down.

Appeal allowed; Case remanded.

(2) 23 Ind. Cas. 632; 41 C. 926 (P. C.); 18 C. W. N. 747; 15 M. L. T. 380; (1914) M. W. N. 397; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059.

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249.

JISHVANATH GANESH JOSHI v. BALA KAKU KAPADI.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1914.

December 1, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Beaman.VISHVANATH GANESH JOSHI AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

BALA KAKU KAPADI AND OTHERS —

PLAINTIFFS—RESPONDENTS.

Transfer of Property Act IV of 1882), s. 55 (2) — Vendor and purchaser—Vendor professing to sell particular quantity or quality of property, whether bound to pay damages for errors of quality or quantity.

Where a seller professed to transfer by a sale-deed to the buyer particular plots of land burdened only by a yearly tenancy, and the buyer subsequently found that they were burdened by a permanent tenancy:

Held, that there was a clear case of a broken contract or warranty for which the purchaser was entitled to claim damages without rescinding the purchase. [p. 148, col. 1.]

After the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. [p. 148, col. 1.]

Second appeal from the decision of the Acting District Judge of Ratnagiri, in Appeal No. 218 of 1913, amending the decree passed by the Subordinate Judge at Deorukh, in Civil Suit No. 132 of 1912.

Mr. V. B. Virkar, for the Appellants.

Mr. K. N. Koyajee, for Respondent No. 1.

Mr. B. V. Desai, for Respondent No. 2.

JUDGMENT.

SCOTT, C. J.—The plaintiff, by a sale-deed of the 9th of November 1908, took a transfer of certain immoveable property from the 1st and 2nd defendants in which it was stated by the transferors that plots bearing serial numbers 2 to 4 are given for cultivation to Sayyad Ali Bavasaheb under an oral agreement for one year on a *makta* (rent) of Rs. 5-12-0, and having paid the consideration money he was obstructed in his attempt to obtain possession of these plots by the alleged yearly tenants who claimed to be permanent tenants. He, therefore, has brought this suit against his vendors and the tenants to recover possession of the land from the tenants or, in the alternative, to recover Rs. 600 as damages from the vendors on account of the misrepresentation in the

sale-deed ■ to the nature of the tenancy. It has been held that the tenants are permanent tenants, and with that question of fact we cannot interfere in second appeal.

The more difficult question is whether the defendants are liable to pay damages to the plaintiff in consequence of their statement contained in the sale-deed with reference to the tenancy of the occupants of the plots above mentioned. Both Courts have held that the plaintiff is entitled to damages and the lower Appellate Court has differed from the Trial Court only in granting the plaintiff substantial, instead of unsubstantial, damages. The defendants 1 and 2, who are the vendors, expressed their willingness to refund the price and cancel the sale. This, however, the plaintiff is not prepared to consent to. He only wishes for damages in respect of that portion of that land which is held on permanent tenancy. There is no doubt that there has been a serious misdescription of the plots with which we are now concerned, and that the purchaser has got something of less value than what he had reason to believe he was buying from the statement contained in the conveyance.

Most of the English authorities referred to do not afford much assistance in the case, because there was in them generally a stipulation in the contract made before conveyance entitling the purchaser to compensation for misdescription, and the question has arisen in England whether such compensation can be claimed after the purchaser has proceeded to completion by taking a conveyance. In such cases the question appears to have been now settled in favour of the purchaser by the decision of the Court of Appeal in *Palmer v. Johnson* (1).

Here, however, we have not got any preliminary written contract, and no express stipulation prior to conveyance. On the other hand we have in the Transfer of Property Act a provision in section 55 (2) that "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same." Now here the seller has professed to transfer to the buyer these particular plots of land burdened only by an yearly tenancy, and the

(1) (1883) 13 Q. B. D. 351; 53 L. J. Q. B. 548; 51 L. T. 211; 33 W. R. 36.

HARDEO v. SHER SINGH.

buyer now finds that they are burdened by permanent tenancy. The profession is as to the extent of the reversionary interest of the vendor. The purchaser, therefore, would be entitled to sue upon the implied contract expressed in the sub-section which we have just referred to, and to recover damages for the breach of it. It would seem from the dictum of the Court in *Jolliffe v. Baker* (2) that "after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser." The contract, which would by the terms of the Conveyancing Act, 1881, section 7 [which came into force after the conveyance in *Jolliffe v. Baker* (2)], be implied, is more limited than the implied contract under section 55 (2) of the Transfer of Property Act. Such implied contract would be in the nature of the warranty referred to in *Jolliffe v. Baker* (2). There can be no doubt as to the quality of the subject-matter represented in the present case. It is found by the lower Court that the insertion as to the particular nature of the lessees' holding in the transfer-deed was made at the desire of the purchaser. We think, therefore, that there is a clear case of a broken contract or warranty for which the purchaser is entitled to claim damages without rescinding the purchase. The damages have been fixed by the lower Appellate Court, and the decision upon that point has not been attacked on any ground of law, and is, therefore, binding upon us. We affirm the decree and dismiss the appeal with costs. Separate sets of costs. Defendants 1 and 2 must pay half the costs of the plaintiff throughout. In other respects the decree is affirmed. Respondent No. 1's cross-objections 3 and 4 are allowed to be withdrawn as they do not exist for want of notice.

Decree affirmed.

(2) (1883) 11 Q. B. D. 255 at p. 269; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 136 of 1914-15 of
BIJNORE DISTRICT.

January 13, 1916.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

HARDEO—DEFENDANT—APPLICANT

versus

Chaudhri SHER SINGH—PLAINTIFF

—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 3, 12—*Restriction on leases, applicability of—Stipulation contrary to Proviso to s. 12, how far valid—Contract Act* (IX of 1872), s. 23.

The restrictions on leases and agreements relating to tenancy, contained in section 3 of the *Agra Tenancy Act*, apply only to tenants and do not take away or limit any right of a landholder. [p. 149, col. 1.]

Where, therefore, a lease contained a definite stipulation that it was not to interfere with the accrual of occupancy rights either in the past or in the future, i. e., the zamindar practically agreed that the proviso to section 12 should not apply:

Held, (1) that the stipulation was valid and could have effect as making the proviso inapplicable in the case; [p. 149, col. 1.]

(2) that the stipulation could not be said to defeat the provisions of the *Agra Tenancy Act* and as such unlawful under section 23 of the *Contract Act*. [p. 149, col. 1.]

Sanwal Kunwar v. Murli, 16 Ind. Cas. 339; 10 A. L. J. 52, distinguished.

Application for revision of the order of the Commissioner of Rohilkhand Division, dated the 30th July 1915, confirming that of the Assistant Collector, Bijnore, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(January 5th, 1916.)—As regards ground (3) of the application, the applicant is unable to point to any proof whatever that the rent was enhanced. There is, therefore, no question of estoppel. In the lease there is a definite stipulation that the lease which was being executed was not to interfere with the accrual of occupancy rights either in the past or in the future, that is to say, the zamindar practically agreed that the proviso to section 12 should not apply. The question for decision is—is such a stipulation valid, and whether it can have effect as making the proviso inapplicable in this particular case? In section 3 of the *Tenancy Act* there are definite restrictions on leases and agreements relating to tenancy made on or after the 1st of April 1900, but the

NAIK PANDEY v. BIDYA PANDEY.

restriction is merely this that nothing in any such document shall take away or limit any right of the tenant ■ conferred or recognised by this Act. There is no similar restriction to the effect that nothing in any such document shall take away or limit any right of the landholder under the Act. The respondent relies on *Nain Singh v. Mahmood Ali* (1), but it does not affect the present question at all. He also refers me to *Sanwai Kunwar v. Murli* (2), decided by the High Court, in which ■ somewhat similar question ■ arose. The learned Judge in that case based his decision on other points and did not discuss the main question. He, however, expressed ■ tentative view that a particular stipulation by ■ tenant was unlawful under section 23 of the Indian Contract Act as being of such a nature that, if permitted, it would defeat the provisions of the Agra Tenancy Act.

The attention of the learned Judge apparently was not directed to section 3 of the Tenancy Act, which applied directly to the case under his consideration. The respondent lays stress on section 23 of the Contract Act, because, he says, the object of this agreement is unlawful, as it is of such a nature that, if permitted, it would defeat the provisions of section 12 of the Tenancy Act. This, I think, is stretching language rather too far. Such an agreement would only be entered into on rare occasions, and can hardly be said to defeat the provisions of this section. Moreover, as I have said before, had it been intended that ■ landholder was restricted from making an agreement which should limit his right under the Act, section 3 would have been drafted otherwise.

The only question that remains for consideration is whether the error of law is so gross and palpable as to necessitate interference on revision, for there is no question that substantial injustice has been caused.

I think it is. I would, therefore, set aside the orders of the lower Courts, and dismiss the suit for ejectment, respondent paying costs throughout:

CAMPBELL, J. M.—I agree.

Application allowed; Suit dismissed.

(1) Selected Decision No. 14 of 1910.

(2) 16 Ind. Cas. 339; 10 A. L. J. 52.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1277 of 1914.

April 11, 1916.

Present:—Mr. Justice Mullick.

NAIK PANDEY—PLAINTIFF—

APPELLANT

versus

BIDYA PANDEY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 56, 58 (3), (5)—Landlord's refusal to grant rent receipts—Summary enquiry by Collector on tenant's application, whether prosecution of landlord—Discharge without award of compensation—Claim for compensation in Civil Court—Malice, reasonable and probable cause, whether questions of law—Decree for rent—Bar of proceedings under s. 58—Res judicata—Civil Procedure Code (Act V of 1908), s. 11.

A summary inquiry by a Collector under section 58 (3) of the Bengal Tenancy Act on the application of a tenant is in the nature of a prosecution of the landlord for an offence within the meaning of that term in the Indian Penal Code. [p. 151, col. 1.]

Emperor v. Mohunt Ramdas, 9 C. W. N. 816; 2 Cr. L. J. 532, followed.

The discharge of a landlord under section 58 (5) without an award of compensation does not bar the landlord's right to recover the same by proceedings in a Civil Court, the cause of action being referable to tort. [p. 151, col. 2.]

Malice and absence of reasonable and probable cause follow as an inference of law from the finding that a complaint under section 58 (3) of the Bengal Tenancy Act is false. These are questions not for the Jury, but for decision by the Judge as questions of law. [p. 150, col. 2; p. 151, col. 1.]

Pestonji Muncherji M. Mody v. Queen Insurance Company, 25 B. 332; 2 Bom. L. R. 939; 4 C. W. N. 781, explained.

Harish Chunder Neogy v. Nishi Kanta Banerjee, 28 C. 59; *Shama Bibi v. Chairman of Baranagore Municipality*, 6 Ind. Cas. 675; 12 C. L. J. 410; *Lister v. Perryman*, (1870) 39 L. J. Ex. 177; 4 H. L. 521; 23 L. T. 269; 19 W. R. 9 and *Brown v. Hawkes*, (1891) ■ Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 109; 55 J. P. 823, referred to.

The existence of a decree against a tenant for rent, in respect of which receipts are claimed under section 56, operates as *res judicata* of the fact of its payment in subsequent proceedings held under section 58 (3) of the Act. [p. 150, col. 1.]

Mr. Rajendra Prasad, for the Appellant.

Mr. Baidyanath N. Sinha, for the Respondents.

JUDGMENT.—The plaintiff is the landlord and the defendants are the tenants. On the 19th of April 1912, the defendants made a complaint to the Collector against the plaintiff, stating that they had paid Rs. 24 to the plaintiff on account of rent for 1319 *Fasli* but that the plaintiff in

NAIK PANDEY v. BIDYA PANDEY.

spite of demand had refused to give them a printed rent-receipt. The plaintiff was summoned by the Collector in accordance with the provisions of section 58 of the Bengal Tenancy Act, but on the 7th of July 1912 the case was dismissed for want of prosecution. The present suit was instituted on the 21st of September 1912 for damages for malicious prosecution in respect of the above complaint. The Munsif found for the plaintiff and decreed a sum of Rs. 100 as damages. Against that decree both sides appealed. The Subordinate Judge who heard the appeals found that the allegation of the tenants to the effect that they had paid the rent for 1319 *Fasli* was true and that the landlord had contravened the provisions of the Bengal Tenancy Act in refusing to give them a printed rent-receipt. The Subordinate Judge accordingly dismissed the suit. Against this decree the plaintiff prefers the present second appeal.

A very material fact in the case is that on the 30th of June 1913 the landlord obtained a decree against the defendants for the rents of the years 1316 to 1319 *Faslis* inclusive; that decree was not appealed against and is final, and on behalf of the plaintiff it is urged that it operates as *res judicata* of the fact of payment of Rs. 24 alleged by the defendants. In my opinion this contention must prevail.

It is argued by the learned Vakil for the respondents that no issue in the present suit was directly and substantially in issue in the rent-suit and that, therefore, section 11 of the Civil Procedure Code cannot apply. Now what is the material issue in the present suit. It is issue No. 3 which runs as follows:—

“Whether the proceedings under section 58 of Act VIII of 1885 were initiated falsely, maliciously and without reasonable and probable cause.”

It is true that this issue was not in issue in the rent-suit, but the decision of this issue depends on the question whether the defendants' allegation as to payment of rent for 1319 *Fasli* is true or false and that matter was certainly directly and substantially in issue in the rent-suit. The vital matter in the present

suit is the fact of payment, and it is admitted that that was certainly the matter directly and substantially in issue in the former suit. I cannot see that the matter of the payment is collateral or incidental in the present suit. So it being admitted that the Munsif who tried the rent-suit had jurisdiction to try the present suit also, the defendants cannot escape the operation of section 11 of the Civil Procedure Code. I hold that it was not open to the learned Subordinate Judge of the Court below to find that the tenants had paid the Rs. 24 alleged to have been paid on account of rent for 1319 *Fasli*. If that finding goes, then it follows that the plaintiff in the present suit must get a decree. There could not have been any reasonable or probable cause for laying the complaint under section 58 of the Bengal Tenancy Act and I agree with the reasonings of the learned Munsif as to the absence of such reasonable and probable cause. I also agree with the learned Munsif's reasons for inferring that there was malice on the part of the defendants.

It has been contended by the learned Vakil for the respondents before me that the questions of reasonable and probable cause and of malice are questions of fact, which the learned Subordinate Judge was competent to determine and in respect of which his findings cannot be interfered with.

Now as I have already observed, the learned Subordinate Judge's judgment is vitiated by an error of law and cannot be supported. But I do not think it necessary that I should remand the appeal again for re-hearing because the question of reasonable and probable cause as well as that of malice is a question of law to be determined upon certain facts found. Here I have found that the complaint of the defendants of the 19th of April 1912 was false. In my opinion it follows from this as an inference of law that there was no reasonable or probable cause for making the complaint. In my opinion it also follows that there was malice on the part of the defendants in the circumstances in making the complaint. Although there are certain expressions used in *Pestonji Muncherji*

NAIK PANDEY v. BIDYA PANDEY.

Moody v. Queen Insurance Company (1) to the effect that in India in trials without a Jury the question of reasonable and probable cause and malice becomes a question of fact, it is clear that those expressions were used only in reference to the propriety of a certificate for appeal to the Privy Council. The ruling in fact expressly accepts the general doctrine that the question of reasonable and probable cause and of malice is one for the Judge, a question of law. That has been also held in the case of *Harish Chunder Neogy v. Nishi Kanta Banerjee* (2), where the High Court in second appeal proceeded to consider whether the Court of first appeal was right upon the facts in deciding whether there had been reasonable and probable cause and malice. The case of *Shama Bibi v. Chairman of Baranagore Municipality* (3) is also to the same effect. And the English cases of *Brown v. Hawkes* (4) and *Lister v. Perryman* (5) lay down what are the functions of the Judge and Jury in England in cases of this kind. I am of opinion, therefore, that it is unnecessary for me to remand the case to the lower Appellate Court and that it is competent to me to set aside the decree of the Subordinate Judge and to restore that of the Munsif.

The next point which has been argued by the learned Vakil for the respondent is that there was no prosecution in this case for which damages could be given. That depends on a construction of section 58 of the Bengal Tenancy Act. It is clear from the terms of that section that the plaintiff has committed an offence within the meaning of the Indian Penal Code. That has been held to be so by the Calcutta High Court in *Emperor v. Mohant Ramdas* (6). Now if the omission to grant rent receipts in this case constitutes an offence within the criminal law and the defendants laid a complaint asking the

punishment of the landlord for committing that offence, can it be said that there was no prosecution upon their part?

It is argued that it would have been a prosecution if the complaint had been laid before a Magistrate but it is not a prosecution because the complaint was laid before the Collector, and that it was at best only a miscellaneous revenue proceeding and not a prosecution. I am unable to accept this argument. The designation of the officer before whom the complaint was laid cannot affect the question as to whether the proceeding can be called a prosecution in the one case and not a prosecution in the other. In my opinion there was a criminal prosecution before the Collector.

The third point which has been taken is that the defendants in the proceeding under section 58 were not given an opportunity for adducing evidence. It appears that the application was dismissed for default and even if it was not dismissed for default, I cannot see how the fact whether he did or did not call evidence affects the question whether the prosecution was malicious and without reasonable and probable cause.

The fourth point is that as the Collector is empowered under section 58, Bengal Tenancy Act, to give compensation to the landlord, the landlord cannot now in a civil suit claim compensation. In my opinion there is no substance in this argument. The suit is based on tort and the plaintiff is entitled, if he proves the necessary ingredients, to obtain the reliefs in respect of his cause of action. The omission of the Collector to give compensation in the proceeding before him does not affect the plaintiff's right in this proceeding. The result, therefore, will be that the appeal is decreed with costs and the decree of the Munsif restored.

Appeal allowed.

(1) 25 B. 332; 2 Bom. L. R. 939; 4 C. W. N. 781.

(2) 28 C. 591.

(3) 6 Ind. Cas. 675; 12 C. L. J. 410.

(4) (1891) 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108, 55 J. P. 823.

(5) (1870) 39 L. J. Ex. 177; 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.

(6) 9 C. W. N. 816; 2 Cr. L. J. 532

BBIKARIRAM BHAGAT v. MAHARAJ BAHADUR SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 572
OF 1913.

June 7, 1915.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Chapman.

BHIKARIRAM BHAGAT AND OTHERS—
DEFENDANTS—APPELLANTS

versus

MAHARAJ BAHADUR SINGH—
PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 185, provisions of, if applicable to lease of lands for building shop—Occupancy right in site of shop held by raiyat.

A raiyat who acquired lands under a lease for building a shop, in which he has resided and from where he has carried on his agricultural operations in another village and in respect of holdings under the same landlord, can claim the protection of section 182 of the Bengal Tenancy Act in respect of the lands. [p. 153, col. 1.]

Gulam Mowla v. Abdool Sowar Mondul, 9 Ind. Cas. 922; 13 C. L. J. 255; *Protap Chandra Das v. Biseswar Pramanick*, 9 C. W. N. 416; *Kripa Nath Chakrabutty v. Sheikh Ann*, 10 C. W. N. 944; 4 C. L. J. 332 and *Harihar Chattopadhyaya v. Dinu Bera*, 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536, followed.

Appeal against the decree of the District Judge, Murshidabad, dated the 25th September 1912, modifying that of the Subordinate Judge, Murshidabad, dated the 30th June 1911.

Babu Ram Chandra Majumdar (with him Pabu Nagendra Nath Sen,) for the Appellants.

Babu Dwarka Nath Chakravarti, for the Respondent.

JUDGMENT.—The defendants were *raiya*t holding certain *jamas* under the father of the plaintiff at Nalhati. When the Bokhara station on the Nalhati-Azimganj Railway (broad gauge) was opened, the father of the plaintiff wanted to establish a bazar. To do so he wanted shopkeepers to settle on his lands near the station. The defendant Bhikhari was asked to come and open a shop, and he did come and was given some lands to build his shop which would necessarily be his dwelling house also. He built a *katcha* thatched house and held his shop there for a time. Then after a short time he built a *pakka* room and subsequently other *pakka* rooms and resided with his family there and held his shop as well. He acquired several *raiya*t *jamas* in this place also under the plaintiff, so that he is a *raiya*t under the plaintiff at

Nalhati as well as this place called Sanko or Raipur Telkul. Being a *raiya*t at Nalhati he acquired the lands for building the shop where he resided, and then he became a *raiya*t at Raipur Telkul or Sanko and resided in the shopbuilding and carried on his agricultural operations from there.

The plaintiff, at first, sued to evict him as a trespasser but failed, the Court holding that the defendants were tenants and could not be ejected without a proper notice.

This suit was then brought after the service of a notice. The question whether the tenancy is governed by the Transfer of Property Act or by the Bengal Tenancy Act was raised in the previous case, but in view of the finding on the question of notice the Court did not think it necessary to go into the question. In this case the Trial Judge held that, as the land was originally taken for building a shop, it was governed by the Transfer of Property Act and made a decree for ejectment on the payment of Rs. 1,200 as compensation. On appeal by the plaintiff and cross-appeal by the defendants, the learned District Judge decreed the entire suit, allowing the defendants time to remove the materials of their *pakka* house.

In second appeal, it has been contended that both the Courts below are wrong in not applying the provisions of the Bengal Tenancy Act. We think this contention is supported by a number of decisions of this Court dating back from 1893. In the case of *Gulam Mowla v. Abdool Sowar Mondul* (1) Mr. Justice Rampini held that if a *raiya*t holding *jotes* with occupancy rights in a village holds *bastu* land in the same village, not as a *raiya*t but separately from his *raiya*t holding, he would, in the absence of a local custom to the contrary, have a right of occupancy in the homestead also. It is not clear from the report whether the homestead and the *jote* were held under the same landlord. Then in the case of *Protap Chandra Das v. Biseswar Pramanick* (2) the homestead was under one landlord and the *jote* under another in the same village. Mr. Justice Geidt held that section 182 of the Bengal Tenancy Act applied. Mr. Justice

(1) 9 Ind. Cas. 922; 13 C. L. J. 255.

(2) 9 C. W. N. 416.

MA PAIK v. MA NWAI PAUK.

Ghose did not think it necessary to go into the question. This was in 1904. Then in 1906 came the case of *Kripa Nath Chakrabutty v. Sheikh Anu* (3), in which Rampini and Mookerjee, JJ., held that the homestead and the *raiya* need not be in the same village or under the same landlord and section 182, Bengal Tenancy Act, applied when both were different. The above cases were followed by Mookerjee and Teunon, JJ., in the case of *Harihar Chattopadhyaya v. Dinu Bera* (4), and it was held that for the application of section 182 of the Bengal Tenancy Act it was not necessary that the homestead and the *raiya* should be either in the same village or under the same landlord. Under these rulings, the defendants would be holding the homestead lands at Sanko subject to the provisions of the Bengal Tenancy Act from the beginning.

But supposing that during the first two or three years during which the defendants merely held their shop and resided on the disputed land and held *jotes* at Nalhati, they could not invoke the aid of section 182 of the Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to their claiming the protection of that section after they became agriculturists at Sanko and carried on agriculture from their residence at Sanko, which was also used as a shop. The incidents of their tenure of the homestead are, therefore, governed by the Bengal Tenancy Act, as no local custom to the contrary is alleged or proved. The suit for ejectment, therefore, fails. As the parties have not been able to agree as to the rent payable for the homestead, that must form the subject of a separate suit.

The appeal is allowed and the suit of the plaintiff dismissed with costs in all Courts.

Appeal allowed.

(3) 10 C. W. N. 944; 4 C. L. J. 332.

(4) 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 40
of 1915.

January 6, 1916.

Present:—Mr. Justice Maung Kin.
MA PAIK—DEFENDANT—APPELLANT

versus

MA NWAI PAUK AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 91, 65—Deed of sale—Intention to create mortgage—Oral evidence, admissibility of—Secondary evidence—Loss of original document, sufficient proof of—Discretion of Trial Court.

Oral evidence is inadmissible under section 91 of the Evidence Act to show that a transaction effected by a registered deed, which purports to be a sale, is in reality a mortgage. [p. 154, col. 2.]

Maung Bwin v. Ma Hlaing, 3 L. B. R. 100, followed.

The question, whether sufficient proof has been given of search for and loss of an original document, to lay ground for the admission of secondary evidence, is a point proper to be decided by a Judge of first instance and his conclusion should not be overruled except in a clear case of miscarriage. [p. 154, col. 2.]

Haripria Debi v. Rukmini Debi, 19 C. 438; 19 I. A. 79, referred to.

Mr. J. R. Das, for the Appellant.

Mr. N. C. Sen, for the Respondents.

JUDGMENT.—Plaintiff Maung Shwe Lu (since deceased and now represented in the appeal by the first and 2nd respondents as his legal representatives) and his wife Ma Ngwe Paung sued the defendant-appellant in the Sub-Divisional Court of Wakema for the redemption of certain lands for the sum of Rs. 1,000.

In their plaint the plaintiffs allege that in 1260 B. E. (1898-99), Maung Shwe Lu with the consent of Ma Ngwe Paung mortgaged the lands to Kya Ngan and Ma Tha Ye (both of whom have since died) by way of usufructuary mortgage as security for a loan of Rs. 1,000 and that the defendant Ma Paik refused to allow redemption when in May 1913 they requested her to do so.

The defence is that there was at first a registered mortgage for Rs. 1,000 carrying interest at the rate of Rs. 3 per cent. per mensem and the condition of the mortgage was that if the mortgagor failed to repay the loan together with interest due thereon in Taboung 1261, B. E., the mortgagees were at liberty to take over the mortgaged property outright and that, as he could not repay the amount due at the time agreed upon for the repayment, the plaintiff made over the property to the mortgagees, Kya Ngan

MA PAIK U. MA NWAI PAUK.

and Ma Tha Ye outright by a registered deed of sale. The defendant further alleges that the mortgage-deed and the sale-deed have been lost in a fire and that she; therefore, seeks to prove the transactions by certified copies. Exhibit I is alleged to be a copy of the mortgage-deed and Exhibit II a copy of the deed of sale.

At the hearing plaintiff Shwe Lu admitted that there was at first a registered deed of mortgage of which Exhibit I is a copy, but said that two years afterwards the mortgaged property was transferred to the mortgagees by way of usufructuary mortgage and he denied that he ever executed a deed of sale of which Exhibit II is a copy.

The Sub-Divisional Court held that the plaintiffs had failed to establish that there was a usufructuary mortgage as alleged by them and that, as there was sufficient proof that the original of which Exhibit II is a copy had been destroyed by fire, the copy was admissible to prove the alleged sale. That Court further found that the execution of the original deed of sale had been satisfactorily proved. For these reasons it dismissed the suit.

The Divisional Court held on appeal that there was no evidence on the record to establish or even render probable the destruction of the original of Exhibit II and that Exhibit II was not admissible in evidence. There being no evidence to prove the sale, it held that the suit must be decreed.

The defendant has appealed to this Court.

In my opinion the Divisional Judge was in error in holding that the loss of the original had not been proved. The evidence on the point is not only clear and convincing but also sufficient to establish the loss. Kyin Sein, who was the agent of Kya Ngan and Ma Tha Ye, has sworn that all the "security bonds" which belonged to them were in his house when it was destroyed by fire. Maung Tha Zan's evidence affords general corroboration of Kyin Sein, for he says that after the fire Kyin Sein asked him to get copies of the grants and bonds lost in the fire from the registration office concerned; and that he did so. The Divisional Judge says that there is no evidence that the original of Exhibit II was among the documents which were lost in the fire. But the admission of Shwe Lu that he executed the original of Exhibit I

must not be lost sight of, for that was, or must be held to be, one of those lost. Where then was the original of Exhibit II which is a document by which the admitted original mortgage was converted into a sale? Obviously, it must have been with the original of Exhibit I. Again, why should the defendant have withheld this document? There seems to me to be no reason why she should have done so; she would not gain anything thereby. If the executant had written his name himself, then it may be urged that the object in withholding it was to prevent the plaintiffs from proving that the signature could not be that of Shwe Lu. But the document bears his cross-mark. For these reasons, I hold that Exhibit II must be admitted in evidence.

I may here point out that the question whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given is, as has been said by their Lordships of the Privy Council in *Harripria Debi v. Rukmini Debi* (1), "a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion and his conclusion should not be overruled, except in a clear case of miscarriage." Even if one disagrees with the Sub-Divisional Court, I do not think that any case has been made out for overruling the discretion exercised by it.

Upon the evidence I agree with the Sub-Divisional Court that the original of Exhibit II has been satisfactorily proved to have been executed by Shwe Lu and it must be further held that the sale evidenced by this document is binding on his wife Ma Ngwe Paung also, because the plaintiffs admit that Shwe Lu had the consent of his wife to the simple mortgage and the subsequent transaction, as to the nature of which the parties are at variance and which I have held to be a sale.

Any oral evidence to show that the transaction effected by a registered deed, though it purported to be a sale, was really a mortgage is barred by the ruling of a Full Bench of this Court in *Maung Bwin v. Ma Hlaing* (2). The plaintiffs must, therefore, fail. The appeal

(1) 19 C. 438 (P. C.); 10 L. A. 79.

(2) 3 L. B. R. 100.

MAULA BAKHSH V. KALKA SINGH.

is allowed. The judgment and decree of the Divisional Court are set aside and the suit is dismissed with costs throughout.

Appeal allowed; Suit dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1904-05 OF
JAUNPORE DISTRICT.

March 29, 1905.

Present:—Mr. Hardy, S. M.

MAULA BAKHSH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

KALKA SINGH—DEFENDANT—
RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 150, 156—Suit for assessment of rent—Grove, when liable to assessment—General custom—Burden of proof.

A 'grove', i. e., land covered with trees, does not fall within the definition of the term 'land' as used in the Agra Tenancy Act. [p. 156, col. 1.]

There is no general custom that grove land should pay rent, and unless such a custom is established no rent can be assessed upon it. [p. 155, col. 2.]

Pandit Badri Prasad v. Bhim Sen, Selected Decision No. 2 of 1892, referred to.

The burden of proving such a custom is upon the landholder alleging it. [p. 155, col. 2.]

Where, however, grove land is subsequently brought under cultivation it becomes "land" within the definition of the Tenancy Act, and is liable to assessment of rent. [p. 155, col. 2.]

Second appeal from the order of the Commissioner, Benares Division, dated the 12th September 1904, reversing that of the Assistant Collector, Jaunpore, in a case of assessment of rent.

JUDGMENT.—This is a second appeal in a suit to assess rent on land, under the provisions of sections 150 and 156, Tenancy Act.

The landlords-appellants alleged that the land is a rent-free grant consisting of grove and tank land, on which rent should be fixed.

The respondent replied that the land was not taken for agricultural purposes and is not land liable to resumption under section 156, Tenancy Act. He further claimed adverse proprietary possession. The evidence adduced showed that the

land originally consisted of grove land and a tank, but that part of the grove land has now come under cultivation.

The Record of Rights lays down that holders of grove land are entitled to cut and sell the trees, and to replant, but that when the trees are removed, the holders have the right to cultivate the land on payment of rent, and in case of their refusal, the land can be let to other tenants.

The Assistant Collector dismissed the suit: he held that groves were not rent-free grants within the definition of Chapter X, Tenancy Act, and that as the condition in the Record of Rights regarding the removal of trees had not been fulfilled, rent could not be assessed.

In appeal the Commissioner held that groves were not land within the definition contained in the Tenancy Act, and are not, therefore, liable to resumption, or assessment of rent or revenue. Where, however, grove land had come under cultivation, it became "land" and liable to assessment of rent. He accordingly returned the case for the assessment of rent on so much of the land as had come under cultivation.

The tenants have accepted this decision. But the landholder appeals against it. He contends:—

I. That by general custom, rent should be fixed on grove land.

II. That the Board of Revenue has laid down that the retention by a tenant on his grove land is contingent on his paying a share of the produce as rent.

III. That the tenant is liable to ejectment for having challenged the landholder's title.

I cannot discover any force in these pleas. There is no general custom that grove land should pay rent, though as a matter of fact a certain proportion of the produce of the trees, or a certain sum per tree, is usually paid by tenants who hold groves. No evidence of a general custom has been adduced: and the Board's decision, presumably *Pandit Badri Prasad v. Bhim Sen* (1), merely states that the custom is common. Not unfrequently, no rent and no share in the produce is paid: and it is for the landholder to prove the custom in

(1) Selected Decision No. 2 of 1892.

PANNA LAL v. DHUMI MAL.

individual cases. No attempt has been made to do this, and had such an attempt been made, it could not have succeeded in the present case, which is not a suit for fixation of rent, but for assessment of rent under Chapter X, resumption of rent-free grants. Section 156, under which the suit was brought, relates to "land" not liable to resumption. Now "land" is land let or held for agricultural purposes, and I agree with the Commissioner that land covered with trees, i. e., grove land does not fulfil the terms of the definition.

I, therefore, uphold the Commissioner's decision and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1092 OF 1914.

April 18, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Shadi Lal.

PANNA LAL AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

DHUMI MAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Insolvency—Appointment of Receiver to realise assets and distribute among creditors—Suit by Receiver for recovery of debt due to insolvent, whether maintainable.

Where the managing partner of a firm which had suspended payments entered into an agreement with the creditors, in pursuance of which both parties executed a deed appointing eight persons as Receivers to realise the assets of the firm and distribute them among the creditors *pro rata*, and the Receivers so appointed sued to recover a debt due to the firm:

Held, that the tenor of the document and the purpose for which it was executed pointed to the conclusion that the property vested in the Receivers and that the insolvent had nothing whatever to do with it thereafter; [p. 157, col. 1.]

that, therefore, the Receivers had *locus standi* to maintain the suit. [p. 156, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 8th April 1914, reversing that of the Subordinate Judge, 2nd Class, Delhi, dated the 23rd January 1914, decreeing the claim in part.

Rai Bahadur Pandit Sheo Narain and Rai Sahib Lala Moti Sagar, for the Appellants.

Messrs. Reshan Lal and Gullu Ram, for the Respondents.

JUDGMENT.—The suit, which has led to this second appeal, was brought for the recovery of a debt due to the firm of Shambhu Nath-Babu Ram, and the sole point, which requires determination, is whether the plaintiffs, the Receivers appointed by the firm and the creditors thereof, had the *locus standi* to institute the suit. It appears that in March 1912, the firm suspended payments, and that on the 30th of March Shambhu Nath, the managing partner thereof, entered into an arrangement with the creditors, in pursuance of which both the parties executed a deed appointing eight persons as Receivers to realise the assets of the firm and distribute them among the creditors *pro rata*. The present action was brought by seven of these eight persons, the eighth being dead; and it is obvious that the plaintiffs, in order to establish their right to maintain the action, must show that there was an assignment of their debts by the insolvent in their favour.

The Additional Divisional Judge, dissenting from the Subordinate Judge, has found against the plaintiffs on this point, and has consequently dismissed the suit. They have come up to this Court on second appeal, and the question before us is whether the dismissal *in limine* is warranted by the terms of the contract entered into between the insolvent and his creditors.

Whether the insolvent firm appointed the Receivers simply to receive the debts, or whether it transferred to them the *choses in action*, must depend upon the intention of the parties to the deed, to be gathered, not from isolated sentences here and there, but from all the terms of the document. We have examined the deed carefully, and find that the object in view was that the creditors should receive the assets specified therein in full satisfaction of their claims, and that the insolvent be discharged from all liability and be free to transact business in the future for his own benefit. The instrument empowers the Receivers to realise the outstandings from the debtors *bataur khud*, places upon them the duty of meeting the expenses of litigation, and expressly absolves the insolvent from

ADMINISTRATOR-GENERAL OF BENGAL v. A. D. CHRISTIANA.

all responsibility in respect of any deficiency in realizations. In short, he purchased his release from debts by handing over all the assets he was entitled to at that time. It is true that the clause entrusting the assets to the Receivers contains the word *sapurd*, but we think the ~~use~~ of that word does in no wise negative the idea of an assignment. The Receivers occupied practically the same position as trustees in bankruptcy, and held the assets, not on their own behalf, but on behalf of the general body of the creditors. In view of this aspect of their position, the word *sapurd*, when applied to the transfer of property to them, cannot be regarded as inappropriate.

Nor does the fact, that the deed provides for the execution of a power-of-attorney by Shambhu Nath in favour of the Receivers, in pursuance of which provision a power-of-attorney was actually executed on the 9th of April 1912, militate against the case for the plaintiffs. Mr. Moti Sagar, offers the explanation that the consent of all the creditors was essential to the validity of the transaction, and that, as some delay was anticipated in obtaining their signatures to the deed, the insolvent agreed to furnish the Receivers with written authority, so that they might be able to institute suits pending the completion of their title by the registration of the deed. This explanation may, or may not, be correct, but it seems to us that the language of the instrument indicates an intention of assigning the assets to the Receivers, and that that intention was duly carried into effect. The mere insertion, either through ignorance of law or *ex majori cautela*, of a provision relating to the execution of a power-of-attorney cannot have the effect of undoing what is already *a fait accompli*.

The tenor of the document, and the purpose for which it was executed, point to the conclusion that the property vested in the Receivers, and that the insolvent had nothing whatever to do with it thereafter. In fact, this is what Shambhu Nath, when examined as a witness, stated, and this is the view taken by the learned Additional Divisional Judge him-

self in a subsequent judgment, Civil Appeal No. 17 of 1915, to which our attention has been drawn by the learned Pleader for the appellants.

We accordingly hold that the plaintiffs are entitled to maintain the present suit, and setting aside the decree of the lower Appellate Court we remit the case under Order XLI, rule 23, for the decision on the remaining points. The Court-fee on the memorandum of appeal shall be refunded, and the other costs shall be costs in the cause.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 597 OF 1915.

June 9, 1915.

Present:—Mr. Justice Chaudhuri.
ADMINISTRATOR-GENERAL OF
BENGAL—PLAINTIFF

versus

A. D. CHRISTIANA—DEFENDANT.

Succession Act (X of 1865), ss. 311, 312—Will—Demonstrative legacies, payment of interest on—From what time payable—Rate of interest.

Interest is payable on demonstrative legacies, even though the Will is silent as to it. [p. 158, col. 2.]

Chinnam Rajamannar v. Tadikonda Ramachandra Rao, 29 M.L. 155, approved.

A legacy payable at a future day carries interest only from the time fixed for payment. Where, however, no time is fixed for payment, but the amount is payable out of a particular fund, which is not to be got in until after a long interval, section 311 of the Succession Act applies. [p. 158, col. 2.]

Lord v Lord, (1867) 2 Ch. App. 782 at p. 789; 36 L. J. Ch. 533 at p. 538 and *Walford, In re, Kenyon v. Walford*, (1912) 1 Ch. D. 219 at p. 225; 81 L. J. Ch. D. 828, relied on.

The rate allowed on such legacies is 4 per cent. per annum. [p. 159, col. 1.]

Mr. M. Zorab, for the Administrator-General, Bengal.

Mr. R. C. Bonnerjee, for A. D. Christiana.

Mr. H. G. Pearson, for Mrs. E. C. Swaries.

JUDGMENT.—This suit relates to the estate of one Alexander Watson Christiana. He left a Will, dated the 1st October 1897. On the 10th January 1898, Probate was granted. The Administrator-General is now in possession of the estate. The following questions have arisen and the plaintiff is

ADMINISTRATOR-GENERAL OF BENGAL v. A. D. CHRISTIANA.

desirous to have them determined by this Court: (i) Whether interest is payable out of the estate of the testator, on the legacies of Rs. 1,000, to each of the surviving grandchildren named in the margin of the said Will and the representative of a deceased grandchild, and, if so, from what date and at what rate? (ii) Amongst whom, in the events which have happened, is the residue of the estate of the testator, after payment of the aforesaid legacies of Rs. 1,000 each, and interest thereon, if any, divisible, and in what shares and proportions is it so divisible? The paragraphs in the Will relating to the legacies run thus:—"To my grandchildren named in the margin I leave Rs. 1,000 each from the sale of house No. 8, Lindsay Street, and my half share in house No. 4, Crooked Lane, that is, after the death of my daughter Mrs. Georgiana Harriett Russell, and the marriage of my granddaughter, Florence Elder." These legacies are demonstrative legacies, and the question is as to whether any interest is payable upon these legacies. The Succession Act, section 311, provides: "Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death." There are certain exceptions to that section to which I need not refer at present. Section 312 deals with the question of interest where time has been fixed for payment of a general legacy. The first point argued in this case is that inasmuch as there is no specific provision for payment of interest for demonstrative legacies, no interest was payable in this case. It has, however, been held in the case of *Chinnam Rajamannar v. Tadikonda Ramachendra Rao* (1) that the Law in England relating to interest on a demonstrative legacy is applicable to sections 130 and 131 of the Probate and Administration Act, which correspond to sections 311 and 312 of the Indian Succession Act. The learned Judges held in that case that the absence of a distinct provision in regard to the payment of interest on demonstrative legacies did not imply an intention to disallow interest in such cases. They approved and

followed the case of *Mullins v. Smith* (2). I follow the decision of the Madras Court and hold that interest is payable on demonstrative legacies. The question is whether section 311 or 312 is applicable to this case, that is to say, whether a time has been fixed for the payment of the legacy, or whether there is no fixed time for such payment. The principle applicable to cases of this kind has been laid down by Lord Cairns, L. J., in the case of *Lord v. Lord* (3) in these terms: "The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval." That principle has been upheld and followed in *Walford, In re, Kenyon v. Walford* (4). Here there is no express direction fixing the date of payment. It seems to me to be a case covered by the ruling in *Lord v. Lord* (3), that is to say, that there is no time for payment fixed, although the amount is expressly made payable out of a particular fund, which was not to be got in until after a longer interval. The testator said that he was leaving Rs. 1,000 each to the grandchildren, that it was to be paid out of the sale of the premises, 8, Lindsay Street, and his share in 4, Crooked Lane, and that such sale was not to take place till after the death of Mrs. Georgiana Harriett Russell and the marriage of his granddaughter, Florence Elder. Mrs. Georgiana Harriett Russell died on the 13th February 1915, and Florence Elder was married on the 30th June 1909. Therefore it seems to me to be a case which is governed by the decision I have referred to, and in that view I think section 311 of the Succession Act applies. It is necessary to refer to Exception (2) to that section. This is a case where the

(2) (1860) 1 Dr. & Sm. 204; 8 W.R. 739; 62 E. R. 356; 127 R. R. 81.

(3) (1867) 2 Ch. App. 782 at p. 789; 36 L. J. Ch. 533 at p. 538.

(4) (1912) 1 Ch. D. 219 at p. 225; 81 L. J. Ch. D. 828.

(1) 29 M. 155.

MAUNG SEIN KYI v. MA E.

testator is not the parent, but a mere remote ancestor. I understand that the legatees, Elizabeth Christiana Swaries and Jessie Houston Russell, have attained majority, but it is unnecessary to refer to their case, because no distinction is made in the section in respect of adults and minors. Now about the rate of interest. The Act provides 4 per cent. which will be the rate allowed upon these legacies. The further question is about the division of the residue. The clause in the Will dealing with it runs thus:—"The remaining portion as well as the balance of the accumulated interest or any other money that may be due is to be equally divided among my sons and daughter." I have examined the original Will, and learned Counsel appearing for the parties have also seen it. There is no question that the expression "daughter" there is in the singular, and there is no mistake in the copy annexed to the plaint. The difficulty that has arisen is owing to the fact that the testator had two daughters, and the question is, to which of these daughters does this clause refer; and, if it is uncertain, can it have any effect so far as the daughters are concerned? It is clear to my mind that the daughter referred to in that clause is Louisa Amelia Sinclair. The residue is only to be divided after the payment of the legacies, which can be only ascertained after the death of the daughter Mrs. Georgiana Harriett Russell, and, therefore, there is only one daughter left at the time of the division of the residue, and that daughter is Louisa Amelia Sinclair. Therefore, the residue is to be divided according to the ordinary rule, there being two sons and one daughter. Costs of this suit of all the parties to come out of the estate. The costs of the Administrator-General to come out of the estate as between attorney and client to be fixed on scale No. 2.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEALS NOS. 20 AND 37 OF 1915

January 10, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Farlett.

IN C. A. No. 20 OF 1915

MAUNG SEIN KYI—DEFENDANT—
APPELLANT

versus

MA E—PLAINTIFF—RESPONDENT.

IN C. A. No. 37 OF 1915

MA E—PLAINTIFF—APPELLANT

versus

MAUNG SEIN KYI—DEFENDANT—
RESPONDENT.

Marriage—Marriage between Chinese Buddhist and Burmese Buddhist—Law applicable—Custom in derogation of law, when valid—Evidence—Breach of promise of marriage—Damages, measure of—Substantial damages, award of—Contract Act (IX of 1872), s. 74.

Per Parlett, J. (Fox, C. J., dubitante).—A marriage between a Chinese Buddhist (male) and a Burmese Buddhist (female) in which none of the preliminaries of Chinese Customary Law has been observed, such as negotiations between the parties' parents and their consent, is invalid. [p. 160, col. 2.]

Pai Beng Teng v. Ko Maung, 2 L. B. R. 261, followed.

The evidence of a few of such marriages in Burma, wherein the Chinese ceremonies were treated as optional and not essential, though it shows that public opinion in regard to such unions was lenient and uncritical, falls short of proving a legal and binding custom. [p. 160, col. 2.]

*Per Fox, C. J.—Where one of the parties to a marriage is subject to one Customary Law and the other to another Customary Law, there is prima facie no strong reason why the Customary Law of the man should be applied and the Customary Law of the woman entirely disregarded, at any rate up to and at the time of marriage. Where there is a divergence between the personal laws applicable to the parties, the proper principles to act on are that the *lex loci contractus* quoad solemnitates determines the validity of a marriage, and the *lex domicilii* the question of the capacity of the parties to marry. [p. 161, col. 2; p. 162, col. 1.]*

Brook v. Brook, (1861) 9 H. L. Cas. 193; 7 Jur. (N. S.) 422; 4 L. T. 93; 9 W. R. 461; 11 E. R. 703; 131 R. 123; Brinkley v. Attorney-General, (1890) 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911 and Sottomayer v. De Barros, (1877) 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 413; 26 W. R. 455, relied on.

Per Parlett, J.—In awarding compensation for the breach of a promise to marry, it is open to the Court under section 74 of the Contract Act to award such compensation, not exceeding the amount named in the agreement of the parties, as appears to it to be reasonable. [p. 161, col. 1.]

Per Fox, C. J.—It is doubtful whether the party aggrieved should not be given the full amount named in the agreement. [p. 162, col. 1.]

Ma E v. Maung San Da, 3 Bur. L. R. 8; 1 Chan. Toon. 140, referred to.

Per Parlett, J.—In assessing damages for the breach

MAUNG SEIN KYI v. MA E.

of a promise of marriage, it is not the defendant's position alone that will justify a reduction of damages. Where the defendant has treated the plaintiff in a shameful and hard-hearted manner, cohabited with plaintiff under promise of marriage and committed a breach of faith by marrying another person, the Court should award substantial damages. [p. 161, col. 1.]

Messrs. *Gregory and Hancock*, for the Appellant.

Messrs. *Burjorjee, Dantra and Doctor*, for the Respondent.

JUDGMENT.

PARLETT, J.—Ma E sued as a pauper for a declaration that she was the lawful wife of Maung Sein Kyi and for a decree for restitution of conjugal rights or in the alternative for Rs. 5,000 for breach of an agreement to marry her. The defendant denied the marriage and the promise to marry her. The learned Judge on the original side held in his favour on the former and against him on the latter point and assessed the damages at Rs. 2,000. Both parties appeal, Ma E as a pauper, while Maung Sein Kyi has become insolvent during the pendency of his appeal which has been continued by the Official Assignee. Ma E asks for a declaration of the marriage and restitution of conjugal rights or in the alternative for the full amount of the damages claimed. Maung Sein Kyi contends that there was no valid agreement between the parties for the breach of which damages could be awarded and that the amount awarded is excessive, and he asks that the suit be dismissed.

Ma E is a Burmese Buddhist and Maung Sein Kyi is a Chinese Buddhist: the father of neither is alive. Through a man named Ismail they became acquainted and subsequently became attached to each other, but Ma E having had a previous matrimonial venture which proved unfortunate she and her mother were at first adverse to her remarrying the defendant, but eventually agreed upon his undertaking to sign a document. On the 9th of November 1913, the parties went to a house in a garden belonging to Ismail's sister and there executed a document which was attested by Ismail and Bun Sein, a friend of Sein Kyi, in the presence of Ismail's brother-in-law. Neither plaintiff's nor defendant's mother was present. The latter has admittedly

never consented to the marriage. After the document was executed the defendant cohabited with the plaintiff at her mother's house for 5 or 6 months and then moved with her to Bun Sein's mother's house, but subsequently deserted her. There can be no doubt that this would not constitute a valid marriage according to Chinese Customary Law, none of the preliminaries thereto having been observed, in particular no negotiations between the parties' parents having taken place and the defendant's mother not having given her consent [see *Pai Beng Teng v. Ko Maung* (1) and Alabaster's Notes on Chinese Customary Law, page 172.] But evidence is offered that in Burma such a union between parties, one of whom is Chinese or half Chinese, is recognized as a valid marriage and that the Chinese ceremonies though often observed are optional and not essential. Ma Ket says that three years ago she married a Chinaman without any ceremony and has since been recognized as a wife, but whatever people may have thought, it is clear that at the outset she had not the full status of a wife, for he already had a wife in China who has only been dead about ten years. (See Alabaster, page 171.) Her son Bun Sein took a wife of Chinese extraction a year ago. Aung On Shwe, a half Chinese, took a Burmese wife twenty years ago, and Ma Mya, a half Chinese, took a Burmese husband sixteen years ago, in each case without any ceremony, and the parties are recognized as husband and wife. Such evidence appears to me at most to show that public opinion in this country with regard to such unions is uncritical and lenient, and I consider it falls far short of proving that they constitute legal marriage. I would hold that there was no marriage effected between the parties to this suit.

The defendant contends that the agreement was one not to marry but to live together in concubinage and as such is void under section 23 of the Contract Act. In my opinion it cannot bear any such interpretation. The material portion runs as follows: "As I, Maung Sein Kyi, will live with Ma E for her whole life as husband and wife, hereafter I, Mg. Sein Kyi, from the day we thus live as husband

(1) 2 L. B. R. 261.

MAUNG SEIN KYI v. MA E.

and wife throughout my whole life, will never abandon Ma E, whether infirmity or blindness or any affliction overtakes her or any person interferes ■ makes mischief between us or any relation on my side objects. Handing all my salary as well as all property we may acquire together to her, my wife, I will attend to, maintain, look after, and cherish her in conformity with the duties of a husband. If I fail in any of the aforesaid duties I will pay Rs. 5,000 as compensation for damage to the reputation of my wife Ma E. Ma E also, upon Maung Sein Kyi not failing in but performing the duties defined above, will throughout her whole life carry out the various acts of attendance upon her husband in accordance with the duties of a wife. Though her husband become infirm or blind she will not desert him". No wording could, I think, make it plainer that a lifelong and binding union was contemplated by the parties. The defendant admits that his intention was to marry the girl if he could get his mother's consent, and there is no doubt that it was due to her opposition that he failed to carry it out. I am of opinion that there was a promise to marry her, which defendant broke.

The plaintiff contends that she should be awarded the full amount of compensation named in the agreement to be paid in case of its breach. It appears to me, however, that under section 74 of the Contract Act it is open to the Court to award such compensation not exceeding the amount so named as appears to it to be reasonable. The defendant urges that Rs. 2,000 is an excessive amount to award against a person in his position of a clerk on Rs. 75 a month. As he is insolvent it appears to me improbable that the plaintiff would realize any considerable sum from the defendant himself but as pointed out, his stepfather holds a well-paid Government appointment and the defendant's position does not alone justify a reduction of the damages. He has treated the plaintiff in a shameful and hard-hearted manner and if, as was stated in this Court and not denied, he has since married another girl, he has put it out of his power to make even tardy amends to the plaintiff by offering her the status of a chief wife. On the other hand, Rs. 2,000 is a handsome sum to a girl in the plaintiff's position and is, I consider, a reasonable compensation under the circumstances. I would dismiss both the appeals

and would order the plaintiff Ma E to pay the Court-fee which would have been paid by her if she had not been permitted to appeal as ■ pauper and a copy of the decree to be forwarded to the Collector.

Fox, C. J.—I hesitate to find that there was no marriage between the plaintiff and the defendant, and I refrain from differing from the decision on the first issue only because the plaintiff appears to be indifferent as to whether that issue is decided in her favour or not, and because there has been no child as ■ result of the connection between her and the defendant. The case to be dealt with is that of a man of 25 years born in Burma of a Chinese father and a Burmese mother, the latter of whom is alive and the former dead, hiring a Burmese woman into having connection with him under a formal promise of marriage from the time of connection, the woman not having been likely to consent to connection unless such promise had been given, and unless she believed at the time that she was then the man's wife.

Assuming that the man had been brought up to follow his father's customs, although this seems very doubtful, we have the case of one party following or being subject to one Customary Law, that of China, and the other governed by another Customary Law, that of Burma.

Prima facie there is no strong reason why the Customary Law of the man should be applied, and the Customary Law of the woman utterly disregarded, at any rate up to and at the time of marriage. After marriage other considerations apply.

The decisions in this Province which have held that in order to constitute a valid marriage between a Chinaman and a Burmese woman, it must be shown that certain formalities and ceremonies enjoined by Chinese Customary Law were gone through, and that the consent of the parents of the parties must have been given to the marriage, overlook the rule of British Courts stated in *Brook v. Brook* (2) and other cases that the *lex loci contractus* *quoad solemnitates* determines the validity of a marriage, and the *lex domicillii* the question of the capacity of the parties to marry. The principle was followed in *Brinkley v.*

(2) (1861) 9 H. L. Cas. 193; 7 Jur. (N. S.) 422; 4 L. T. 93; 9 W. R. 461; 11 E. R. 703; 131 R. R. 123.

MIZAJI LAL v. HORI LAL.

Attorney-General (3), in which the marriage in Japan of an Irishman with a Japanese woman according to forms required by Japanese Law was recognized as valid. *Sottomayer v. De Barros* (4) affords an example of the application of the law of domicile.

It may be noted that in this last case consent of parents required by the law of France was considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.

When there is divergence between the personal laws applicable to the parties to a marriage or alleged marriage, it appears to me that the principles acted on in the above cases should be followed in determining whether there has been a marriage or not.

Taking it however, that there was not sufficient evidence to prove a marriage even according to Burmese ideas and law, there can be no question that the defendant promised to marry the plaintiff and that he broke that promise. The agreement is not open to the construction that the union of the parties contemplated was merely a temporary one. I agree in the award of damages to the plaintiff. My only doubt is whether she should not be given the full amount mentioned in the document, as was done in *Ma E v. Maung San Da* (5).

The appeal of Maung Sein Kyi is dismissed with costs as she has succeeded substantially, but she is ordered to pay the Court-fee which she would have had to pay if she had not been allowed to appeal as a pauper.

Appeals dismissed.

(3) (1890) 13 P. D. 76; 59 L. J. P. 51; 62 L. T. 911.

(4) (1877) 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415; 26 W. R. 455.

(5) 3 Bur. L. R. 8; 1 Chan. Toon, 140.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 149 OF 1915.

May 3, 1916.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Piggott.

MIZAJI LAL *alias* MULAIM SINGH—
DEFENDANT—APPELLANT

versus

HORI LAL AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Res judicata—*Suit for occupancy holding in Revenue*

Court—Suit for holding and grove in Civil Court—Decision of Revenue Court, how far bars civil suit—Jurisdiction—Agra Tenancy Act (II of 1901), s. 202.

The plaintiff's suit in the Revenue Court against the defendant for possession of an occupancy holding was dismissed on the ground that the defendant was the adopted son of the original tenant and had succeeded to the holding. The plaintiff thereafter sued in the Civil Court for possession of the holding and a grove:

Held, that the decision of the Revenue Court in respect of the holding could not operate as *res judicata* in the civil suit relating to the grove, inasmuch as the Revenue Court could not have decided the suit brought in respect of the grove; [p. 163, col. 1.]

Held, also, that section 202 of the Agra Tenancy Act had no application inasmuch as the suit, so far as the grove was concerned, was not a suit relating to an agricultural holding. [p. 163, cols. 1 & 2.]

First appeal from the order of the District Judge of Mainpuri, dated the 4th June 1915.

FACTS material for the report are as follows:—

One Sampat was the occupancy tenant of a certain holding and also owned a certain grove in the village. The plaintiff, the *zemindar* of the village, sued the defendant in the Revenue Court for possession of the holding. The defendant contested the suit on the ground that he was the adopted son of Sampat and had succeeded to the holding as well as to the grove. The contention of the defendant was allowed and the suit was dismissed by the Revenue Court. The plaintiff then brought this suit in the Civil Court for possession of the holding as well as the grove. The Court of first instance dismissed the suit, holding that the decision of the Revenue Court as regards the occupancy holding was conclusive and the suit as regards the grove was barred by *res judicata*. The plaintiff appealed and the lower Appellate Court remanded the suit. Hence the second appeal by the defendant.

Mr. Jang Bahadur Lal, for the Appellant.—There will be two decisions, one of the Revenue Court holding the defendant to be the adopted son of Sampat and the other of the Civil Court holding the defendant not to be the adopted son. There will be an anomalous position.

[BANERJI, J.—A decision of a Revenue Court is not final as to matters not triable by that Court.]

Section 202 of the Agra Tenancy Act applies to the case and the Civil Court ought to have acted under that section.

MADAN CHANDRA PAL v. KRITIRAM BISWAS.

[BANERJI, J.—Section 202 applies only to suits relating to agricultural holdings.]

The Revenue Court has decided the question and the effect of its decision is that the defendant is the adopted son of ampat. The Civil Court adopts that finding and holds that the defendant is the adopted son.

[BANERJI, J.—As regards the occupancy holding the decision of the Revenue Court is final, but as regards other properties ■ suit for which is not cognizable by the Revenue Court the decision is not final.]

Dr. Tej Bahadur Sapru, for the Respondents, was not called upon.

JUDGMENT.—This is an appeal from an order of remand. The suit out of which it arises was brought by the plaintiff for possession of an occupancy holding and ■ grove. The plaintiff is the *zemindar*. The holding and the grove belonged to one Sampat. The defendant alleged that he was the adopted son of Sampat and had succeeded to the grove and the holding. The plaintiff brought a suit in the Revenue Court in respect of the holding and that suit was dismissed, the Revenue Court being of opinion that the defendant was the adopted son of Sampat and had succeeded to the holding. Therefore, so far as the holding was concerned, the Court of first instance held that the decision of the Revenue Court was conclusive between the parties and the matter could not be re-opened in the Civil Court. It accordingly dismissed that part of the claim. It also dismissed the claim with regard to the grove on the basis of the Revenue Court's decision, which in its opinion apparently operated as *res judicata*. The plaintiff submitted to the decision of the first Court as regards the occupancy holding but appealed in regard to the grove. The learned Judge has held that the Court of first instance was wrong in refusing to try the question of the defendant's status so far as the claim related to the grove. We think the learned Judge was right. The Revenue Court could not have decided the suit brought in respect of the grove and, therefore, its decision in the suit which was decided by it could not operate as *res judicata* in this suit relating to the grove. Section 202 of the Tenancy Act had no application inasmuch as the suit, so far as the grove was con-

cerned, was not ■ suit relating to an agricultural holding. There is no force in the appeal. We dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1116 OF 1912.

March 30, 1916.

Present:—Mr. Justice Teunon and Mr. Justice Choudhuri.

MADAN CHANDRA PAL AND ANOTHER —
PLAINTIFFS — APPELLANTS

versus

KIRTIRAM BISWAS AND OTHERS —
DEFENDANTS — RESPONDENTS.

Evidence Act (I of 1872), s. 13—Evidence, admissibility of —Proceedings in a suit not inter parties, when admissible.

In a suit by the plaintiffs to recover possession of certain lands on the allegation that the same were included in a sub-lease granted to them by the lessees of C, the defence being that the lands in suit were comprised within a lease granted by C to the defendants prior to the lease of the plaintiffs' lessors:

Held, that the proceedings of a rent suit by C against the plaintiffs' lessors including the judgment and decree and the *amin's* maps, report and field-book filed in that suit were admissible in evidence, although the defendants were not parties to that suit. [p. 165, col. 1.]

Tepu Khan v. Rajani Mohun Das, 25 C. 522 (F. B.) 2 C. W. N. 501, referred to.

Appeal against the decree of the Additional Subordinate Judge, Khulna, dated the 29th January 1912, reversing that of the Munsif, 1st Court, Khulna, dated the 23rd March 1911.

FACTS.—This appeal arose out of a title suit. The plaintiffs' case was that an entire plot of 300 *bighas* of land was an *abadkari jama* of Sashibhushan Bhattacharya and Harimohan Dutt under the superior *taluqdars* who might be conveniently described as Chatterjeas, that out of these plots 100 *bighas* were let out by Sashibhushan and Harimohan to the plaintiffs by an *amal-nama* granted in the name of Harimohan. The plaintiffs in their turn let out the lands in suit and other lands by an *amal-nama* to Taker Sheikh and others, who executed ■ registered *kabuliyat* in their favour in 1303. On their failing to pay rent

MADAN CHANDRA PAL V. KRITIRAM BISWAS.

for those lands, the plaintiffs brought a rent suit against them and got a decree in execution whereof the tenancy was put up to sale and was auction-purchased by the plaintiffs themselves. Since then the plaintiffs possessed the lands in suit both in *khas* and also through other tenants. In 1315 the plaintiff No. 1 as well as the plaintiffs' tenants, the *pro forma* defendants Nos. 15, 16 and 17, grew paddy on the land in suit, but the principal defendants caused a proceeding under section 145, Criminal Procedure Code, to be instituted with respect to the land in suit with the result that the land was declared to be in the possession of the principal defendants. Plaintiffs, therefore, had to bring this suit. The defendants' case was that the Chatterjeas at first by an *amulnama* and then by a *patta*, Exhibit B, settled the portion of about 200 *bighas* of land lying in west Bajna on the 5th *Asar* 1301 to the principal defendants, Nos. 9, 10 and others, and that under them the defendant No. 1 and others were holding the land by a *jamai* right and the land in dispute appertained to the said *jamai* right. The Munsif decreed the suit on the finding that the disputed land formed a part of Taher Sheikh's holding and was covered by the plaintiffs' *patta*. Some of the defendants appealed and the Additional Subordinate Judge of Khulna decreed the appeal and dismissed the plaintiffs' suit, holding that the plaintiffs failed to prove their title to the lands in suit. In his judgment he observed: "Before I proceed to discuss that matter (the position of the Bashabati Khal), there is another matter which has greatly influenced the Munsif in coming to the conclusion that the Chatterjeas included the disputed land in the *ganti* of the plaintiffs' lessors and that is the Rent Suit No. 1038 of 1899; the decree has been marked Exhibit XIX, judgment, Exhibit XX, and the Civil Court *amin's* report, map and field book of that rent suit are marked Exhibits II, III, and IV. It appears that the Chatterjeas were the plaintiffs in that rent suit and the plaintiffs' lessors were the principal defendants. I fail to understand how that map, report, decree and judgment are admissible in evidence in this case

* * The learned Pleader for the respondents contended that the map and report of that Rent Suit No. 1038 of 1899 are admissible in evidence in this case inasmuch as the Chatterjeas were the plaintiffs in that rent suit, although the defendants were no parties. But I cannot accept this contention, because the defendants' lease is prior in date to the lease of the plaintiffs' lessors.

If any authority is needed I may refer to the case of *Priyanath Majumdar v. Mahendra Kumar Mitra* (1) which has been remanded by the Honourable High Court to this Court on that ground amongst others. That case has been reported in 10 Ind. Cas. 376."

Babus Joges' Chandra Roy and Sarat Chandra Ghose, for the Appellants.

Babu Judu Nath Kanjilal, for the Respondents.

JUDGMENT.—The most important points in dispute between the parties in this case are the position and situation of the Bashabati Khal and the Bashabati Shisa Khal, but we regret to say that the findings of the learned Subordinate Judge about them are unsatisfactory, especially as his judgment is one of reversal. There is not much difficulty in following the decision of the learned Munsif. He refers to the plaintiffs' *patta* under Sashi Bhusan Bhattacharjee and Hari Mohan Dutt, Exhibit I, dated 1st *Asar* 1302 and the *kabuliat*, Exhibit XI, dated 30th *Kartik* 1303, executed by Taher Sheikh and others in favour of the plaintiffs and comes to the conclusion that it is clear from them that Bashabati Khal forms the western boundary and the Bashabati Shisa Khal, the southern boundary of the land of the plaintiffs' *jama* as well as of the land let out by them to Taher Sheikh and others. He then says that "if the Khal shown in the Civil Court *amin's* map as running by the western side of the land in suit be Bashabati Khal, and the Khal shown in that map as running by the southern side of the land in dispute be Bashabati Shisa Khal, as alleged by the plaintiffs, then the land in suit is clearly included within the plaintiffs' *jama* and the *jama* of Taher

(1) 10 Ind. Cas. 376; 14 C. L. J. 578; 16 C. W. N. 317,

PAKARIA v. RANJITA.

Sheikh and others as described in Exhibit I and Exhibit XI. But if, on the other hand, the Khal shown in the *amin's* map as flowing by the south of the land in suit and then flowing northward for some distance along its eastern side be the main channel of Bashabati Khal as contended by the defendants, then the land in suit falls outside these *jamas*." He holds that Exhibit XI is a genuine document which was executed before there was any dispute between the plaintiffs and the defendants, and says that the evidence of the defendants about the position of the land covered by Exhibit XI is conflicting, and holds upon a consideration of Exhibit I and Exhibit XI and Exhibit VII, which is an application for execution by the defendants against Taher Sheikh and others, that *there is a Shisa Khal to the south of the plaintiffs' jama* and from the failure on the part of the defendants' witnesses to locate the land of the plaintiffs' *jama*, he accepts the plaintiffs' case and says that he is supported by, amongst other documents, the proceedings in Rent Suit No. 1038 of 1899 instituted by the Chatterjea *talukdars* against the lessors of the plaintiffs and the Civil Court *amin's* map and report Exhibits II and III therein filed.

The learned Subordinate Judge has entirely disregarded these proceedings and exhibits, as inadmissible in evidence against the defendants because they were not parties to the Rent Suit No. 1038. (*Gujja Lall v. Fatteh Lall* (2) has been considerably modified by the Privy Council decision in *Run Bahadur Singh v. Lucho Koer* (3) and other cases, among them *Tepu Khan v. Rajani Mohun Das* (4). The learned Subordinate Judge has overlooked the fact that a map prepared at that time is of considerable value in determining the question before him. We think that he ought to have treated them as evidence, especially as the defendants had the fullest opportunity of rebutting such evidence before the Trial Court. The defendants' lease is no doubt prior in date to the lease granted by the Chatterjeas to the plaintiffs' lessors, but the defend-

(2) 6 C. 171 (F. B.); 6 C. L. R. 433; 3 Shome L. R. 132.

(3) 11 C. 301; 12 L. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202.

(4) 25 C. 522 (F. B.); 2 C. W. N. 501.

ants are not the lessors of the whole of west Bajna, but of only 200 *bighas* of that *mahal*, a fact which he has apparently overlooked. He has fallen into serious error in saying that the fact that the disputed land lies in west Bajna and not in east Bajna is sufficient to negative the plaintiffs' title. We do not know how far this erroneous view may have influenced his decision. The learned Subordinate Judge has in fact been unable to come to any definite finding on the oral evidence and a finding such as the following is not of much value. He says, "it seems not likely that the said southern boundary is the Bashabati Shisa Khal as depicted in the *amin's* map. It is rather the small Khal shown in the previous map, Exhibit 3." He gets rid of Exhibit VII by saying that the boundaries as given therein in the year 1307 appear to have been copied from those given in Taher's lease Exhibit XI and then concludes that the plaintiff has failed to prove his title.

As we have said before, the learned Subordinate Judge's judgment is one of reversal and ought, therefore, to contain clear findings about the position and situation of the two Khals above mentioned. We set aside his decree and remand the case to him for reconsideration after admitting the evidence he has rejected. Costs of this appeal to abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 35 OF 1915.
April 19, 1916.

Present:—Mr. Justice Walsh.
PAKARIA—PLAINTIFF—APPELLANT
versus

RANJITA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Redemption—Entries in khewat, attestation of, value of—Estoppel—Admission—Burden of proof—Inherent power.

Entries in a *khewat* as to certain persons being in possession of certain land as mortgagees, verification of which is attested by those persons, amount to an

PAKARIA V. RANJITA.

admission by those persons that they are in possession as mortgagees. [p. 166, col. 1.]

The plaintiff alleged that he mortgaged certain lands to the defendant in 1859. In the *khevat* of 1877 the defendant was shown as mortgagee and the entry was attested by the defendant. The defendant was entered as mortgagee. In a suit for redemption the mortgagee denied the mortgage:

Held, that the onus was on the defendant to show that there was any change in the circumstances between the years 1877 and 1913 and that the defendant having failed to discharge the onus, the Court had inherent power of drawing inferences of fact from such evidence as was undisputed. [p. 166, col. 2.]

Second appeal from the decision of the District Judge of Agra, dated the 12th September 1914.

Mr. Benod Behari, for the Appellant.

Mr. Narayan Prasada, for the Respondents.

JUDGMENT.—In this case I feel bound to allow the appeal. The subject-matter of the litigation is of the most trumpery description. The rent of the land in dispute, I am told, is Rs. 2-10, and the amount on payment of which redemption was decreed by the Munsif is Rs. 8. Putting the matter shortly, what appears from the judgments of the Courts below is that at some time or another in 1859, it is alleged, the plaintiff mortgaged this property to the defendants. A feeble attempt was made in the first Court to prove the original transaction and it wholly broke down. The lower Appellate Court has held that the evidence called by the plaintiff upon this part of his case is false. The result is that there is no oral evidence in the case at all. But there are certain entries in the *khevat* of 1877, the verification of which was attested by the predecessors of the defendants and apparently by one of the defendants himself. (I was so told at the Bar by the appellant's Counsel and it was not denied by the respondents). It is quite clear apart from any authority that those entries so verified amounted to an admission by the then persons in possession that they were in possession as mortgagees. Now the whole trouble in this case is as to the terms of the contract under which they were so in possession. A great number of cases have been cited to me and the argument has been ably conducted on both sides. The result has been to leave me in a state of some doubt, and I think it, therefore, best to decide according to my own impression of the justice of this case apart from any decision on any other set of facts,

Some onus undoubtedly must be thrown upon the party who has been shown to be in possession as mortgagee in 1877 and still in possession in 1913 and who fails to show any change in the circumstances between those two *termini*. Once a mortgage always a mortgage, and it is impossible for me to hold that the defendants could not, if the plaintiff's equity of redemption had been extinguished, have shown something at any rate, if they could not go the whole distance, which would shift the onus back on to the plaintiff. I, therefore, think that it is satisfactorily established that the present defendants are in possession as mortgagees and that they have not discharged the onus of showing that the plaintiffs' equity of redemption has been extinguished. The real trouble in the case is that I am absolutely without a thread of evidence as to the amount on payment of which the plaintiff is entitled to redeem. The only persons who spoke about it were feeble witnesses, whose evidence was completely thrown out by the lower Appellate Court. The evidence produced by the defendants does not throw any light upon it. The lower Appellate Court took rather a strange view in that it was prepared to accept the plaintiff's case if it was a claim for Rs. 80 instead of Rs. 8. That shows the danger of drawing on one's own imagination, because if the fact be that the rent was only Rs. 2-10 it is very unlikely that anybody would ever have got Rs. 80 on the mortgage of this property. I have got all the evidence before me and I am going to exercise my inherent powers of drawing inferences of fact from such evidence as is undisputed. The onus having been cast on the defendants, they having failed to discharge it and the value of the property being what it was admitted to be, I hold that it is satisfactorily established that this mortgage was for a sum of Rs. 8. The decree of the Munsif entitling the plaintiff to redemption on payment of that sum must, therefore, be restored. The appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance is restored with costs.

Appcal allowed.

BAPUJI JAGANNATH v. GOVINDLAL KASANDAS SHAH.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 47 OF 1915.

February 14, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heatcn.

BAPUJI JAGANNATH—DEFENDANT—
APPELLANT

versus

GOVINDLAL KASANDAS SHAH—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Suit by a trustee against co-trustee with whose conduct he was dissatisfied—Administration suit—Charitable bequests to be separated—Advocate-General or Collector to obtain directions of Court—Appointment of Receiver.

One of the two executors of the Will of a Hindu sued his co-executor, charging him with having misapplied the property of the testator and praying that the defendant should be held responsible for all sums of money which would be found to have been given or caused to be given to friends and relations, or proved to have been mismanaged, after taking an account, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing. There was not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts, and the plaint contained no description of the trusts or directions contained in the Will of the testator:

Held, (1) that the suit might be treated as a general administration suit brought by one trustee against another with whose conduct he was dissatisfied; [p. 167, col. 2.]

(2) that section 92 of the Civil Procedure Code did not apply and that if any question relating to charitable bequests should arise in the case, a notice might be given to the Advocate-General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code; [p. 168, col. 1.]

(3) that it would be quite possible for the Court to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate-General or the Collector had obtained the directions of the Court, if such were necessary, with reference to the disposal of those funds under some suitable scheme under section 92 of the Civil Procedure Code. [p. 168, col. 1.]

Appeal from an order passed by the Joint Judge, Ahmedabad, in Appeal No. 172 of 1913, reversing the decree passed by, and remanding the suit to, the First Class Subordinate Judge, Ahmedabad, in Civil Suit No. 553 of 1912.

Mr. G. N. Thakor, for the Appellant.

Mr. T. R. Desai, for the Respondent.

JUDGMENT.

SCOTT, C. J.—The plaintiff brought this suit as one of two surviving executors of the Will of one Harjivandas Purshottam, dated the 15th June 1892. The defendant executor is alleged to be an *Audich Brahmin* of the age of 80, and is charged with having misapplied the property of the testator, and prayer is that the defendant should be held responsible for all sums of money which would be found to have been given, or caused to be given, to friends and relations, or proved to have been mismanaged, after taking an account from the year 1899, and onwards, since when he has been in sole management of the property of the late Harjivandas, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing. The plaint is a document of some length, and contains no description of the trusts or directions contained in the Will of the testator. But the suit may be treated as a general administration suit brought by one trustee against another with whose conduct he is dissatisfied, and the stamping of the suit as a suit for an account at the value of Rs. 150 does not prevent the Court from imposing an adequate Court-fee in the event of any decree being passed for the payment of money by the defendant.

That, however, is not the question now before the Court: it is whether the learned Judge in the District Court was wrong in remanding the case for trial after the suit had been rejected by the Subordinate Judge on the ground that it was a suit framed under section 92 of the Civil Procedure Code, and as such could only lie in the District Court. There is not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts. There is no prayer for relief of any of the kinds specified in that section, and upon the face of the plaint we see no reason for holding that the Subordinate Judge had not power to entertain the suit. That learned Judge, however, states in his judgment that from the Will it appears that the property was worth about Rs. 89,500, out of which private legacies amount to Rs. 19,500 and the rest Rs. 70,000 are to be

GUJAR SINGH v. MEHR SINGH.

used for purely charitable and religious purposes.

The learned Joint Judge in appeal pointed out that it did not follow that because money was to be used for the benefit of charities, therefore, a scheme would be necessary in the case of those charities. In England the difficulty arising from superior and inferior jurisdictions does not arise, and any question relating to charitable bequests could be disposed of in an administration suit by the addition of the Attorney-General, who corresponds to the Advocate-General in this country, as a party to the suit. As an instance, we may refer to *In re Lea, Lea v. Cooke* (1), which was a general suit for administration. The report relates to a question arising with reference to a particular charitable bequest, involving the question whether a scheme should be framed or whether money should be paid by the executors direct to the legatee named as the controller of the charity. It appears to us that if any questions relating to charitable bequests should arise in the present case before the Subordinate Judge, his proper course would be to give notice to the Advocate-General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code in order to get any of the specific reliefs referred to in that section. It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate-General or the Collector had obtained the directions of the Court, if such were necessary, with reference to the disposal of those funds under some suitable scheme. Such directions, of course, would have to be taken from the District Court under section 92. But we know nothing at present of the position of the charities in question. We do not know whether any schemes will be necessary, and it appears to us, as it appeared to the Joint Judge, that it will be altogether premature to say that this suit, as framed, cannot be disposed of by the Subordinate Judge.

(1) (1887) 34 Ch. D. 528; 56 L. J. Ch. 671; 56 L. T. 42; 35 W. R. 572.

The only other question which has been referred to is, whether the Joint Judge was wrong in not giving effect to what has been described as an application for a decree in terms of the compromise. We have been referred to documents upon which the point is based, and it appears that there was no application for a decree in terms of the compromise. There was only a mention of a previous agreement, and it was requested that the Court would admit the papers on the proceedings. According to the judgment of the Joint Judge the only issue raised before him at the time of the appeal was whether the lower Court had erred in holding that the suit fell within the purview of section 92 of the Civil Procedure Code and that the Court had no jurisdiction to entertain it. Upon that issue we think that the Joint Judge was right in holding in the affirmative and in remanding the suit. We affirm the order and dismiss the appeal. Costs costs in the cause.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 230 OF 1912.

May 6, 1916.

Present:— Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

GUJAR SINGH AND OTHERS—PLAINTIFFS—
(APPELLANTS

versus

MEHR SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Evidence Act (I of 1872), s. 90—Will professing to be over 30 years old—Suspicious circumstances—Presumption, whether to be drawn—Delay in suing, whether proves acquiescence or waiver.

The last male owner of the property in suit died, leaving two widows and a daughter. On 2nd January 1884, the widows gifted the property to the daughter who died on 7th November 1894. On the death of the surviving widow on 24th October 1902, the reversioners got mutation of the landed property effected in their favour, but the property in suit remained with defendant No. 2 (the husband of the donee). On 17th September 1906, he sold the property to defendant No. 1. On 29th November 1910 the reversioners sued to recover their share. It was contended that the deceased male owner had gifted this property to his widows absolutely, who had gifted it absolutely to the daughter on whose death her husband became the owner.

GUJAR SINGH v. MEHR SINGH.

Held, (1) that the suit was within time, having been brought within 12 years of the death of the second widow; [p. 169, col. 2.]

(2) that mere delay in suing was no proof of acquiescence or waiver by the plaintiffs of their rights; [p. 170, col. 2.]

(3) that as there were circumstances giving rise to grave suspicions as to the genuineness of the Will alleged to be executed by the last male owner the presumption allowed by section 90 of the Evidence Act could not be drawn; [p. 170, col. 1.]

(4) that the alleged Will not having been proved, the widows must be regarded as having held only on the usual tenure for life, and no gift by them could defeat the claims of the reversioners on the widows' death; [p. 170, col. 2.]

(5) that, therefore, the plaintiffs were entitled to a decree. [p. 170, col. 2.]

First appeal from the decree of the Subordinate Judge, 1st Class, Amritsar, dated the 27th November 1911, dismissing the claim.

The Hon'ble Mr. Muhammad Shafi, and Lala Sarab Dayal, for the Appellants.

Mr. Kirkpatrick and Rai Bahadur Pandit Sheo Narain, for the Vendee-Respondent.

Mr. Manohar Lal, for the Vendor-Respondent.

JUDGMENT.—This suit relates to two shops and a *haveli* in Amritsar City, which were formerly the property of Sardar Jiwan Singh who died about 35 years ago, leaving two widows Musammât Dayal Kaur and Musammât Mehtab Kaur and a daughter Musammât Sahib Kaur alias Hukum Kaur, the wife of Sardar Harnam Singh alias Richpal Singh. The plaintiffs and Saudagar Singh are the reversioners of Sardar Jiwan Singh. Plaintiffs sue for their share, 7/8ths. Defendant No. 1 is Mehr Singh, purchaser from Richpal Singh. Defendant No. 2 is Richpal Singh. Defendant No. 3 is Saudagar Singh. The remaining defendants are tenants. Of the defendants Saudagar Singh, Ganesha Singh and Daulat Singh have not been served, service on Ganda Singh and Kirpa Ram has been effected by posting notices on to their doors, but it is not clear that this step was justified, Sawan Singh and Kharka are said to have died and their representatives have not been brought on to the record. But as Mr. Shafi says he does not want a decree against these seven respondents, we strike their names off the record.

On 2nd January 1884 the widows gifted the property in suit to Musammât Sahib Kaur, daughter of Musammât Mehtab Kaur.

Sometime after Musammât Dayal Kaur died. On 7th November 1894 Musammât Sahib Kaur died. Then on 24th October 1902 the remaining widow Musammât Mehtab Kaur died and the reversioners got mutation of the landed property effected in their favour, but the property in suit remained with Sardar Richpal Singh (who had been living with his mother-in-law apparently since the death of his wife). On 17th September 1906 Sardar Richpal Singh sold the property to Mehr Singh who is the principal defendant in this case. On 29th November 1910 the plaintiffs brought the present suit. It is within time, having been brought within 12 years of the death of the second widow. The defence is that Sardar Jiwan Singh gifted this property, which was his self-acquired property, to his widows absolutely, and that they gifted it absolutely to Musammât Sahib Kaur, on whose death her husband became the owner.

The plaintiffs deny that Sardar Jiwan Singh ever made any Will. The first Court has dismissed the suit, holding the Will propounded to be a genuine one. The plaintiffs appeal.

The Will in question is an unregistered document, dated 13th February 1869, professing to have been written by one Ala Dad, and witnessed by two illiterate Kashmiri weavers. It professes to bear the marks of Sardar Jiwan Singh and of the two attesting witnesses. Mehraj Din deed-writer (P. W. No. 12) says his father Ala Dad died in 1907 at the age of 70; he identifies his father's handwriting. This is really the only evidence to prove the Will. One witness Ahad Khan (D. W. No. 6) son of Satar Khan professes to recognize his father's mark on the Will; his father's name is entered as one of the two attesting witnesses. But Ahad Khan's evidence is obviously worthless. He professes also to identify his father's mark on two other documents, but he owns that all three marks differ from one another.

The first Court has made the presumption allowed by section 90, Evidence Act, the document professing to be over 30 years old. After due deliberation we do not think that this is a case in which the presumption should be made. Such a Will could easily be forged at any time, and where the writer, the executant and the witnesses

GUJAR SINGH v. MEHR SINGH.

are all dead the forgery could be perpetrated without much fear of any criminal prosecution.

It is to be noted that in the deed of gift the widows only refer to a Will in a vague way, saying they make the gift of their own free will and consent, and according to their husband's Will (*hasb wasiyat khawind*). Had they had the Will with them there is no reason why the date of the Will should not have been mentioned. To give the date is not compulsory no doubt, but it certainly is very usual. The deed of gift does not even mention whether the Will was written or oral. The widows certainly were not acting on instructions contained in the Will now set forward, for that Will says nothing as to any gift to the daughter. Had there been a written Will, we should have rather expected a *wasiyatnama* to be mentioned in the deed of gift. If the *Sardar* had wished to leave the house to his daughter he would have done so in writing. The words *hasb wasiyat* are such as would often be used by widows desirous of making a gift and professing to be acting merely in accordance with deathbed oral instructions in order to prevent the reversioners from afterwards contesting the gift. Further the defendants' pleas do not give the date of the Will, nor even mention if it was a written or an oral Will, and the fact is noticeable that though the defendants put in on 27th March 1911 the deed of sale and an extract shewing the date of the death of *Musammât Sahib Kaur*, they did not put in the Will on which they now rely until a later date. All this gives rise to grave suspicions. Respondents' Counsel points to the elaborate description of *Sardar Jiwan Singh* given at the foot of the Will, but this description seems to be a *verbatim* copy of the description given at the foot of the sale-deed of 7th January 1869, cf. pages 9 and 17 of the paper-book.

The plaintiffs, on the other hand, have produced evidence to shew that *Sardar Jiwan Singh* sometimes signed documents in *Gurmukhi* and sometimes used a seal. This evidence, however, is not very strong, but apart from this we think there are circumstances giving rise to grave suspicions as to the genuineness of the Will, and we do not, therefore, think fit to make the presumptions allowed by section 90, Evidence Act. Unless

these presumptions are made it is impossible to pronounce in favour of the Will. Even if the evidence of *Mehraj Din* be accepted as correct (though other evidence would shew that *Ala Dad* generally wrote *shikasta* and not *nastalik*), this only shews that the document must have been written somewhere before 1907 when *Ala Dad* died. It is not impossible that *Richpal Singh* wanted a document to support the deed of gift in order to satisfy a purchaser who might fear to purchase a property gifted by females. The conduct of *Sardar Richpal Singh* in this case has not been creditable; his defence was struck off because he evaded service of notice when his evidence was required, see page 64 of the paper-book. As we hold the Will not proved it follows that the widows must be regarded as having held only on the usual tenure for life, and no gift by them can defeat the claim of the reversioners on their death. The plaintiffs must, therefore, get a decree.

As to the claim for compensation for improvements we have examined the evidence, and can find no proof of improvements subsequent to the death of *Musammât Mehtab Kaur*. Before her death money was no doubt laid out on the property, but from the evidence it is not proved whether the money so laid out belonged to her or to her son-in-law. The claim for compensation cannot therefore, be allowed.

The first Court has held that plaintiffs' delay in bringing this suit till 8 years after the death of *Musammât Mehtab Kaur*, "if it does not amount to acquiescence, is nothing short of waiver." The plaintiffs have sued within the time allowed by law, and the mere delay in suing is no proof of waiver or acquiescence. All the same time had the plaintiffs sued promptly on the death of *Musammât Mehtab Kaur* the sale to *Mehr Singh* would never have taken place, and *Mehr Singh* would not have been a loser. *Mehr Singh* is entitled to sympathy, and the plaintiffs will be left to bear their own costs.

In conclusion we may remark that the first Court is in error in thinking that the plaintiffs were parties to the suit decided in 1902 in the Munsif's Court. As far as we can see there is nothing to shew that the plaintiffs, who do not live in Amritsar City,

KUNWAR ■■■ v. DARBARI LAL.

were ever aware of the gift by the widows during the lifetime of Musammat Mehtab Kaur.

We accept this appeal and give the plaintiffs a decree for 7/8ths of the property in suit.

The parties will bear their own costs in both Courts. The decree will stand against defendants other than those whose names have been struck off (see earlier part of this judgment).

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1885 OF 1914.

April 10, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
KUNWAR SEN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

DARBARI LAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Adverse possession—Right to redeem, it can be adversely possessed—Equity of redemption, nature of.

A person cannot be said to be in "adverse possession" of the right to redeem immovable property, where the right to possession and actual possession is all the time in the hands of the mortgagee. The fact that he succeeds in getting his name recorded in the Revenue papers does not confer a title on him. [p. 172, col. 1.]

Semle.—A person cannot be said to be in "adverse possession" against the owner while the former is neither in actual possession nor in constructive possession by receipt of the rents and profits. [p. 172, col. 2.]

The equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee. [p. 172, col. 2.]

Second appeal from the decision of the District Judge of Mainpuri, dated the 15th August 1914.

Mr. Durga Charan Banerji, Dr. S. N. Sen and Mr. Yatish Chandra Roy, for the Appellants.

Dr. Tej Bahadur Sapru, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought to redeem a mortgage, dated the 17th of July 1874. The mortgage was made by one Dulha Rai. The plaintiffs alleged that their ancestor (what ancestor, they do not say) was the real owner and that it was

only on account of private arrangement that Dulha Rai made the mortgage instead of the ancestor. They then go on to claim that only a small sum is now due on the mortgage, but they are willing to pay whatever the Court finds to be due and so redeem the property. The Court of first instance, after calling attention to the very vague way in which the plaintiffs alleged their right, held that the plaintiffs had not proved that they had any connection with Dulha Rai, or that their ancestor was the owner of the property. The plaintiffs had alleged, and produced some evidence to show, that they had been in receipt of certain *sewai* income. They also proved (which apparently is the fact) that some time after the death of Dulha Rai they or their ancestor succeeded in having the name of the widow of Dulha Rai removed from the revenue papers and their own names recorded; also that they successfully resisted an attempt of the heirs of Dulha Rai to have this record changed in the year 1902. The plaintiffs' witnesses went so far as to swear that the plaintiffs had been receiving Rs. 24 annually from the mortgagee. This allegation was quite contrary to the allegation in the third paragraph of the plaint, in which the plaintiffs say that this sum of Rs. 24 a year had never been paid or realised. The first Court found that the allegation of the plaintiffs that *sewai* income had been received was untrue. On appeal the plaintiffs contended that even on the assumption that they had failed to prove that Dulha Rai represented their ancestor, they had nevertheless (by the evidence they produced) proved that they had been in "adverse possession" of the equity of redemption. They based this contention on the proved fact that they and their ancestors had succeeded in having their names entered in the manner we have stated and on the further allegation (which is probably quite untrue) that they had received the *sewai* income. In this connection we may mention that, whether they received the *sewai* income or not, is of very small importance, because under the terms of the mortgage (whether Dulha Rai was the real mortgagor or not) the mortgagor during the continuance of the

KUNWAR SEN v. DARBARI LAL.

mortgage was not entitled to the *sewai* income. The only reservation in the mortgage was Rs. 24 *mulikana* allowance, which according to the plaintiffs' own admission was never paid or realised. The lower Appellate Court held against the plaintiffs. The learned Judge says that there might have been something in the plaintiffs' contention had that been their original case, but goes on to hold that it was no part of their original case. The learned Judge dismissed the appeal. In second appeal to this Court it was contended that the plaintiffs did foreshadow, at least in their plaint, the case of adverse possession of the equity of redemption, that evidence was on the record and the defendants could not be said to have been taken by surprise, and that accordingly the Court ought to have considered this contention and to have decided in favour of the plaintiffs if they were so entitled. Accepting this standpoint, the question we have to decide is whether or not the plaintiffs can be said to have been in "adverse possession" of the equity of redemption. In other words, whether the right of *Dulha Rai* and his heirs has by adverse possession vested in the plaintiffs. For the reasons already stated we may disregard altogether the allegation of the receipt of *sewai* income. There remains only the fact that the plaintiffs succeeded in getting their names recorded in the way we have mentioned. It seems to us that this fact could never confer a title on the plaintiffs. We have great difficulty in seeing how a person could be said to be in "adverse possession" of the right to redeem immovable property, where the right to possession and actual possession is all the time in the hands of the mortgagee. Article 144 of the Limitation Act provides that a suit for possession of immovable property or any interest therein is to be brought within 12 years of the time when possession of the defendant becomes adverse to the plaintiff. If we assume that *Dulha Rai* and his heirs were all along entitled to possession of this property subject to the possessory mortgage of the defendants, it is quite clear that so long as the mortgage subsisted, they could never have brought a suit for possession against the plaintiffs. The mere fact that the plaintiffs had been asserting

a title adverse to them, would not have entitled the plaintiffs to bring a suit for possession. True it is that they might have brought a suit for a declaration of their title but they were not bound to do so. A person cannot be said to be in "adverse possession" against the owner while the former is neither in actual possession nor in constructive possession by receipt of the rents and profits. Reliance is placed upon a judgment of the Calcutta High Court in the case of *Lalla Kanhoo Lal v. Musammatt Manki Bibi* (1). This case, no doubt, is to some extent in favour of the plaintiffs. A number of authorities were referred to including the case of *Casborne v. Scarfe* (2) and the judgment of Lord Hardwicke is quoted. Lord Hardwicke, no doubt, pointed out in that case that an equitable estate might be barred by time just as much as a legal estate, and he then refers to and describes an equity of redemption. It must be borne in mind, however, that the equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee. There can be no doubt that an equitable estate, as distinguished from a legal estate, can be barred by time, but it seems to us impossible that any person can be in possession of the right to redeem a mortgage where, under the terms of the mortgage, the mortgagee is entitled to the actual possession, and is in fact in possession thereunder. We think that the view taken by the Court below was correct and we accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 6 C. W. N. 601.

(2) (1737) 1 Atk. 603; 2 Wh. & T. L. C. (7th ed.) 6; 26 E. R. 377.

HARPAL V. RAM SARUP.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 31 of 1915.

April 28, 1916.

Present: Mr. Justice Walsh.

HARPAL—PLAINTIFF—APPELLANT

versus

RAM SARUP AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 62, 116—Mortgage—Mortgagor receiving rents—Suit by mortgagee to recover rents received by mortgagor, nature of—Money had and received—Breach of contract—Damages—Mesne profits—Practice.

The defendant mortgaged certain holdings to the plaintiff. The plaintiff lived some distance away and the rents were collected by a relation of his. After the death of the relation the defendant collected the rents and thereby became possessed of the property. The plaintiff sued for possession and claimed rents received by the defendant from the mortgaged property from time to time during the last three years immediately preceding the suit. The defendant contended that the action for rent wrongfully received by him was barred because the rents had been received for more than six years:

Held, that Article 62 of Schedule I to the Limitation Act, 1908, applied to the case and the suit was not barred, inasmuch as each time the defendant received rent he committed a breach of contract. [p. 174, col. 2; p. 175, col. 1]

Held, also, that the plaintiff might have claimed in several distinct causes of action, although combined in one suit, all the rents received within six years of the suit inasmuch as each receipt was a separate breach of the mortgage contract or money received to his use. [p. 175, col. 2.]

Semle.—Where a mortgagor having no shadow of right to take the rents of the mortgaged property realizes such rents he commits not only tort but also a breach of contract. [p. 174, col. 2.]

Damages for a wrong can only be claimed once, and the cause of action accrues at the date of the wrong. But if another person receives money which rightly belongs to a third person, that third person has a right to sue him each time it occurs as it is not damages at all but money had and received within the meaning of Article 62 of the Limitation Act. [p. 175, col. 1.]

In such cases the practice of framing claims for general damages for the original breach of the contract by dispossession is attended with serious risks to the litigant and Pleaders would be well advised to frame their claims for what they are in substance, namely, money wrongfully received from time to time as defined by Article 62 of the Limitation Act or as successive breaches of contract under Article 116 of the Act. [p. 175, col. 2.]

Second appeal from the decision of the District Judge, Allahabad, dated the 5th December 1914.

FACTS of the case appear from the following judgment of the lower Appellate Court:—

"The plaintiff-appellant Harpal filed a suit out of which this appeal arises on the allegation that the property in suit was mortgaged to him with possession in 1898 and that he was deprived of possession by the defendants seven years before the suit. He claimed (1) recovery of possession; (2) Rs. 360 damages for his dispossession during the three years prior to the suit; (3) in case these reliefs were not granted, recovery of the mortgage-money with interest.

The suit has been decreed in his favour as regards the first relief and dismissed as regards the remaining reliefs. His appeal is directed solely against the dismissal of his claim for three years' damages. The learned Munsif has held this relief to be time-barred under Article 116 of the Limitation Act on the strength of the ruling in *Madan Lal v. Reoti Singh* (1). The appellant, on the other hand, contends that it is covered by Article 109 of the Limitation Act and relies on a ruling in *Govindrav v. Jiwanji* (2). He also suggests that it might be claimable as interest, inasmuch as the mortgage-deed allowed him to recover 2 per cent. interest in case of dispossession. In answer to this contention it is pointed out that the claim for the mortgage-money including interest has been dismissed by the lower Court and that no appeal has been preferred against this part of the decree.

It appears to me that it is unnecessary to go into the question of which Article of the Limitation Act applies inasmuch as there is a plain and obvious ground on which the suit must fail, as it plainly appears on the face of the proceedings that the plaintiff's want of possession is entirely due to his own negligence. The plaintiff admits that he has never been near the property, and has never collected any rents of it himself. It appears that one time his uncle collected rents. From the time that his uncle died the plaintiff allowed his possession to lapse. He does not even assert that he ever took any steps towards taking possession, except that

(1) 4 A. L. J. 249; A. W. N. (1907) 108.
(2) 2 Bom. L. R. 201.

HARPAL V. RAM SARUP.

last year before bringing the suit he asked the defendants to pay him profits, and there is no doubt that in reality he never made any attempt to claim or assert possession until the present suit. Under such circumstances, as was held in *Jhunku Singh v. Chatkan Singh* (3), he has no right to claim damages. It was objected by the appellant that this plea, which has been very forcibly urged before me in this Court, was not put forward in the defendants' written statement. This is only partly correct. The defendants' main case no doubt was that the possession of Oudh Behari who was found to be in possession of the property up to the time of suit, was possession on behalf of the plaintiff. But they did in paragraph 2 of their written statement categorically deny that they ever took unlawful possession by dispossessing the plaintiff and this I find to be true. At that time the plaintiff's uncle had died and the plaintiff had made no attempt to assert his own possession. The defendants also deny generally that the plaintiff is entitled to any damages or that he has any cause of action for this relief, and for the reason which I have given I find that he is not entitled. The result is that the appeal fails and it is accordingly dismissed with costs."

Mr. *Gulzari Lal*, for the Appellant, contended that the mere fact that the appellant made no attempt to assert his possession does not disentitle him to claim mesne profits, and that in addition to his remedy for his dispossession. Because the respondents were in wrongful possession he could claim the rents actually and wrongfully received from time to time by the respondents.

Mr. *P. L. Banerjee*, for the Respondents, contended that the dispossession of the plaintiff began from seven years before the suit and that as the damages for breach of contract could be claimed only for six years from the breach, the suit is barred.

He referred to *Balgobind Das v. Barkat Ali* (4); *Mansab Ali v. Gulab Chand* (5); *Madan Lal v. Reoti Singh* (1); *Jhunku*

Singh v. Chatkan Singh (3); *Abbas v. Fasih-ud-din* (6); *Jiwan Singh v. Miskin Lal* (7); *Hays v. Padmanand Singh* (8).

Mr. *Gulzari Lal* replied.

JUDGMENT.—In this case the defendant mortgaged certain property for Rs. 500 on 12th September 1898 to the plaintiff.

The property consisted of certain occupancy holdings.

The plaintiff lived some distance away and the rents were collected for him by an uncle, who died in the year 1906.

After that date the defendant collected the rents and thereby became possessed of the property.

That was an actionable wrong which took place seven years before the commencement of the suit.

The plaintiff in 1913 sued for and recovered possession, and that part of the judgment of the first Court is not contested.

The plaintiff also claimed the rents received by the defendant from the mortgaged property from time to time during the last three years immediately preceding the suit.

It cannot be denied that the defendant's possession has throughout been wrongful. He had no shadow of right to take the rents, and each time that he took them he was putting in his pocket money which under the contract belonged to the plaintiff. That, of course, was a tort, but it was also a breach of contract.

It is said that this began seven years ago, that the limit for actions for damages for breach of contract is six years from the breach, and that, therefore, the action for rent wrongfully received by the defendant is barred because the rents have been received for more than six years.

So far as the act of dispossession is concerned this argument is perfectly sound. It is immaterial in this case because the period is 12 years, and the suit has been brought after the lapse of seven years.

But so far as the actual receipts of rent are concerned I am unable to follow the argument. Each time the defendant received rent he committed a breach of contract. It was nonetheless a breach

(3) 2 Ind. Cas. 221; 6 A. L. J. 247; 31 A. 325.

(4) A. W. N. (1888) 15.

(5) A. W. N. (1887) 292.

(6) 24 C. 413.

(7) A. W. N. (1894) 48.

(8) 32 C. 118.

HARPAL U. RAM SARUP.

contract, because he had already committed several others and had been in wrongful possession for a long time. His possession was still wrongful, and he had acquired no title to the money. I held that the Article of the Limitation Act which is applicable is Article 62.

The respondent's Counsel was forced to admit that he might have been sued for each given period in respect of which he had received rent. That seems to me to knock the bottom out of his case. Damages for a wrong can only be claimed once, and the cause of action accrues at the date of the wrong. But if another person receives money which rightly belongs to me I have a right to sue him each time it occurs. It is not damages at all. It is money had and received to my use which gives me the cause of action defined in Article 62 whenever the money is received.

In this case the plaintiff described his claim in his plaint as one for damages. This is an erroneous description, but the law looks at the substance and not at the form.

A number of authorities were cited which seemed at first sight to be inconsistent with this view. But on examination they turn out to be clearly distinguishable. The strongest perhaps is *Balgobind Das v. Barkat Ali* (4). That case has been followed in various others of a somewhat similar character. In none of them was Article 62 referred to.

They may all be justified on the ground that what was attempted there was to claim general damages in a round sum, based upon an estimate of the loss suffered by the person dispossessed of land, calculated upon the annual value, or rents likely to be received during the period which had elapsed since the dispossession. This is one way of claiming mesne profits no doubt. It is the only way when the wrongdoer has himself been in occupation, and after a lapse of six years it seems clear that such a claim is time-barred.

But Mr. Gulzari Lal, for the appellant, repudiated this form of claim. He put his case upon the ground that in addition to his remedy in specie for his dispossession, i.e., the decree for possession, he claimed the rents actually and wrongfully received from time to time by the defendant.

In none of the cases cited was this question raised or decided, and the decisions are, therefore, not binding upon me.

A practice seems to have grown up of framing claims of this nature as claims for general damages for the original breach of the contract by dispossession. It seems to me in the light of the authorities cited, that this form of claim is attended with serious risks to the litigant, and that in future Pleaders would be well advised to frame their claims for what they are in substance, namely, money wrongfully received from time to time as defined by Article 62 of the Limitation Act or as successive breaches of contract under Article 116.

I may add that whereas in this case the mortgagee was originally in possession and was dispossessed during the currency of the mortgage, in the case above referred to the mortgagee had been withheld from possession from the very beginning. This is another distinction, but it is not the ground upon which I decide this case.

The view I take was taken in Bombay in *Gorindrav v. Jiwanji* (2) by construing Article 109 as meaning "profits belonging to" instead of "property belonging to". I am not satisfied that this is not a strained interpretation of the Article but if it is sound it clearly justifies the claim made here.

But I think the plaintiff might have claimed in several distinct causes of action although combined in one suit, all the rents received within six years of the suit on the ground that each receipt was a separate breach of the mortgage contract or money received to his use.

The view taken by the District Judge was not persisted in this Court. Some people may think it desirable that persons who neglect to make claims promptly should be liable to be defeated altogether on the ground of negligence. It would revolutionize the prevailing system of credit. But at present such a view is inconsistent with the Statute of Limitation and has no foundation in law.

This appeal must be allowed. The decree in the lower Appellate Court must be reversed and the decree of the Munsif putting the plaintiff in possession must be restored, with the further modification

MANECKJEE PALONJEE V. NEDERLANDSCHE HANDEL MAATSCHAPIJ.

that the plaintiff recover from the defendant the sum of Rs. 300 with costs of the suit. The plaintiff must have his costs of the appeal to the lower Appellate Court and of this appeal on the higher scale.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 151 OF 1914.

January 10, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Parlett.

MANECKJEE PALONJEE—PLAINTIFF—

APPELLANT

versus

NEDERLANDSCHE HANDEL

DEFENDANT—MAATSCHAPIJ—DEFENDANT

RESPONDENT.

Evidence—Bank, deposit of money in—*Proof of payment*—*Burden of proof*—*Fraud*.

When a Bank denies the alleged payment of money to it by any of its constituents, the onus is on the latter to prove payment and the burden is discharged when it is shown that the money was made over to the cashier or to some employee of the Bank authorized to receive moneys on its behalf. It is not necessary for such constituent either to allege or prove fraud on the part of any of the Bank officials.

Mr. N. Cowasjee, for the Appellant.

Mr. Leach, for the Respondent.

JUDGMENT.

Fox, C. J.—Practically the only question in this case is whether the plaintiff proved that, on the 20th May 1913, Rs. 15,000 had been handed over on his behalf to an employee of the Bank authorized to receive money from its clients for credit to their accounts.

The learned Judge says in his judgment that the onus was on the plaintiff to prove affirmatively that the money was paid in, and also to prove the fraud he alleges. The first proposition is correct, but in stating that it lay on the plaintiff to prove that a fraud had been committed the learned Judge, in my opinion, erred in law. It was not incumbent on the plaintiff to allege any fraud and he in fact did not do so in the plaint. Soon after his cheque for Rs. 45,000 was refused payment, it was no doubt clear to him as well as to the Bank's higher officials that a fraud had been

committed and the attitude taken by him was that the fraud must have been committed by one or more of the Bank's employees, but the onus of proving who committed it and how it was done certainly did not lie on him. If he could prove that the money had been made over to a cashier of the Bank in the Bank premises an amount to be placed to his credit in the Bank's books, he was entitled to succeed in the suit. It is not material whether the amount passed through the Bank's books or not. The cashiers of this Bank as well as of probably all other Banks were its employees held out by it to receive moneys from their clients, and the Bank was liable for all moneys paid to one of them in the Bank's premises for credit to a client's account even if no other official in the Bank saw or heard of the money. The plaintiff's case was that the Rs. 15,000 was made over by his son Mutabhoy to one of the Bank's cashiers Jugganath P. Pandiya on the afternoon of the 20th May 1913. Jugganath denied that any sum had been made over to him by Mutabhoy on that day. The question is fixed down to whether credit is to be given to Mutabhoy's statement in support of his father's case as opposed to Jugganath's denial of them.

[After discussing the evidence in the case, His Lordship concluded as follows:—]

I would allow the appeal, reverse the decree of the Original Court, and give the plaintiff a decree for Rs. 15,216-8-3 plus Rs. 500 as damages, and interest on Rs. 15,000 at 6 per cent. per annum from the 26th May 1913 and his costs in the Original Court and in this Court, the costs in the Original Court to be as settled by that Court, and the costs on the appeal to be calculated as usual, but an extra fee of 7 gold mohurs to be allowed as Advocate's fee for every day after the first on which the appeal was heard.

PARLETT, J.—I concur.

Appeal allowed.

KAHAN SINGH v. MOHAN LAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1997 OF 1912.

November 7, 1914.

Present:—Mr. Justice Rattigan.

Bhai KAHAN SINGH—PLAINTIFF—

APPELLANT

versus

Rai Bahadur Lala MOHAN LAL AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 15 (c)—Award filed after time fixed therefor, whether nullity—Agreement not to raise any objection to award, how far binding.

An award made after the expiration of the time fixed by the Court is not a mere nullity, though it is liable to be set aside upon an application by one or other of the parties affected thereby [p 178, col. 2.]

Shib Kristo Daw and Company v. Satish Chandra Dutt, 18 Ind. Cas 69; 39 C. 822, followed.

On the date fixed for the hearing of a second appeal, the parties presented an application in writing signed by themselves and their respective Counsel appointing two persons as their sole arbitrators and authorising them to decide all matters in dispute between them. They agreed that they would have "no objections whatever" to the award. The Court thereupon referred the matter in dispute to the two arbitrators, who were directed to make an award within one month from the date of the order, i.e., the 29th March 1913. On the 29th April the arbitrators applied for an extension of one month from the date of the application, which was allowed on the 5th May. The award was made on the 30th May 1913. On the 26th June the appellant filed objections, claiming that the award should be set aside because (1) it was filed after the time fixed and (2) the arbitrators were guilty of misconduct:

Held, (1) that the mere fact that the award was filed after the time fixed therefor did not make it a nullity; [p. 278, col. 2]

(2) that in view of his agreement the appellant was debarred from urging any objections to the award of the arbitrators. [p. 179, col. 2; p. 180, col. 1.]

Tullis v Jackson, (1892) 3 Ch. 441; 61 L. J. Ch. 655; 67 L. T. 340; 41 W. R. 11, followed.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 14th October 1912, reversing that of the Subordinate Judge, first class, Lahore, dated the 12th April 1911, decreeing the claim.

Mr. Broadway, for the Appellant.

The Hon'ble Mr. Mohammad Shafi, K. B., Kanwar Dalip Singh and Lala Durga Das, for the Respondents.

JUDGMENT.—Plaintiff, Bhai Kahan Singh, instituted a suit in the Court of the Subordinate Judge, First Class, Lahore, in which he prayed for the grant of an injunction restraining defendants, Rai Bahadur Mohan Lal and Lala Lal Chand, from building

on certain specified land. A decree with the consequential relief prayed for was granted to him by the Subordinate Judge, but this decree was reversed and plaintiff's suit dismissed by the Additional Divisional Judge.

Plaintiff filed a second appeal in this Court and his appeal was admitted by order dated 10th January 1912 and the hearing was fixed for the 29th March 1913, on which date the parties presented an application in writing signed by themselves and their respective Counsel to the following effect:—

"We, the parties to the above appeal, of our free will and consent, appoint Lala Mool Chand, merchant of Anarkali, and Lala Ram Rakha Mul, Banker and Proprietor of the firm of Lala Tirath Ram Khushali Mal, our sole arbitrators, and authorise them to decide all matters in difference in the above appeal finally, in whatever manner they may choose and their award will be binding on both parties and we will have no objections whatever to their award."

This Court thereupon, by order dated 27th March 1913, directed that in accordance with the said application all matters in difference between the parties in the said appeal should be referred to the aforesaid arbitrators, who were to determine the same and to make an award within one month from the date of the order.

The arbitrators on the 29th April 1913 presented a written application to this Court, stating that they were unable within the time appointed to make their award and praying for an extension of one month from the date of their application.

This application was granted on the 5th May 1913 and the award (which practically upheld the order of the Divisional Judge) was made on the 30th May 1913.

Appellant on the 26th June 1913 filed written objections to the award and claimed that it should be set aside (a) because the award was submitted after the time fixed therefor had expired and (b) because the arbitrators had been guilty of various acts and omissions which amounted to misconduct.

At the hearing before me on the 5th instant Mr. Shafi on behalf of the respondents raised the preliminary objection that

KAHAN SINGH v. MOHAN LAL.

the appellant was debarred from making an objection to the award, inasmuch as the parties had expressly agreed that the decision of the arbitrators was to be final and binding, and that the parties would not raise any "objections whatever" to it.

In reply to this contention Mr. Broadway, for the appellant, urged (1) that the award was a mere nullity, inasmuch as it had been made after the time fixed by this Court and that consequently this Court should *suo motu* treat it as non-existent, apart from any objection urged by the appellants and (2) that the appellant's agreement could not reasonably be construed as depriving him of the right which he had under the Civil Procedure Code to object to an award which was given by arbitrators who had been guilty of misconduct.

In support of his first contention the learned Counsel relied upon the ruling of their Lordships of the Privy Council reported as *Raja Har Narian Singh v Chaudrain Bhagwant Kuar* (1). This decision was given when the Civil Procedure Code of 1882 was in force and it would, of course, be binding upon me if I had to decide the present case under that Code. But the Code of 1882 has been since repealed by the Code of 1908 and there is good authority for holding that the Legislature has altered the law upon this point. The change in the law is clearly brought out by Bannerji in his work on the Law of Arbitration in India (1913). At pages 286 and 287, he observes, "Under section 521 of the Code of 1882, after setting out the grounds on which an award could be set aside in clauses (a), (b) and (c), the Legislature provided in the last paragraph of that section that 'no award shall be valid unless made within the period allowed by the Court.' This clearly implied that an award made after the period fixed by the Court was an absolute nullity and it was not necessary to have it set aside within the period allowed by law. The effect of the omission of the last paragraph of section 521 of the Code of 1882, as a separate provision, and the addition of the words 'or after the expiration of the period allowed by the Court' in clause (e) of paragraph 15 of the

(1) 13 A. 300 (P. C.); 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283.

present Code, is that though an award made after the period allowed by the Court is invalid under the present Code, as it is under the Code of 1882, the only remedy now open to a party impeaching the award on that ground is to apply under paragraph 15 to set aside the award. If no application is made to set aside the award or if an application is made and refused, the award becomes final, and no appeal will lie from the decree passed in accordance with that award." This statement of the law as it now stands is supported by *Shib Kristo Daw and Company v. Satish Chandra Dutt* (2), in which case Jenkins, C. J., remarked: "I fail to see how it can be said, in view of the language used in rule 15, that there was no award, because that rule deals explicitly with the position of an award having been made after the expiration of the period allowed by the Court, and it does not, as the Code of 1882 did, provide that such an award shall not be valid, but that such an award must be set aside, so that it seems to me that it cannot be said that there was no award. The most that could be said is that this award was liable to be set aside."

This exposition of the law accords, if I may venture to say so, with my own views as to the proper interpretation of paragraph 15 of Schedule II of the present Code of Civil Procedure, and I accordingly hold that the award before me, though made after the expiration of the period fixed by this Court, was not a mere nullity, and at most was liable to be set aside upon an application by one or other of the parties affected thereby.

The question, then, remains whether it is competent to the appellant, in view of his agreement not to offer 'any objections whatsoever' to the award, to object nevertheless to it upon the grounds set forth in his memorandum of objections.

Mr. Broadway urged that it would be most inequitable, and indeed contrary to public policy, if an agreement of this kind were to deprive a party from objecting to an award if he could show that the arbitrators had been guilty of the most scandalous misconduct and had acted in defiance of the most elementary principles of justice. He does not say that such was actually the case in the present instance but

(2) 18 Ind. Cas. 69; 35 C. 822.

KAHAN SINGH v. MOHAN LAL.

he argues that if an agreement of this kind is to act as a bar irrespective of the grounds upon which the award is attacked, the result would be that arbitrators would have leave and license to decide disputes arbitrarily and without regard to the ordinary canons of fairplay and justice. This argument has a specious plausibility, but consideration shows that it has no real force. No one is obliged to enter into such an agreement, and presumably a man of full age who does so is a free agent when he undertakes to abide at all hazards by the award. He presumably is acquainted with the character of the arbitrator to whose sole arbitrament he leaves his case, and the Court is justified in assuming that an arbitrator so selected is not likely to act unfairly towards either parties. Moreover, it may well be that the parties would not have agreed to refer their disputes to the determination of an arbitrator unless they were satisfied that no objections would thereafter be raised to the decision of that arbitrator. Of course, if one of the parties can show that he was induced to make an agreement of this kind by the fraud of the other party, or if he can prove any other ground which would render his agreement void or voidable, he may well be entitled to claim that the agreement is not binding on him. That, however, is an entirely different question and does not arise in this case. Here we have business men of full age deliberately and with knowledge of what they were doing agreeing to accept as final the award of two arbitrators and not to raise any objection whatsoever to that award, and I know of no authority which supports the contention that despite that agreement it is still open to one of them to object to the award on the ground that the arbitrators acted fraudulently, dishonestly or in bad faith. Mr. Broadway argues that his client's agreement cannot deprive him of the rights which the Civil Procedure Code gives him. But *quilibet potest renunciare juri pro se introducto*, and apart from that answer to the argument, I fail to see what would be the meaning of the agreement if the learned Counsel's argument were to be accepted. The only objections which can be urged to an award are those specified in the Code and if these are to be eliminated, what possible meaning could be placed upon the agreement?

Upon principle, therefore, I would hold

that appellant is debarred by his agreement from urging any objections to the award of the arbitrators, but I find that there is direct authority which supports my view. In *Tullis v. Jackson* (3), Chitty, J., made the following remarks:—

'It is said that the clause is void as being against public policy, because in substance it is an agreement on the part of the plaintiffs and defendants through the committee not to set up fraud, and the argument proceeds in this way. 'The Court will not listen to any such stipulation to be found in any contract however solemn.' To some portion of this argument, I accede. If a contract was obtained by fraud and in the contract itself there was the term inserted that neither party should impeach the contract on the ground of fraud, it may well be that such a term would not stand, and the reason is obvious, that the Court would set aside that contract, because it was obtained by fraud, and setting aside the contract, it would set aside the stipulation. That is a case I put by way of illustration, of fraud between the parties to the contract in its inception.

* * * * * But the case I have to deal with appears to me to be an entirely different one. * * * * * It is of course for the contractor when he enters into a contract of this kind to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific; but they do it as business men, they do it for better or worse, and they think on the whole it is very unlikely that any architect selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject. Then it appears to me that the policy of the law does not require that I should hold, in the case I am now dealing with, a clause like the present to be void. To put an illustration, suppose a gentleman who is going to have a house built for him enters into a complex agreement with the contractor, in the performance of which innumerable questions may arise, says, 'will you agree with me (for if you will, I will agree with you) that nothing on earth shall upset the certificate that is given?' Why is that unfair or against public policy? The

(3) (1892) 3 Ch. 441; 61 L. J. Ch. 655; 67 L. T. 340; 41 W. R. 11.

MATHURA MOHAN SAHA v. NABIN CHANDRA DUTT.

late Master of the Rolls (Sir G. Jessel) in the case of the *Printing and Numerical Registering Company v. Sampson* (4), says this: 'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.' Entirely agreeing as I do with these remarks, I myself can see no reason why grown up men should not be allowed to contract in these terms. 'Neither of us', each says to the other, and each agrees with the other, 'will ever raise the charge of fraud.' Persons will shrink very often from charges of this kind, and those who are persistent, will, by making charges, induce persons to come to terms of compromise. It seems to me that this clause is addressed to get out of what the parties may consider evils, and which I have endeavoured to describe. The clause, therefore, stands thus: 'both of us agree, to our advantage or disadvantage as it may turn out, that every certificate given by the gentleman named shall stand firm and good and shall not be questioned even for fraud.' That that is the meaning of the clause I have no doubt." In the case referred to the agreement between the parties which was upheld by the Court was that the valuation, certificates and words of the architect should be final and binding, and should not be set aside or attempted to be set aside on any ground or for any reason, or for any pretence, suggestion, charge or insinuation of fraud, collusion, or confederacy, and the case is referred to in standard works as an authority for the proposition that "it is competent for the parties to agree that the question of fraud or misconduct on the part of the arbitrator shall not be raised by either party," (see Redman's Laws of Arbitration and Awards, 4th Edition, pages 18 and 274; Halsbury's Laws of England, Volume I, page 481, paragraph 96; Russell's Law of Arbitration, page 95, 9th Edition).

I must accordingly hold that appellant is debarred from objecting to the award of the

arbitrators and as that award, though made after the period fixed by this Court, is not a nullity and cannot be set aside except upon a valid objection by one of the parties, I must reject this appeal, pronounce judgment according to the award, and direct that a decree be drawn up in accordance with the terms thereof.

Appeal rejected.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 55
OF 1911.

March 7, 1916.

Present:—Mr. Justice N. Chatterjea and
Mr. Justice Richardson.

MATHURA MOHAN SAHA AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

NABIN CHANDRA DUTT AND OTHERS—
DEFENDANTS RESPONDENTS.

Sole in execution of rent-decree—Purchaser of tenure, liability of, for past arrears of rent.

The purchaser of a tenure at a sale held in execution of a decree other than a decree for rent must, in the absence of anything to denote the contrary, be taken to have purchased it charged with the rent which might be due in respect of it at the time of his purchase. [p. 181, col. 2.]

But where a tenure or holding is sold in execution of a decree for its own arrears of rent, in the absence of anything to denote the contrary, it passes to the purchaser free from all liabilities for its previous arrears, and the purchaser is not liable for the arrears of rent for the period prior to the date of confirmation of sale at which he purchased. [p. 182, col. 1.]

Fazl Rahman v. Ramsukh Brijpri, 21 C. 169; and *Hemlath Chatteraj v. Kartik Chandra Chattopadhyaya*, 6 C. W. N. 877, followed.

Srimati Mohanmoy Das v. Harendra Lal Roy Chowdry, C. W. N. 458; *Perry Mohan Mukhopadhyaya v. Sreeram Chandra Bose*, 6 C. W. N. 744; and *Minindra Chandra, Nanu v. Jimthir Kumari*, 32 C. 644; 9 C. W. N. 570, distinguished.

Appeal against the decree of the Officiating Subordinate Judge, Tipperah, dated the 28th November 1910.

Dr. Sarat Chandra Basak and Babus Bepin Chandra Bose and Srihar Das Gupta, for the Appellants.

Babus Kumar Sunker Roy, Upendra Kumar Roy and Shib Chandra Palit, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the recovery of Rs. 6,249-2-0

(4) (1875) 19 Eq. 462; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.

MATHURA MOHAN SAHA v. NABIN CHANDRA DUTT.

which was paid by the plaintiffs in order to save a *putni taluq* from being sold in execution of a decree for arrears of rent, under the following circumstances.

The plaintiffs on the 5th June 1906 purchased the *putni taluq* for Rs. 11,000 at a sale held in execution of a decree for arrears of rent due thereon up to *Assar kist* of 1312, B. S. Some of the *putnidars* applied to set aside the sale on the 26th June 1906. The application was dismissed for default on the 23rd March 1907, when the sale was confirmed, but the application was subsequently revived and eventually dismissed on the 27th January 1908. While the proceedings for setting aside the sale were pending, and on the 19th March 1907, the *zemindar* brought a suit for arrears of rent of the last three *kists* of 1312 and the whole of the year 1313, B. S., against the recorded *putnidars* (defendants Nos. 1 and 2 in that suit), and the plaintiffs who had purchased the *putni* also were made parties to the suit as defendants Nos. 3 to 10. The present plaintiffs (defendants Nos. 3 to 10 in that suit) contended that they had not obtained possession of the auction-purchased property and the *zemindar* was not entitled to any relief against them, nor to lay any claim over the sale proceeds.

On the 6th July 1907, the Court made a decree which, after directing that the defendants do pay to the plaintiffs the amount of rents, cesses, damages and costs decreed, proceeded as follows:

"That the decretal amount be at first realised by the sale at auction of the property in arrears; but if the entire amount be not realised by the sale at auction of that property, plaintiffs shall be able to realise the amount claimed from the surplus sale proceeds of that *taluk* as realised on the 6th June 1906 by Mathura Mohun Saha and others (the present plaintiffs) and from the defendants Nos. 1 and 2 personally, and it is further ordered that on the confirmation of the sale the defendants Nos. 3 to 10 shall remain liable for the amount of deficit, in proportion to their liability from the date of the sale or from the date of confirmation of the sale. But they shall not be liable in any other way. But even if the sale be not

confirmed, the defendants Nos. 1 and 2 shall remain personally liable."

In execution of that decree the *putni* was put up for sale, and the plaintiffs whose purchase at the previous sale had been by that time finally confirmed, deposited the decretal amount (Rs. 6,066-1-6) and saved the *putni* from sale. It appears that out of the Rs. 11,000, the proceeds of the sale at which the plaintiffs had purchased, Rs. 7,438 is still left in deposit as the surplus sale proceeds, and the plaintiffs in the present suit, which was brought against the former *putnidars* (both recorded and unrecorded), seek to recover the amount paid by them together with interest and costs (Rs. 6,249-2-0) from the defendants and from the surplus sale proceeds.

The Court below held that the plaintiffs are not entitled to recover the sum paid by them, and they have appealed to this Court.

The first question for consideration is whether the plaintiffs were liable for the arrears of rent which were paid up by them. Now the said arrears were for a period prior to the date of the confirmation of the sale at which the plaintiffs purchased the *putni*, during which the former *putnidars* were in possession. The Court below was of opinion that as rent is a first charge on the *putni*, the plaintiffs purchased it charged with the rent due in respect of it at the time of their purchase, and relying on the cases of *Srimati Moharane Dasya v. Harendra Lal Roy Chowdry* (1), *Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose* (2) and *Manindra Chandra Nandy v. Jamahir Kumari* (3) held that it was the plaintiffs who were bound to satisfy the rent decree.

We are of opinion, however, that the principle laid down in those cases do not apply to the present case. The purchaser in those cases purchased the tenure at a sale held in execution of a decree other than a decree for rent, and such a purchaser in the absence of anything to denote the contrary must be taken to have purchased it charged with the rent which

(1) 1 C. W. N. 458.

(2) 6 C. W. N. 794.

(3) 32 C. 643; 9 C. W. N. 670.

MATHURA MOHAN SAHA v. NABIN CHANDRA DUTT.

might be due in respect of it at the time of his purchase. In the present case the tenure was sold in execution of a decree for arrears of rent, and where a tenure or holding is sold in execution of a decree for its own arrears of rent it passes to the purchaser freed from all liabilities for its previous arrears. See *Faez Rahaman v. Ramsukh Bajpai* (4). See also the case of *Haradhan Chatteraj v. Kartik Chandra Chattopadhyay* (5), in which the purchaser of the tenure purchased it with a notice that it was saddled with liability for previous arrears, and the case of *Faez Rahaman v. Ramsukh Bajpai* (4) was distinguished on that ground.

We are of opinion that in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears. That being so, the plaintiffs were not in fact liable for the arrears of rent for the period prior to the date of confirmation of sale at which they purchased the *putni*.

The next question for consideration is, what is the effect of the decree in the second rent suit to which the plaintiffs were parties. At the date of that decree, the sale held in execution of the previous decree (at which the plaintiffs purchased) had not been confirmed, and proceedings for setting aside that sale were then pending.

The decree is not a well-drawn instrument. It begins apparently by imposing a joint and several liability on the two sets of defendants (the plaintiffs and the defendants in the present suit). No doubt it goes on to say that the tenure shall be sold in the first instance, but it also appears to recognise a primary personal liability on the part of the defendants in the present suit. It also leaves open the question whether on the sale of the tenure being confirmed any personal liability on the part of the plaintiffs is to arise as from the 5th June 1906, the date of the sale (in which case the plaintiffs would be liable for a considerable portion of the arrears

covered by that suit, July 1905 to March 1907), or as from the 23rd March 1907, the date of the confirmation of the sale.

The case is not free from difficulty, but in our opinion regard being had to the circumstances and especially to the circumstance that the sale was not finally confirmed when the decree was made, the decree does not preclude the plaintiffs from succeeding in the present suit on the ground that it placed the burden of the debt due to the landlords once for all on the land. That was the ground on which the learned Subordinate Judge dismissed the suit, and no doubt there is something to be said for the conclusion at which he arrived. On the whole, however, it appears to us, the present suit may be regarded either as a suit for contribution on the footing that the decree in the rent suit treated the plaintiffs and the defendants as jointly and severally liable for the arrears claimed, or as a suit for the determination of an issue as to the respective liabilities of the plaintiffs and the defendants, an issue which was not finally decided between them in the rent suit and which may, therefore, be legitimately raised in such a suit as the present.

In either of these two views of the nature of the present suit, the plaintiffs are entitled to succeed.

The defendants Nos. 39 and 40 in execution of their mortgage-decree against the defendant No. 13 (one of the former *putnidars*) attached his interest in the surplus sale proceeds, to the extent of Rs. 472. The plaintiffs in this Court do not object to the payment of Rs. 472 to the said defendants Nos. 39 and 40 out of the surplus sale proceeds in the first instance.

The plaintiffs will accordingly get a decree for Rs. 6,249-2-0, the amount paid by them, to be realised from the surplus sale proceeds of the sale held on the 5th June 1906.

Under the circumstances, each party will bear its own costs in both Courts.

Appeal allowed.

(4) 21 C. 169.

(5) 6 C. W. N. 877.

HARIHAR CHARAN V. JANG BAHADUR.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1625 OF 1914.

April 28, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.HARIHAR CHARAN—DEFENDANT—
APPELLANT

versus

JANG BAHADUR—PLAINTIFF—
RESPONDENT.*Hindu Law—Mitakshara—Succession—Bandhu—
Grandfather's daughter's son's son, whether heir*A grandfather's daughter's son's son is a legal heir
under the Mitakshara School of Hindu Law*Babu Lal v. Nanku Ram*, 22 C. 330; *Buddha Singh
v. Lattu Singh*, 30 Ind. Cas. 52; 20 C. W. N. 1; 29 M.
L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L.
T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481; (1915) M.
W. N. 772; 37 A. 604; 42 I. A. 208, referred to.Per Roe, J.—Although the position of a *bandhu*
in Mitakshara Law is based on consanguinity, it must
still be supported by the right to offer oblations to a
common ancestor.Second appeal from the decision of the
District Judge of Patna.

Mr. Kulwant Sahai, for the Appellant.

Messrs. L. N. Sinha and Ram Prasad, for
the Respondent.

JUDGMENT.

SHARFUDDIN, J.—The only point for decision in this appeal is as to whether Jung Bahadur, the plaintiff, is the legal heir of one Sham Narain. The contesting defendants are purchasers from Gouri Sundar Kuar, the widow of Sham Narain. After the death of Sham Narain Gouri Sundar Kuar took possession of the estate left by her husband, and she, during her lifetime, alienated certain properties of the estate of her husband to the contesting defendants. The plaintiff brought the suit for the purpose of a declaration that he is the legal heir of Sham Narain. Jung Bahadur, the plaintiff, is Sham Narain's grandfather's grandson's son. Todur Mull is the original ancestor; he had a son and a daughter, namely Udit Narain and Sulochan Kuar. Udit Narain's son was Sham Narain; Sulochan had a son Kali Sahai, whose son is Jung Bahadur, the plaintiff. It has been conceded that if Jung Bahadur is removed in the 5th degree from Sham Narain he will be a legal heir, and will succeed to the estate left by Sham Narain. It was contended that, counting from Sham Narain, Jung Bahadur stands in the 6th degree. Udit Narain and Sulochan Kuar are related to each other in the first degree. Sham Narain is related to Sulochan

MUHAMMAD ALI V. BALDEO PANDE.

in the third degree, and to Kali Sahai in the 4th and to Jung Bahadur in the 5th degree. Jung Bahadur, therefore, being removed from Sham Narain in the 5th degree is the rightful heir to the estate left by Sham Narain. This was so held by the two Courts below, and I think they arrived at a right conclusion.

The method of counting the degrees that I have adopted is supported by the course adopted in the case of *Babu Lal v. Nanku Ram* (1). That being the view that I have taken, I affirm the decision of the Court below and dismiss this appeal with costs.

ROE, J.—I agree that the position of the plaintiff as an heir has been fully established. The latest case quoted by the learned Vakil for the appellant, which is that of *Buddha Singh v. Lattu Singh* (2), is in no sense opposed to the plaintiff's claims. Therein it is stated that although the position of a *bandhu* in Mitakshara Law is based on consanguinity, it must still be supported by the right to offer oblations to a common ancestor. And on page 3* is set forth a quotation from Manu, Chapter IX, that the 4th descendant is the giver of oblations. Jung Bahadur is within four generations from Todur Mull and Sham Narain is within three generations. Therefore, the position of Jung Bahadur is clearly one which entitles him to succeed to the estate of Sham Narain.

Appeal dismissed.

(1) 22 C. 330.

(2) 20 C. W. N. 1; 30 Ind. Cas. 529; 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481; (1915) M. W. N. 772; 37 A. 604; 42 I. A. 208.

* of 20 C. W. N.—Ed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1472 OF 1914.

December 13, 1915.

Present:—Mr. Justice Tudball and
Mr. Justice Walsh.MUHAMMAD ALI AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

BALDEO PANDE—PLAINTIFF—
RESPONDENT.

Tender—Mortgage—Redemption, suit for—No offer of payment before institution of suit, effect of—Suit, maintainability of—Cause of action—Usufructuary agricultural mortgage.

A mortgagor has no right to institute a suit for redemption unless and until he has tendered to the

MUHAMMAD ALI V. BALDEO PANDE.

mortgagee the debt due to the latter or at least the amount which he considers to be due to the latter.

A suit for the redemption of an agricultural usufructuary mortgage, redeemable only in *Jeth* of any year, was brought without any offer of payment having been made before institution of the suit:

Held, that the plaintiff had no cause of action and that, therefore, the suit was not maintainable.

Bansi v. Girdhar Lal, A. W. N. (1894) 143, followed.

Second appeal against the decree of the Subordinate Judge, Mirzapur.

The Hon'ble Mr. Abdul Raof and Mr. Iqbal Ahmad, for the Appellants.

Dr. Surendra Nath Sen, for the Respondent.

JUDGMENT.—This is the defendants' appeal arising out of a suit for redemption. The mortgage-deed is dated *Miti Asadh Badi* 7th, *Sambat* 1918, corresponding with the 29th of June 1861. It was for a term of five years certain and it was an agriculturist's mortgage, in which the parties laid down a condition that the right to redeem should be exercised only in the month of *Jeth* of any year. The Courts below have decreed the suit. The defendants raised a plea that the plaintiff had made no payment or offer of payment before bringing his suit. The plaintiff in paragraph 5 of the plaint stated that on the 18th of June 1913 he had expressed his readiness to redeem the property and offered to pay the mortgage-money to the defendants but the latter declined to allow redemption. In paragraph 6 of the plaint he stated that the cause of action had accrued to him on the 18th of June 1913, the date of the mortgagee's refusal. The Courts below have found as a fact that the plaintiff had not made any tender of the mortgage money at any time to the mortgagees, but in spite of that they proceeded to give the plaintiff a decree allowing redemption of the mortgaged property in the month of *Jeth* following the date of the decree. The defendants have appealed and the plea raised on their behalf is that in view of the fact that the plaintiff had at no time offered to pay the mortgage-debt prior to the institution of the suit, he had no cause of action and the suit ought to have been dismissed.

Reliance is placed on the ruling in *Bansi v. Girdhar Lal* (1). The two cases

are parallel. In that case as in the present there was an agricultural mortgage and the parties had laid it down in clear terms that the mortgage was redeemable only in the month of *Jeth*. It is unnecessary to give the reasons why such a term is entered in this class of mortgage. Section 60 of the Transfer of Property Act lays down what a right of redemption is. It clearly shows that the right to recover possession does not arise until the mortgagor has at the proper time and place paid or tendered the mortgage-money. It is contended that this section was not in force at the date of the mortgage and that the principles of justice, equity and good conscience should be employed for the decision of this case. This would seem to be an argument that section 60 of the Transfer of Property Act is not based on principles of justice, equity and good conscience. It clearly is based on such principles, and it seems even as a matter of business or common sense that a mortgagor has no right to institute a suit for redemption, unless and until he has tendered to the mortgagee the debt due to the latter, or at least the amount which he considers to be due to the latter. The point before us is clearly covered by the decision in *Bansi v. Girdhar Lal* (1), which was subsequently followed by this Court in *Hafiz Muhammad Abdul Rahim v. Lala Tulshi Prasad* (2). The facts of both these cases are like those of the present case. It is clear, therefore, that the plaintiff's suit was brought without any cause of action and ought to have been dismissed.

We, therefore, allow this appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

(2) S. A. No. 1721 of 1903, decided on the 22nd of June 1905.

(1) A. W. N. (1894) 143.

GANGA RAM RAI v. MAULA BAKSH.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 96 OF 1915.

April 25, 1916.

Present:—Mr. Justice Mullick.

GANGA RAM RAI AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

[Sheikh MAULA BAKSH AND OTHERS—
DEFENDANTS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), O XLI, r. 31 —
Appeal—Judgment of reversal, what should contain—
Discussion of evidence—Jotedar, meaning of.*

A judgment of an Appellate Court reversing that of the Court of first instance was in the following terms:—

“I am unable to agree with the Munsif that this entry (Record of Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion”:

Held, that the judgment was in contravention of the provisions of Order XLI, rule 31, of the Code of Civil Procedure, 1908.

When the judgment of an Appellate Court is one of reversal, the aggrieved party is entitled to a consideration of the points on which the lower Court relied for the purpose of giving the successful party a decree.

The expression ‘jotedar’ may mean either tenure-holder or *raiyat*.

Messrs. Ganesh Dutt Singh and Sivanandan Ray, for the Appellants.

Mr. Khurshed Hasnain, for the Respondents.

JUDGMENT.—The plaintiff is the landlord and the defendant is the tenant.

The plaintiff sues for ejectment on the ground that the defendant is a trespasser. The Record of Rights shows the plaintiff to be a tenure-holder and the defendant to be an occupancy-*raiyat*. The Munsif found that the plaintiff was an occupancy-*raiyat* and the defendant an under-*raiyat*. The plaintiff's claim for *khas* possession was dismissed.On appeal by the defendant the learned District Judge has found that the Record of Rights has not been rebutted and that the defendant is not an under-*raiyat* but a *raiyat* and he accordingly decreed the appeal. The present second appeal is by the plaintiff, who asks for the restoration of the Munsif's decree.The first point taken is that the defendant admitted in the first trial that the plaintiff was an occupancy-*raiyat*, but it does not appear that there was any express admission to this effect. All that the defendantadmitted was that Chulhai, the predecessor of the plaintiff, cultivated 10 *bighas* out of the whole holding which measures 15 acres, that is about 23 *bighas*. There is nothing, therefore, in the contention that the plaintiff's status as occupancy-*raiyat* has been proved by the defendant's own admission.But the next point is more substantial. It is contended that the judgment of the learned District Judge is not one according to law and that it offends against Order XLI, rule 31. I agree with the learned District Judge that the expression “jotedar” used by witnesses on behalf of the defendant in reference to the plaintiff's title is inconclusive. It may mean either tenure-holder or *raiyat*. I also agree that there is no direct evidence to show for what purpose that tenancy was created, but the learned Munsif has considered the whole evidence in the case and come to the finding that the plaintiff cultivated the whole holding himself for 32 years and he has inferred from that that the plaintiff's status is that of an occupancy-*raiyat*. With regard to this part of the case the learned District Judge has disposed of it in the following words: “I am unable to agree with the Munsif that this entry (Record of Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion.” I think that the plaintiff is entitled to a fuller consideration of his case before the Munsif's decree can be set aside. It would have been otherwise if the judgment had been one of affirmance, but when the judgment is one of reversal the aggrieved party is entitled to a consideration of the points upon which the lower Court relied for the purpose of giving the successful party a decree. It is not easy to lay down in general terms what degree of particularity is required on the part of an Appellate Court in the examination of the evidence but having regard to the particular facts of the case before me, I think it is necessary in the interests of justice that the case should be remanded to the lower Appellate Court for re-hearing and for recording a judgment in accordance with law.

The decree is accordingly set aside. Costs will abide the result.

Appeal allowed; Case remanded.

MOHAMMAD HUSAIN KHAN v. SIS RAM.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 173 OF 1914-15 OF
MUZAFFARNAGAR DISTRICT.

January 17, 1916.

Present:—Mr. Campbell, J. M.

MOHAMMAD HUSAIN KHAN—

PLAINTIFF—APPLICANT

versus

SIS RAM—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 14—Agreement to exchange holding—Landholder, whether can give possession of new holding before old one has been vacated—Tenant cultivating both holdings, whether loses his right of exchange

A tenant must be admitted to possession of a new holding within a year of loss of possession of the old one to claim a right of exchange; but there is nothing to prevent the landholder from giving possession of the new holding, before the old holding has been actually vacated: nor would the tenant thereby be deprived of his right of exchange on the new holding.

Where, therefore, there was an agreement between the landlord and his tenant to the effect that the tenant should exchange one holding for another and the tenant cultivated both the holdings for one year:

Held, that section 14 of the Tenancy Act did not operate to destroy the tenant's right of exchange.

Application for revision of the order of the Commissioner, Meerut Division, dated the 29th June 1915, confirming that of the Assistant Collector, Muzaffarnagar District, in a case of ejection.

JUDGMENT.—I see no reason to interfere with the Commissioner's order in this case. It is quite clear that there was an agreement between the parties that respondent should surrender the 12 *bighas* 3 *biswas* rented at Rs. 66-9, which he had held for 11 years, in 1317 *Fasli* and should receive in exchange land of approximately equivalent value, *viz.*, 11 *bighas* 6 *biswas* rented at Rs. 66 according to the plaint, or at Rs. 70 according to the *patwari*.

It is now alleged that respondent cultivated both holdings in 1318 *Fasli* and that he has thereby sacrificed his right of exchange under section 14 of the Tenancy Act, because he had not lost possession of his first holding before he got possession of the new one.

I agree with the Commissioner that this is not the intention of the law. A tenant must be admitted to possession of a new holding within a year of loss of possession of the old one to claim a right of exchange;

BROJENDRA KUMAR DAS v. GOBINDA MOHAN DAS.

but there is nothing to prevent the landholder from giving possession of the new holding, before the old holding has been actually vacated: nor would the tenant thereby be deprived of his right of exchange on the new holding. In this case respondent had actually acquired occupancy rights in his old holding by the end of 1318 *Fasli* and it was clearly in the landholder's interest to have the exchange given effect to during the currency of that year, to prevent respondent going back upon his agreement to take a new holding.

I uphold the Commissioner's order and dismiss this application with costs.

Applicati dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 325
OF 1915.

March 17, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.BROJENDRA KUMAR DAS AND OTHERS—
DEFENDANTS—APPELLANTS*versus*GOBINDA MOHAN DAS AND OTHERS —
PLAINTIFFS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 115, O. I, r. 10 (2), O. XXIII, r. 3, application under—Transposition of parties, power of Court to order—Application for transposition, dismissal of—Discretion of Court—Jurisdiction, failure to exercise—Erroneous view of law—Revision by High Court—Dismissal for want of prosecution—Decree, refusal to draw up—Appeal.*

Order I, rule 10 (2), Civil Procedure Code, empowers a Court to make a transposition of parties, the omission in the new Code of the words "the Court might make a plaintiff a defendant or a defendant a plaintiff" in Act XIV of 1882 being due to avoidance of redundancy. [p. 188, col. 1.]

Krishnabai v. Sonubai, 2 B. H. C. R. 310; *Edulji v. Vullebhoy*, 7 B. 167; *Sayad Abdul Hak v. Gulam Jilani*, 20 B. 677, approved.

It is in the discretion of a Court to refuse an application under the said rule, and where a Court refuses to transpose parties in the exercise of its discretion, the High Court will not interfere in revision. Where, however, the order is expressly based on a want of jurisdiction by the Court the order is subject to revision by the High Court under section 115, Civil Procedure Code. [p. 188, col. 1.]

BROJENDRA KUMAR DAS v. GOBINDA MOHAN DAS.

A Court is not bound to draw up a decree on an application under Order XXIII, rule 3, Civil Procedure Code, where the plaintiff, after compounding his differences with some of the defendants, prays only for withdrawal of the suit without further relief. The appropriate order to pass under the circumstances is one of dismissal for want of prosecution. Against such an order no appeal lies. [p. 187, col. 2; p. 188, col. 1.]

Plaintiffs sued defendants for dissolution of partnership and for accounts. During the pendency of the suit plaintiffs and some of the defendants entered into a compromise, and the plaintiffs, after stating the nature of the settlement to Court, applied for permission to withdraw the suit. The Court passed an order dismissing the suit for want of prosecution without entering a decree. Thereupon, the defendants who had not joined in the compromise, applied to be substituted as plaintiffs and to continue the suit. In the alternative they asked that a decree might be prepared to enable them to appeal. The Court refused both prayers, holding that it had no power to transpose parties under the new Civil Procedure Code and that a decree was unnecessary. The objectors-defendants then appealed to the High Court, and, as an alternative, invoked the High Court's interference under section 115, Civil Procedure Code:

Held, (1) that no appeal lay against the order under Order XXIII, rule 3, Civil Procedure Code; [p. 188, col. 1.]

(2) that the lower Court had power to transpose parties under Order I, rule 10 (2); [p. 188, col. 1.]

(3) that as the lower Court had failed to exercise a jurisdiction vested in it by law, it was competent to the High Court to interfere with the order in revision. [p. 188, col. 2.]

Appeal against the judgment of the Subordinate Judge, 1st Court, Barisal, dated the 3rd of March 1914.

Mr. B. Chakravarty (with him Babus Upendra Lal Roy, Bhupendra Chandra Guha and Jitendra Nath Roy), for the Appellants.

Sir Rash Behary Ghosh (with him Babus Bepin Chandra Mullick, Sarat Chandra Dutt and Sib Chandra Palit), for the Respondents.

JUDGMENT.

D. CHATTERJEE, J.—The plaintiffs brought the suit giving rise to these proceedings in 1909, for declaration of title to certain shares in a certain partnership business with its branches, for dissolution of the said partnership and for accounts. The suit went on for several years through various vicissitudes of fortune until in March 1914, the plaintiffs made a compromise with the principal defendants and on receipt of consideration from them made an application for withdrawing from the suit, the said defendants giving up costs. The petition of compromise stated the nature of the settlement,

but did not ask for any relief and in fact under the circumstances related no decree was required, as the plaintiffs stated that they had received the value for the rights given up by them under a deed of release.

Upon the said application being made by the plaintiffs, the appellants before us, i.e., the defendants who had not joined in the petition of compromise, applied to be made plaintiffs, to amend the plaint, and to continue the suit as one on their behalf. The learned Subordinate Judge refused their application on the ground that the present Civil Procedure Code did not authorise him to make the transposition asked for, that the applicants had not asked for retaining the original plaintiffs on the record as defendants, that there was conflict of interests between the original plaintiffs and the appellants, so that it could not be said that the old suit was to be continued. The suit was accordingly dismissed without costs as the objectors did not ask for costs. The appellants then asked that a decree might be prepared so that they might appeal from the same, but the learned Subordinate Judge refused their application saying that no decree was necessary as the suit had been dismissed for want of prosecution. Against the said order the appellants filed the above appeal and as an alternative obtained the above Rule.

If the Court below had been bound to make a decree and had not, we might have entertained the appeal.

We find, however, no reason to differ from the learned Subordinate Judge on this point. The plaintiffs had settled their differences and received satisfaction out of Court by the execution of separate deeds and intimated to the Court that they would not proceed with the suit.

The Court was not required to give them any relief and the Court could not give them any. It is contended that the Court was bound to pass a decree under Order XXIII, rule 3. The parties to the compromise, however, which had been effected out of Court, did not ask for a decree, and the objectors, who were no parties to the same, could not ask for one, so that the only course left to the Court was to dismiss the suit, as it did, for want of prosecution, unless, of course, it saw its way to conti-

KRISHNA DHONE v. BHAGABAN CHANDRA.

nue the suit at the instance of the objectors. There is no appeal against an order of this kind, and the appeal fails. As regards the Rule, it is contended that the learned Judge, in refusing to make the transposition of parties and amendment asked for, refused to exercise a jurisdiction vested in him by law. It is true that the provision in section 32 of Act XIV of 1832 that the Court might make a plaintiff a defendant and a defendant a plaintiff, has been omitted from the present Code, but, I think, it was omitted as redundant as the provision of Order I, rule 10 (2), for striking out or adding parties is sufficient to cover the case of such a transposition, being in effect the striking one party off the side of the suit in which he had been placed and re-adding him on the opposite side.

Such transpositions are frequent in partnership cases: see *Krishnabai v. Sonubai* (1) and *Edulji v. Vullebhoy* (2), and there is nothing in the Code to take away the power of the Court to make orders in that behalf when the circumstances require it. The Court below distinguishes the last case on the ground that the applicants did not ask the Court to make the original plaintiffs defendants. I do not think that the distinction is legitimate, because in the first place the original plaintiffs had parted with all their interest in the partnership in favour of defendants Nos. 1 to 15 and had, therefore, no subsisting interest in the suit: see *Sayad Abdul Hak v. Gulam Jilani* (3), and in the second place the applicants did not say that they did not want to have the original plaintiffs as defendants, and the Court had ample power under Order I, rule 10, to make them defendants if it thought necessary. The Court below was in error therefore in holding that it was not authorized to make the transposition under the new Code. It is true that the Court had a discretion in the matter and might refuse to make the order in the exercise of that discretion. The learned Judge, however, thought he had no jurisdiction and cannot, therefore, be said to have exercised the discretion which he had in the matter, with that consciousness of power and competence which

is necessary to strengthen his hands in the use of the discretion. He has made other distinctions also on minor points which can be met by amendments. He has, therefore, I think, refused to exercise a jurisdiction vested in him by law. The case of *Edulji v. Vullebhoy* (2) is exactly in point, and I think the learned Judge should have followed it and allowed the appellants to continue the suit which had passed through five years in Court and was ripe for hearing. It is true that the appellants have subsequently filed an independent suit of their own which is pending, but if that suit has to pass through another five years to be ripe for hearing, the proceedings may be endless. I think, therefore, the right order would be to dismiss the appeal as incompetent and to make the Rule absolute, and order the Court below to restore the suit to its file, make the necessary amendments and proceed to trial in accordance with law. No costs.

BEACHCROFT, J.—I agree.

*Rule made absolute;
Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3132
OF 1914.

May 24, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

KRISHNA DHONE BHATTACHARJYA
—DEFENDANT No. 1—APPELLANT

versus

BHAGABAN CHANDRA BHATTACHARJYA AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 44—Guardian and minor—Fraudulent sale by guardian, only voidable—Minor's right to possession, extinction of, after bar of right to avoid sale.

A sale of a minor's property by his guardian in fraud of his rights is only voidable. It is valid until avoided by the minor within 3 years on attaining majority under Article 44 of the Limitation Act. When his right to avoid the sale has become barred by limitation, his right to recover possession of the property is gone. [p. 191, col. 1.]

Gnanasambunda Pandara Sannadhi v. Velu Pandaram, 23 M. 271 at p. 273; 27 I. A. 69; 4 C. W. N. 329; 10 M. L. J. 29; 2 Bom. L. R. 597; *Jagadamba Chaudhrani v. Dakhina Mohun Roy*, 13 C. 308; 18 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P. O. J. 715 and

(1) 2 B. H. C. R. 310.

(2) 7 B. 167.

(3) 20 B. 677.

KRISHNA DHONE v. BHAGABAN CHANDRA.

Malkarjun v. Nathari, 25 B. 337; 27 I. A. 216; 2 Bom. L. R. 97; 5 C. W. N. 0; 10 M. L. J. 364, referred to.

Appeal against the decree of the Subordinate Judge, Sylhet, dated the 9th June 1914, reversing that of the Munsif, 2nd Court, Habiganj, dated the 10th February 1913.

FACTS.—The material facts as they appear from the judgment of the first Appellate Court are as follows:—

"The land in suit belonged to two brothers, Chandra Nath Chakrabarty and Dina Nath Chakrabarty, who executed a deed of gift in respect of the disputed land and other lands in favour of Sailaja Debi in consideration of her marriage with Chandra Nath. Akshoy Kumar, *pro forma* defendant No. 5, was a son born of that marriage. On the 5th of *Falgun* 1306, Chandra Nath and Dina Nath sold the disputed land to the defendant No. 1 and the principal defendants Nos. 1, 2, 3, 4 took possession of it on *Magh* 25th, 1318 B. S. The plaintiffs purchased the land from Akshoy Kumar, defendant No. 5, for a consideration of Rs. 50 but they failed to get possession. Hence they were obliged to come to Court.

The defendant No. 1 pleaded limitation and estoppel, contending that the deed of gift in favour of Sailaja Debi relied upon by the plaintiffs was a collusive and sham transaction and that the *kobaia* by which the plaintiffs alleged to have purchased the lands was also collusive and fraudulent.

The Munsif dismissed the suit, holding that the deed of gift was not acted upon and that the defendants were in adverse possession. He, however, decreed the plaintiffs' claim for refund of the purchase-money. The plaintiffs appealed and the Subordinate Judge of Sylhet decreed the appeal, holding that the gift was a *bona fide* transaction and was effected in consideration of the marriage between Sailaja and Chandra Nath. In his judgment he observed: 'The fact that subsequently Chandra Nath and Dina Nath dealt with the property as their own during Sailaja's minority and that of her son Akshoy will not be sufficient to destroy the titles of the minors.' As to limitation and adverse possession he observed: "The donee (Sailaja) was then a girl of 13 or 14 years of age. She having been married to Chandra Nath, he was her *de facto* guardian;

within two years of her marriage a son (Akshoy) was born of the couple; within 6 months of the birth of the child Sailaja died. When she died her age was about 16 years. So she died a minor, leaving her surviving a babe. Chandra Nath, therefore, acted as the guardian of the child. In 1301 he and his brother Dina Nath mortgaged the property to defendant No. 1 in consideration of a loan. Afterwards they sold it to him for a price in 1306 B. S. The real owner of the property was this child Akshoy Kumar. Up till 1206 he was a minor and attained his majority in 1307 B. S. His cause of action to recover the property arose from the date of the sale, that is, May 1900 or from his attaining majority in 1307 B. S. To the plaintiffs Akshoy sold this suit land in *Magh* 1318 B. S., i. e., February 1912. This sale took place within 12 years of the sale to the defendants. The present suit was filed in the same month of February. Thus within 12 years of the sale to the defendants the plaintiffs have come to Court * * *

"The mortgage of 1301 B. S. no longer exists. Admittedly it was redeemed before the sale in 1900. Akshoy was not, therefore, under any obligation to set aside the mortgage or to redeem it."

Babu *Brajlal Chakrabarty*, for the Appellants.—Chandra Nath was the guardian of Sailaja and Akshoy, but Dina Nath was not and so his possession as to a moiety was not on behalf of the minors, but was adverse to them.

The sale by Chandra Nath and Dina Nath to the defendants was in their capacity as guardians and so the minor could bring a suit to set aside the sale within 3 years from 1907, when he attained majority. Refers to Article 44, Limitation Act, *Sikher Chund v. Dulputty Singh* (1), *Raghubar Dyal Sahu v. Bhikya Lal Misser* (2), *Satish Chandra Guha v. Chunder Kant Pyne* (3). Therefore, his right to bring such a suit became barred after 1910 and the plaintiffs, as his representatives, are in no better position.

The plaintiffs cannot succeed without setting aside the sale by the minors' guardians to

(1) 5 C. 363; 5 Ind. Jur. 200; 5 C. J. R. 374.

(2) 12 C. 69.

(3) 3 C. W. N. 278.

JIWAN LAL DEOSAY v. OUDH COMMERCIAL BANK, LTD., LUCKNOW.

the defendants. Refers to *Malkarjun v. Narhari* (4).

Babu Birendra Chandra Das, for the Respondents.—The lower Appellate Court has found that Dina Nath, though not the *de jure* guardian, was the *de facto* guardian along with Chandra Nath. That finding is conclusive. So the possession of both was on behalf of and for the benefit of the minor and not adverse to him.

The transfer by Chandra Nath and Dina Nath, who, as guardians, were trustees for the minor Akshoy, was an act fraudulent, wrongful and in breach of their trust. A minor is bound by all lawful acts of his guardian, but cannot be bound by acts of fraud and acts involving breach of trust on the part of his guardian. The sale, therefore, did not bind him, nor did it affect his interests and he was not bound to set it aside under Article 44, Limitation Act. Refers to *Kamakshi Nayakan v. Ramasami Nayakan* (5).

The real test is to see not whether the sale is void or voidable, but whether it was effected under circumstances binding on the minor.

The cases cited are all distinguishable, because there was no element of fraud or breach of trust on the part of the guardian in those cases.

Even if Article 44 applies, the only effect would be that Akshoy's remedy to set aside the sale might have been barred, but his right to the lands in suit was not extinguished under section 28, Limitation Act. Refers to *Barada Proshad Banerjee v. Gajendra Nath Banerjee* (6), *Rajah of Venkatagiri v. Isakapalli Subbiah* (7). Akshoy had, therefore, a subsisting title, which he could and did convey to the plaintiffs, and the plaintiffs having sued within 12 years from the date of the defendants' purchase—from which date defendants' possession became adverse—the suit is not barred by limitation.

JUDGMENT.—Dina Nath and Chandra Nath were two brothers and they lived joint in mess and property. Chandra Nath's first wife having died at a late stage of his life, he

married the mother of defendant No. 5 and in consideration of the marriage the two brothers executed a deed of gift in respect of some of their properties and made over the deed of gift to the girl, who was then a minor, aged 13 or 14 years, and who died a minor after giving birth to defendant No. 5 in about two years from her marriage. Dina Nath and Chandra Nath remained in possession of the property covered by the deed of gift and in 1901 made a usufructuary mortgage of the same to defendant No. 1. In 1906 they redeemed the mortgage and sold the property to defendant No. 1. The date of the sale was the 16th February 1900. Defendant No. 5 came of age on the 27th February 1907, and in February 1912 sold the property covered by the gift to the plaintiffs, who brought this suit on the 12th February 1912 for recovery of possession on the strength of their purchase from defendant No. 5.

The first Court dismissed the suit as barred by limitation. The lower Appellate Court has reversed that decision and decreed the suit, holding that it was brought within 12 years from the date of the sale and was, therefore, not barred.

It is contended before us that the lower Appellate Court was wrong. Chandra Nath may be taken to have been the guardian of his minor wife and minor son, defendant No. 5, but Dina Nath was in no sense the guardian of any of these minors. Dina Nath's possession, therefore, was not the possession of a guardian or a trustee; his possession after the deed of gift must be taken to have been adverse and that being for a period much more than 12 years, the suit is clearly barred as to a moiety of the property. As regards the other moiety, Chandra Nath was the guardian and he made an alienation in fraud of the minor's right, the minor was, therefore, entitled to set aside the alienation within 3 years from 1907 under Article 44 of the Schedule to the Limitation Act. As he did not bring such a suit his right to set aside the sale became barred. As he could not recover possession without setting aside the sale, his right to recover possession was also consequently barred and he could not in 1912 pass any title to the plaintiffs. It is contended that the bar of the right to set aside the sale should not bar the right to

(4) 25 B. 237 (P. C.); 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368.

(5) 7 M. L. J. 131.

(6) 1 Ind. Cas. 289; 13 C. W. N. 557; 9 C. L. J. 353.

(7) 26 M. 410.

JIWAN LAL DEOSAY v. OUDH COMMERCIAL BANK, LTD., LUCKNOW

recover possession and if the right to recover possession is not barred, the defendant No. 5 had a subsisting title which he could pass to the plaintiffs. This argument would have been of weight if the sale were *ab initio* void. That is, however, not the case. A sale by a guardian is only voidable and is valid until avoided. This avoidance must be by a suit within 3 years under Article 44 of Schedule I, Limitation Act. As the ward cannot recover possession without the sale, his right to recover possession is also gone. In the case of *Gnanasambanda Pandora Sannadhi v. Velu Pandaram* (8) their Lordships of the Privy Council said: "Chikalanga attained majority in 1880 and had by Article 44 of the Act 3 years for suing to set aside the sale by his guardian. He did not do so and by section 28 of the Limitation Act his right became extinguished." In the case of *Jagadamba Chaokhrani v. Dakhina Mohun Roy* (9) the Judicial Committee of the Privy Council held that if an adoption has to be set aside before a party can recover possession, the bar to the right to set aside the adoption is a bar to the recovery of possession. Later on the same Tribunal held in the case of *Malkarjun v. Narhari* (4) that anybody who desires a relief inconsistent with an intermediate sale which has to be set aside, may and should pray to set it aside; the bar to the setting aside of the sale bars the suit for the relief so inconsistent. Here the vendor of the plaintiff could not recover possession without setting aside the sale by his guardian, and the plaintiffs are in no better position.

The appeal must, therefore, be allowed and the decree of the learned Munsif restored with costs in all Courts. *Appeal allowed.*

(8) 23 M. 71 at p. 279; 27 I. A. 69; 4 C. W. N. 329; 10 M. L. J. 29; 2 Bom. L. R. 597.

(9) 13 C. 308; 13 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 148 OF 1914.

January 17, 1916.

Present:—Mr. Lindsay, J. C.

JIWAN LAL DEOSAY—DEFENDANT—
APPELLANT

versus

ODDH COMMERCIAL BANK, LTD.,
LUCKNOW—PLAINTIFF,

AND ANOTHER DEFENDANT—RESPONDENTS.

Hundi drawn at one place and accepted and dis-

honoured at another—Drawer and acceptor, arrangements between, effect of Holder, position of—Acceptor and drawer both, suit against—Cause of action—Jurisdiction Civil Procedure Code (Act V of 1908), s. 20.

A hundi was drawn at Lucknow and was payable at Bombay, where it was accepted and then dishonoured. The holder instituted a suit against both the acceptor and the drawer at Lucknow. The acceptor's defence was that there was an understanding between himself and the drawer that the former was not to be liable on the acceptance unless the latter kept him supplied with funds and further, that the cause of action having accrued at Bombay where the hundi was accepted and dishonoured, the suit was not cognizable at Lucknow.

Held, that whatever arrangements there might have been between the drawer and the acceptor they did not affect the position of the holder, unless he had knowledge of that arrangement. [p. 192, col. 1.]

Held, further, that the suit having been brought not only against the acceptor, who after his acceptance became the principal debtor of the holder, but also as against the drawer, who stood towards the holder in the relation of a surety and a part of the cause of action for the suit against both of them having arisen out of the original contract of the hundi which was drawn at Lucknow, the Courts at Lucknow had jurisdiction under section 20, Civil Procedure Code, to try the suit. [p. 192, col. 2.]

Shirji Ram v. Hem Raj, 57 P. R. 1900, referred to.

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 31st August 1914.

Rai Ba adur Babu Nagenbro Nath Ghoshal, for the Appellant.

Babu Rudra Dat Sinha, for Respondent No. 1.

JUDGMENT.—I have heard the learned Counsel who appears for the appellant and in my opinion this appeal ought to be dismissed. The facts of the case are as follows: On the 16th April 1913, one Seth Hansraj, who is the second respondent in this appeal, drew a hundi upon Jiwan Lal Deosay, proprietor of a firm which carries on business in Bombay. This hundi which was for a sum of Rs. 5,000 odd was discounted by the Oudh Commercial Bank. The bill was payable in 95 days after the date of execution, and it is quite clear that it was presented for acceptance to the appellant Deosay who accepted it on the 22nd of April 1913. After the bill became due it was presented for payment at Bombay through the Bombay agent of the plaintiff Bank; the bill was then dishonoured. The appellant refused payment on the ground that he had

RAM JAWAYA MAL V. DEVI DITTA MAL.

no funds of the drawer in his possession.

The present suit was brought against both the acceptor Deosay and the drawer Seth Hansraj and a decree has been passed in favour of the plaintiff Bank. On the merits it seems to me that the appellant Deosay has no defence. He raised various pleas, the principal one of which was that there was an understanding between himself and Seth Hansraj that he (the appellant) was not to be liable on this acceptance unless Hansraj kept him supplied with funds. It was also pleaded by Deosay that this arrangement between his firm and Hansraj was very well known to the plaintiff. The Court below held, and I think rightly, that this plea was not made out; in fact there was no evidence worth the name in support of it. Whatever arrangements there may have been between Seth Hansraj and Deosay, they do not in any way affect the position of the plaintiff Bank. The only plea which has been seriously pressed here in appeal is with regard to jurisdiction. Deosay took a plea in the Court below that the suit was not cognizable in Lucknow, that the cause of action had arisen at Bombay and that the suit was exclusively triable in Bombay, where the bill was accepted and where it was also dishonoured. This would, no doubt, have been a very good argument if the Bank had brought the suit against Deosay alone. There can be no doubt that Deosay after his acceptance became the principal debtor of the Bank in connection with this transaction and as the acceptance was made at Bombay and as the refusal to pay was also made at Bombay, the cause of action for a suit against Deosay alone would undoubtedly have arisen entirely in Bombay city. But the suit has been brought not only against Deosay, the principal debtor, but also as against Seth Hansraj who as drawer stands toward the Bank in the relation of a surety. There can be no doubt that the Bank was entitled to sue both these parties in the same suit (see the provisions of Order I, rule 6, of the Code of Civil Procedure) and this being so, we have to consider whether any part of the cause of action for this suit against both these defendants arose in Lucknow, for under section 20 of the Code of Civil Procedure it is now clear that the suit may be

brought at any place where the cause of action wholly, or in part, arises. It has been held in a Punjab case decided by a Full Bench [*Shivji Ram v. Hem Raj* (1)] that where a plaintiff sues the drawer, acceptor and subsequent endorsee, the cause of action arises out of the original contract which in such a case is the *hundi*, and in the case which was before them they held that the suit which was before them was triable only at Karachi, as that was the place at which the *hundi* was drawn and made payable. If we apply this principle to the facts of the present case, we find that the *hundi* was drawn at Lucknow and that being so, it seems to me to be clear enough that a part of the cause of action for this suit against both of these defendants did arise at Lucknow and that the Court had jurisdiction under section 20 of the Code. I must, therefore, find against the appellant on this point.

As this is the only ground which has been seriously taken in appeal, the result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 57 P. R. 1900.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 622
OF 1914.

May 3, 1916.

Present:—Sir Donald Johnstone, Kt., Chief
Judge, and Mr. Justice Shadi Lal.

RAM JAWAYA MAL—PLAINTIFF—
APPELLANT

versus

DEVI DITTA MAL AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (d), (f), Sch. II, Art. 17—Reference to arbitration—Order rejecting award for misconduct—Appeal—Revision—Parties agreeing not to object to award, effect of—Estoppel—Contract Act (IX of 1872), s. 28—Court Fees Act (VII of 1870, Sch. II, Art. 17 (vi)—Punjab Land Revenue Act (XVII of 1887), s. 158—Prayer for setting aside award, valuation of.

Plaintiff and defendants, members of a joint Hindu family, wished to separate. On 6th March 1910 they entered into an agreement

RAM JAWAYA MAL v. DEVI DITTA MAL.

to refer their disputes to arbitration and nominated three gentlemen as arbitrators one of whom was to act as umpire. The arbitrators were authorized to partition the property in unequal shares, but not to exclude any party altogether. No award was written and in February 1913 an application was made to the Court asking that the agreement to refer be filed in Court and the usual proceedings be taken thereupon. On 28th March 1913 the parties put in a joint application saying that a compromise had been effected and that they agreed to the appointment of arbitrators as in the agreement of 6th March 1910, and asking that the arbitrators be directed to file their award. The parties agreed to abide by the award and to raise no objections to it. The reference having been made the arbitrators put in their award on 13th October 1913. Both sides filed objections, but the Court allowed only those filed by the defendants and declared the award invalid on the ground of misconduct, as the arbitrators gave only a life-interest to 1st defendant in some lands and excluded him contrary to the terms of the reference. Against this order the plaintiff appealed under section 104, Civil Procedure Code:

Held, (1) that neither clause (d) nor clause (j) of section 104, Civil Procedure Code, applied to the case, and, therefore, no appeal lay as an appeal from an order; [p. 194, col. 2.]

Jagan Nath v. Nanak Chand, 16 Ind. Cas. 996; 248 P. L. R. 1913; 9 P. R. 1913; *Wali Muhammad v. Bahawal Baksh*, 21 Ind. Cas. 925; 14 P. L. R. 1914; 20 P. W. R. 1914; 28 P. R. 1914, referred to.

(2) that the proceeding was a "suit", and the order appealed against amounted to a "decree" and was consequently appealable as an appeal against decree and the mere fact that the plaintiff had appealed as from an order did not put him out of Court; [p. 195, col. 1; p. 196, col. 1.]

Narpat Rai v. Devi Das, 126 P. R. 1907; 50 P. L. R. 1908; 88 P. W. R. 1907; *Ponnusami Mudali v. Mandi Sundara Mudali*, 27 M. 255; 14 M. L. J. 356; *Jhangli Ram v. Budho Bai*, 84 P. R. 1901; 112 P. L. R. 1901, referred to.

Seumal Nihalchand v. Mulomal Rahumal, 28 Ind. Cas. 60; 8 S. L. R. 260, dissented from.

Days Nand v. Bakhtawar Singh, 5 A. 333; A. W. N. (1883) 56 *Bhola v. Gobind Dayal*, 6 A. 186 (F. B.); A. W. N. (1884) 31; *Mohan v. Tukaram*, 21 B. 63; *Narpat Rai v. Devi Das*, 9 Ind. Cas. 385; 12 P. W. R. 1911; 1 P. L. R. 1911, distinguished.

(3) that the rejection of an award not being open to revision, the present petition could not be treated as a revision; [p. 194, col. 2.]

Ahmad Din v. Atlas Trading Company of Delhi, 31 Ind. Cas. 80; 146 P. W. R. 1915; 66 P. R. 1915, followed.

(4) that the appeal fell under Article 17 (vi) of Schedule II of the Court Fees Act, for both the original application under Article 17, Schedule II, Civil Procedure Code, and the appeal embodied a prayer that could not be valued in money, and, therefore, the Rs. 10 Court-fee put in by the appellant was sufficient; [p. 196, col. 2.]

(5) that inasmuch as the arbitrators gave no "share" to defendant No. 1 but merely a life-interest in a small piece of land and so violated the injunction in the original agreement that no party was to be wholly excluded, the award was *mala fide* and consequently liable to be set aside; [p. 197, col. 1.]

(6) that the agreement by the parties not to raise objections to the award meant only the usual engagement to accept the award and that it was always open to the parties to object on the ground of fraud or bad faith on the part of the arbitrators. [p. 195, col. 1.]

Bhai Kahan Singh v. Rai Bahadur Lala Mohan Lal, 34 Ind. Cas. 177; 44 P. W. R. 1916, dissented from.

Burla Ranga Reddi v. Kalapalli Sethaya, 6 M. 368, approved.

Obiter.—It is not an unqualified rule that in arbitration cases, where there is no appeal, there can never be a revision. [p. 195, col. 1.]

It is not sufficient for an applicant for revision to show that the lower Court has erred, but he must also show that it acted without jurisdiction or refused to exercise its lawful jurisdiction or proceeded illegally or with material irregularity. [p. 194, col. 2.]

Hansraj v. Ganga Ram, 88 P. R. 1902 (F. B.); 119 P. L. R. 1902; *Ghulam Jilani v. Muhammad Hassan*, 25 P. R. 1902; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 29 I. A. 51, referred to.

A mistaken view by the lower Court as to what amounted to the misconduct of an arbitrator is no ground for revision. [p. 194, col. 2; p. 195, col. 1.]

Panna Lal v. Soman, 89 P. R. 1902; 120 P. L. R. 1902, referred to.

Quere.—Whether the exclusion of civil jurisdiction provided in section 158, Lands Revenue Act, as regards partition is intended to apply where the partition is done by private agency? [p. 198, col. 2.]

Miscellaneous first appeal from the decree of the District Judge, Multan, dated the 28th February 1914, dismissing the application to file an award.

Mr. Broadway, Rai Bahadur Pandit Sheo Narain and Mr. Sewa Ram Singh, for the Appellant.

Mr. C. Beran Petman and Rai Sahib Lala Moti Sagar, for the Respondents.

JUDGMENT.—Of the parties to this case defendant No. 1 is the father, plaintiff the elder son, and defendant No. 2 the younger son. As early as 1910 they wished to separate, and on 6th March of that year they entered into an agreement to refer their differences to arbitration, nominating three gentlemen in whom they trusted, one of whom Shanun Ram was in some sort made umpire, the important words in the reference being these:—

"The arbitrators are authorized to partition between us our entire property and to allot unequal shares to us. But they are not authorized to exclude any party altogether.....None of the parties shall be competent to object to, or refuse to submit to, the award of the arbitrators."

Some three years passed and no award was written, apparently owing to dissensions

RAM JAWAYA MAL V. DEVI DITTA MAL.

and then on 5th February 1913 an application was made to Court and a few days later an amended application asking, with advertence to Article 17, Schedule II, Civil Procedure Code, that the agreement to refer be filed in Court and the usual proceedings be taken thereupon. Next, on 28th March 1913 the parties put in a joint application saying a compromise had been effected, and that all parties now agreed to the appointment of arbitrators as in the agreement of 6th March 1910, and asking that the arbitrators be directed to file their award. The application goes on:—

"We shall abide by their decision, i. e., the award which the arbitrators may file."

Reference was then made and the arbitrators proceeded to work, and on 13th October 1913 put in their award, giving certain portions of the family property to each party. Both sides filed objections, but only those by defendants were serious. Dealing with them the learned District Judge held that there was a "fatal defect" in the award, inasmuch as it gave no "share" to defendant No. 1, but merely life-interest in a small piece of land with a few insignificant odds and ends of other property, and so violated the injunction in the agreement of 6th March 1910 that no party was to be wholly excluded. He then went on to remark that the arbitrators imported their personal knowledge into the award as to certain moneys which they thought defendant No. 1 had concealed, without giving him an opportunity of testing their personal knowledge; and also found fault with them for not seeing the property to be divided or ascertaining its value. On these findings the District Judge held that the award was invalid—apparently for misconduct of arbitrators—and dismissed with costs the application to file it. The decree dismisses both the applications for filing of agreement and of award.

The first question for decision is whether appeal lies, and we have heard this discussed at great length. The appeal—see note at the end of the memorandum—is filed expressly as one against an order, i. e., under Civil Procedure Code, section 104, (d) and (f), which gives an appeal (d) against an order filing or

refusing to file an agreement to refer to arbitration, and (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court. We cannot see how either of these clauses can be invoked by the appellant-plaintiff, for, notwithstanding the peculiar wording of the decree, the District Judge did not refuse to file the agreement to refer, nor did he refuse to act upon it, and, as regards (f), the award is not one made without the intervention of the Court. Clause (f) glances at Article 20, Schedule II, and not at Article 17, under which the application of February 1913 was presented: Cf. *Jagan Nath v. Nanak Chand* (1) and *Wali Muhammad v. Bahawal Baksh* (2).

It is asked, then, by appellant that the petition be treated as a revision under section 70 of the Courts Act, but we cannot accede to this prayer. The matter need not be discussed at great length. The latest ruling of this Court is *Ahmad Din v. Atlas Trading Company of Delhi* (3), in which it was plainly held that rejection or acceptance of an award is not open to revision because (a) the order disposes of a question of law and that order, even if wrong, cannot be called a material irregularity, and (b) appellant had another remedy by regular suit. As to this second reason see also page 59 in *Nurain Das v. Manohar Lal* (4). Then from such rulings as *Hansraj v. Ganga Ram* (5) and page 101 of *Ghulam Jilani v. Muhammad Hassan* (6), we can deduce the principle that it is not sufficient for an applicant for revision to show that the lower Court has erred, but that he must also show that it acted without jurisdiction or refused to exercise its lawful jurisdiction or proceeded illegally or with material irregularity. Again, in *Kali Charan Sirdar v. Sarat Chunder Chowdhry* (7) it was laid down that a mistaken view as to what amounted to

(1) 16 Ind. Cas. 996; 9 P. R. 1913; 248 P. L. R. 1913.

(2) 21 Ind. Cas. 925; 28 P. R. 1914; 14 P. L. R. 1914; 20 P. W. R. 1914.

(3) 31 Ind. Cas. 80; 66 P. R. 1915; 146 P. W. R. 1915.

(4) 21 P. R. 1898 (F. B.).

(5) 88 P. R. 1902; 119 P. L. R. 1902.

(6) 25 P. R. 1902 (P. C.); 12 M. L. J. 77; 4 Bom. L. B. 161; 6 C. W. N. 226; 29 C. 167, 29 I. A. 51.

(7) 30 C. 397 (F. B.); 7 C. W. N. 545.

RAM JAWAYA MAL V. DEVI DITTA MAL.

misconduct would not let in a revision; though, of course,—*Of. Panna Lal v. Soman* (8)—the *dictum* at page 101 of *Ghulam Jilani v. Muhammad Hassan* (6), already cited, must not be taken as laying down an unqualified rule that in arbitration cases, where there is no appeal, there can never be a revision. In the present case certain conduct of the arbitrators was objected to by defendants as misconduct, and the District Judge, after considering the matter, agreed that it was misconduct. If he had jurisdiction to consider the matter, he was right to exercise that jurisdiction; and we cannot find anything perverse in the District Judge's proceedings or in his expressions of opinion. No doubt plaintiff-appellant wishes us to hold that the District Judge acted *ultra vires* in hearing objections at all, inasmuch as, by the agreement of 6th March 1910, the parties undertook to raise no objections. In support of this contention we are referred to a *dictum* of Rattigan, J., in *Bhai Kahan Singh v. Rai Bahadur Lala Mohan Lal* (9), but we have grave doubts as to the correctness of that *dictum*, which is opposed moreover by *Burla Ranga Reddi v. Kalapalli Sithaya* (10) and is also in conflict with at least the spirit of section 23, Contract Act. Further, we are bound to consider what the parties really meant by binding themselves not to make objections. We have little hesitation in holding that they meant little more than that they would accept the award, an engagement always made in these cases, and did not mean that fraud or bad faith on the part of the arbitrators could not be objected to. The wording of the application of 28th March 1913 reviving the arbitration supports this view, for in it we do not find any covenant in terms not to raise objections.

We find, however, that after all an appeal does lie because the order appealed against amounts in law to a "decree." It is a pity that plaintiff-appellant did not appeal as from a decree; but we do not think a mistake on the part of his legal advisers in this respect should put him out of Court,

(8) 89 P. R. 1902 (F. B.); 120 P. L. R. 1902.

(9) 34 Ind. Cas. 177; 44 P. W. R. 1916.

(10) 6 M. 362.

and we will now explain why we look upon the order as a decree.

Section 2 (2), Civil Procedure Code, lays it down *inter alia* that "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit; and that it shall not include any adjudication from which an appeal lies as an appeal from an order. Now we have seen that no appeal lies from the present adjudication as an appeal from an order, and thus we have to decide merely—(i) what were the "matters in controversy" in the proceeding in the lower Court; (ii) were those matters or any of them "conclusively determined," so far as regards the lower Court; (iii) was the proceeding a "suit."

The award was presented by the arbitrators under order of the Court passed in accordance with the joint application of the parties, dated 28th March 1913. Objections were put in, and the "matters in controversy" were in the main whether the arbitrators had been guilty of misconduct. The District Judge considered this, and, finding that the arbitrators had transgressed the terms of the reference by not giving defendant No. 1 a share but merely allotting to him a life-interest in a small fraction of the property, and that they had acted wrongly in other ways as described earlier in this judgment, held that this was misconduct, and so set aside the award. No doubt the Court did not decide on the merits, as between the parties, their rights in the property under law or custom, but that was not the matter in controversy in this proceeding: the matter in controversy was whether the arbitrators had misconducted themselves. This the District Judge did decide, and did conclusively determine, so far as he was concerned.

It remains to say whether the proceeding was a "suit." This word is not defined in the Code, but it was, as required by Article 17 (2), Schedule II, registered and numbered as a suit, and it ended in a decree sheet being drawn up. Had the award not been set aside but accepted as a good award, a decree, albeit in accordance with the award, allotting such-and-such

RAM JAWAYA MAL V. DEVI DITTA MAL.

property to each party, would have ensued; and in these circumstances we see no difficulty in calling the proceeding a suit and the order a decree.

Turning to the authorities we find that in *Ghulam Jilani v. Muhammad Hassan* (6) their Lordships said (page 99): "it would seem that the order made thereon is a decree," the order in question being one of a kind similar to that we have under consideration here. This may be *obiter dictum*, but, as the expression of the views of the Privy Council, it must carry weight. Then, though a good deal of the ruling *Jhanghi Ram v. Budho Bai* (11) was discredited in *Ghulam Jilani v. Muhammad Hassan* (6) as aforesaid, the last part of the ruling has not been touched, and there it is distinctly said that orders rejecting applications under sections 523 and 525 of the then Code of Civil Procedure, which correspond to Articles 17 and 20 respectively of Schedule II of the present Code, are decrees. Again, in *Narpat Rai v. Devi Das* (12) a Division Bench of this Court held that an order under section 523, (old) Civil Procedure Code, admitting an application and ordering an award to be filed when made, is a decree and so appealable. Lastly, *Ponnusami Mudali v. Mandi Sundara Mudali* (13), is a clear authority so far as concerns applications under section 525 of the old Civil Procedure Code.

There is no doubt a conflict of authority on the subject, but we prefer to follow the above rulings. In *Seemal Nihalchand v. Mulomal Rahumal* (14) (Sind Judicial Commissioner's Court) it was held that such a proceeding as the one we are dealing with is not a "suit" and an order setting aside an award is not a "decree." We do not agree with the *ratio decidendi* set forth therein, *viz.*, that an application under Article 17, Schedule II, is merely a prayer to the Court to assist in the disposal of the dispute by a private tribunal, and is not a process for the recovery through the Court of a right or claim. Mr. Bevan Petman's next authority, *Daya Nand v. Bakh-*

tawar Singh (15), is not in point, being concerned with *refusal to file an agreement* under section 523, (old) Civil Procedure Code; nor is *Bhola v. Gobind Dayal* (16) directly in point, for there the case was one under section 525 (Article 20), the award having been made before the application was put in. We observe, however, that indirectly these cases are in respondents' favour, but we are disposed to agree rather with the dissenting Judge than with his four learned colleagues. The next case quoted is *Mohan v. Tukaram* (17), which loses some of its value by being concerned with the word "suit" in the Dekkhan Agriculturists' Relief Act. Then, though Macpherson, J., in *Mahomed Wahiduddin v. Hakimian* (18) laid down the law in accordance with Mr. Bevan Petman's views, the other Judges held very strong views of the opposite kind. *Narpat Rai v. Devi Das* (19) (a judgment of a single Judge) is not in point. There on an application to set aside an award the Court had passed an order rejecting the application and adjourning the case for consideration of its remaining aspects. That order was quite correctly said not to be a "decree", but obviously that case has no resemblance to the present one.

We find, then, that an appeal lies, and the next question for decision is whether the Rs. 10 put in by appellant is sufficient or whether he should pay *ad valorem*. In our opinion the appeal falls under Article 17 (vi) of Schedule II of the Court Fees Act, for the application under Article 17, Schedule II, Civil Procedure Code, and the appeal here embody a prayer that cannot be valued in money. A large number of rulings have been cited on both sides, all of which we have examined, and the above is our conclusion. This case is a peculiar one and must be decided on its own facts. Plaintiff did not pray for a definite share or portion of any property. He asked the lower Court to file the agreement of 6th March 1910 and to direct the arbitrators named therein to proceed to enquire and decide. We fail to see

(11) 84 P. R. 1901; 112 P. L. R. 1901.

(12) 125 P. R. 1907; 50 P. L. R. 1908; 88 P. W. R. 1907.

(13) 27 M. 255; 14 M. L. J. 356.

(14) 28 Ind. Cas. 60; 8 S. L. R. 260.

(15) 5 A. 333 (F. B.); A. W. N. (1883) 56.

(16) 6 A. 186 (F. B.); A. W. N. (1884) 31.

(17) 21 B. 63.

(18) 25 C. 757 at p. 767; 2 C. W. N. 529.

(19) 9 Ind. Cas. 385; 1 P. L. R. 1911; 12 P. W. R. 1911.

RAM JAWAYA MAL V. DEVI DITTA MAL.

how any money value can be assigned to such a prayer. Then in appeal, though no doubt things are rather more definite, for the award gives plaintiff certain land, moveables and houses, yet he does not ask this Court to give him a decree for them: he asks us to set aside the order setting aside the award, and to remand the case to the lower Court to deal with it thereafter according to law—see Articles 14 and 16, Schedule II, Civil Procedure Code. Here again our opinion is as above. We refrain from discussing the dozen or more authorities pressed upon our attention, in which there is a good deal of conflict of opinion, but in which we think the weight of authority is on our side.

Turning now to the merits of the case, what we have to decide is whether the lower Court was right in setting aside the award. It has held, in effect, that the award was *mala fide*, and this is, of course, if established, sufficient reason for setting it aside. We have heard the point argued at length, and our opinion is that the arbitrators have acted in bad faith and have wilfully treated defendant No. 1 unfairly. He is the father and the natural head of the family, and to him has been allotted a very small fraction of the landed property—see pages 8 and 9, paper-book—some 48 *bighas* out of 200 odd or 1/17th; Rs. 270 of mortgage claims out of Rs. 21,000, or so—see pages 10 and 11; one building out of nine buildings and several building sites—see page 12; two cows out of a large number of cows and camels and buffaloes—see pages 14 and 15; and nothing out of outstanding money claims amounting to over Rs. 16,000. In the award the ostensible reasons given for this differential treatment are that defendant is concealing some Rs. 30,000 which he says was stolen by dacoits, and a hint that what is given to defendant No. 1 of the land is sufficient for his maintenance. But against this we have to consider two things—*first*, that at least Shanun Ram, principal arbitrator, knew quite well that these reasons were not *bona fide* for in Court, when examined, he bolsters them up with an assertion which is almost certainly false, namely, that defendant No. 1 repeatedly during the enquiry said he wanted no regular share but only *guzara*. We say this assertion is untrue, because it cannot be reconciled with defend-

ant No. 1's conduct in continuing even as late as 15th September 1913 putting in objections on this and that ground, and actually in that last application discussing with great minuteness a large number of items of property and money and so forth and insisting upon careful accounting for and adjusting of them in the final division. Is it conceivable that defendant No. 1 would act thus, if he was content to take mere *guzara* regardless of his share? And would not the arbitrators have turned on him and asked him what he meant by at one moment filing petitions like that of 15th September 1913 and at another saying in effect—Give me anything you like to keep body and soul together and I shall be content? In short, we agree with the District Judge that defendant No. 1 never agreed to renounce any of his rights; and in the second place we do not think the arbitrators acted in good faith in debiting defendant No. 1 with Rs. 30,000. In the *first* place, even if good faith be presumed, the amount is the wildest conjecture; and, *secondly*, as defendant No. 1 lived with defendant No. 2, a grown up son, full participant in the business of the house, joint custodian of the property and presumably an equal enjoyer of the income, why should not defendant No. 2 have been debited with half or at least some of the Rs. 30,000? In our opinion this suggests that really the arbitrators did not believe in the Rs. 30,000, but merely used it as a cloak for their conduct in cutting off defendant No. 1 with a shilling. These things being so, we need not trouble about the lower Court's idea that the arbitrators used personal knowledge or failed to see the property or assess its value.

Mr. Broadway has striven to overthrow the lower Court's reasoning. He points out that the arbitrators, one a brother-in-law of defendant No. 1 and another the family *guru*, had no motive for swindling defendant No. 1. It is impossible for us to clear up fully such a point as this, but it seems fairly clear that defendant No. 1 was a trouble to them, and there is probably some truth in his allegation—see his application of 19th June 1913—that they were displeased with him. He appears to us to be an old and querulous man, not nearly so important either to a

DALUCHAND FULCHAND GANDHI v. GULABBHAI KANTHADJI.

guru or to ■ relative, as the two sons in the prime of life.

Then Mr. Broadway argues that the note at the end of the award, to the effect that defendant No. 1's widow would have for maintenance what he died possessed of, implies not that defendant No. 1 was to have merely a life-interest but that he could deal with the property awarded to him as he pleased, and the lady would get whatever he chose not to spend or give away. The words are perhaps grammatically susceptible of this construction, but we do not believe for a moment that this is what the arbitrators meant.

Next, it is said that the award should at the worst have been remitted for reconsideration. It is hardly necessary to discuss this seriously, for, on the view the lower Court took and on the view which we take, the faults in the award could not be cured in this way.

Then we are asked to consider certain remarks by the Privy Council in *Amir Begam v. Badr-ud-din Husain* (20) as to the use to be made by the Court of explanations offered by an arbitrator in the witness-box in answer to charges of bad faith, and so forth. In our opinion the Privy Council did not intend that indications of *bad faith* emerging in such explanations should be ignored, but merely that it was not the business of the Court to examine into the workings of the arbitrator's mind and the soundness of his judgment.

It is unnecessary to pursue Mr. Broadway through all the minor points he has raised. It is sufficient to say that we have considered them all and that we are still of opinion that the lower Court's final conclusion is correct.

Mr. Moti Sagar, for respondents, contends that the Civil Courts have no jurisdiction to partition agricultural land, and, therefore, this claim should never have been entertained by the District Judge. The answer is easy. In the *first* place, the award does not divide up holdings by metes and bounds, but merely by shares, and really only settles "title,"

leaving, if the award had been enforced, the Revenue Courts to do the actual division of fields. And *secondly*, we are inclined to doubt whether the exclusion of civil jurisdiction provided in section 158, Land Revenue Act, as regards partition, was intended to apply where the partition is done by what might be called private agency. We need not pursue the subject.

We, therefore, dismiss this appeal with costs, save as regards ■ minor point taken in ground 3. No doubt Rs. 1,400 is the arithmetical maximum Pleader's fee permissible, but we do not think the lower Court should have allowed so large ■ sum. Taking all the circumstances into account we alter the figure 1,400 in the lower Court's decree into Rs. 250, and in this Court we allow Rs. 700, the fee received by Messrs. Petman and Moti Sagar, Counsel for respondents.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST APPEAL FROM ORDER NO. 259 OF 1914.

February 9, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

DALUCHAD FULCHAND GANDHI—
PLAINTIFF—APPELLANT

versus

GULABBHAI KANTHADJI—DEFENDANT
—RESPONDENT.

Bombay Land Revenue Code (Bom. Act V of 1879), ss. 150, 154, 111—Gujarat Talukdars' Act (Bom. Act VI of 1888), s. 33—Talukdari village—Talukdar minor—Guardianship of Collector—Arrears of assessment—Mamlatdar attaching moveables of khatedar—Suit for damages by khatedar for wrongful attachment—Mamlatdar not liable—Income-Tax Act (II of 1884)—Seizure of account-books, wrongful—Liability to damages.

A minor talukdar was placed under the guardianship of the Collector and in consequence of this guardianship the Talukdari Settlement Officer and under him the mamlatdar had the revenue management of the talukdari village. The mamlatdar attached ornaments of a certain khatedar in the village on account of unpaid assessment of previous years. The account-books of the khatedar were also removed for the purposes of income-tax. The khatedar sued the mamlatdar for damages for wrongful attachment of ornaments and seizure of account-books:

(20) 23 Ind. Cas. 625; 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 9 C. L. J. 494; 17 O. C. 120; 16 Bom. L. R. 413; 36 A. 336; (1914) M. W. N. 172; 16 M. L. T. 35; 27 M. L. J. 181; 1 L. W. 1015.

DALUCHAND FULCHAND GANDHI v. GULARBHAI KANTHADJI.

Held, (1) that the *mamlatdar* as a subordinate of the Collector had both under sections 150 and 154 of the Land Revenue Code and section 111 of the said Code as modified by section 33 of Bombay Act VI of 1893 power to attach the ornaments, or at least he and his superiors supposed that he had the power; [p. 201, cols. 1 & 2; p. 203, col. 1.]

(2) that, supposing that the *mamlatdar* and his superiors made a mistake as to the law, the mistake, if any, was a *bona fide* mistake and it was made in pursuance of the provisions of the law; [p. 201, col. 2.]

(3) that attainment of majority by the *talukdar* before the occurrence of attachment did not affect the question, as the *de facto* management of the Government Officers continued uninterruptedly, notwithstanding the event of the *talukdar* attaining majority, and in fact at his own request and with his consent; [p. 201, col. 2; p. 203, col. 1.]

(4) that the seizure of account-books was unauthorized and wrongful, and for this act of his the *mamlatdar* was liable to pay damages, which under the circumstances of the case must be nominal. [p. 202, col. 2.]

First appeal from the decision of the Joint Judge of Ahmedabad, in Suit No. 17 of 1912.

Mr. T. R. Desai, for the Appellant.

Mr. N. K. Mehta, for the Respondent.

JUDGMENT.

HEATON, J.—The village of Moyad-vas-Rupaji is a *talukdari* village. The *talukdar* owner was at one time a minor and the District Court appointed a Government Officer as his guardian, and in consequence of this guardianship the Talukdari Settlement Officer and under him the *mamlatdar* of the Prantij Taluka had the revenue management of this village. The village was leased to a certain person in consideration of the extinction of certain debts due from the *talukdar*. The latter part of the period of this lease became vested in one Makhwad Gafoor, and it was during this period that the events with which we are concerned happened. Makhwad maintained that the landholders of the village were paying far too little by way of assessment. The *khatedars* maintained that they were paying what was customary and all that they could properly be called on to pay. Both sides sent petitions to the *mamlatdar*, and, on the 20th of March 1911, this officer visited the village in order to find out for himself what was the true state of the case. As the result of what he discovered in the village he came to the conclusion, as his subsequent reports clearly show, that the leaseholder was receiving much less by way of assessment than he was entitled to. He,

whilst in the village, caused the property of two of these *khatedars* to be attached. He also advised Makhwad, the leaseholder, to file what are called Assistance Suits against certain of the *khatedars* for the recovery of what he claimed to be due for the current year. Some of these suits were subsequently disposed of by the *mamlatdar* in favour of the leaseholder. One of the persons whose property was attached, and against whom one of these suits was filed, was the plaintiff in this present suit, and briefly stated, the plaintiff asserts that on the occasion of the *mamlatdar's* visit to this village on the 20th of March 1911 he struck the plaintiff with a shoe and with a stick; that he wrongfully entered his house; wrongfully attached certain ornaments and wrongfully took away certain account-books of his. The *mamlatdar* denies that he struck the plaintiff. He admits that he had the ornaments and the account-books taken away from the plaintiff, but submits that this was not wrongful, and in any event he pleads that he acted in pursuance of the law and is protected by section 6 of the Bombay Revenue Jurisdiction Act.

The really material issues of fact in this case are two; (1) whether the *mamlatdar* did strike the plaintiff, and (2) whether he attached the ornaments on account of arrears of assessment for past years, or on account of the assessment of the then current year. The Joint Judge of Ahmedabad who tried the suit found both these issues in favour of the *mamlatdar* defendant and he dismissed the suit entirely.

I will now deal with the first of these two issues. After having read the evidence, and heard it commented on, I can find no convincing reason for supposing that the Court below was wrong in holding that it was not proved that the *mamlatdar* had struck the plaintiff. There is no doubt that the events which have happened have given rise to a great deal of bitterness between the parties, and where this is so, and where we have, as here, a considerable body of landholders in a village ranged on one side against the proceedings of a superior holder and a revenue officer, it is not to be expected that we should have an accurate account of events from the villagers; and

DALUCHAND FULCHAND GANDRI v. GULBBHAI KANTHADJI.

it seems to me that where a Judge who heard the evidence and saw the witnesses, and, as in this case, disbelieved the evidence of a personal assault by the *mamlatdar*, it would require some very convincing reasons to justify a Court of Appeal in reversing his conclusion. Those convincing reasons are not present in this case. So I think that the conclusion of the Trial Judge on this point must be confirmed.

The second issue arises in this way. Seeing that the assessment for the current year was due to the leaseholder who was a superior holder, it could only be recovered, if not duly paid, by the leaseholder who, for this purpose can bring Assistance Suits or ordinary civil suits. The assessment for that year could not be recovered by the *mamlatdar* under the provisions of section 150 of the Land Revenue Code. This is admitted. Therefore, it is urged on behalf of the plaintiff that the attachments made by the *mamlatdar* were on account of the current year's assessment because if so, these attachments were admittedly illegal. But it is urged by the *mamlatdar* that these attachments were made on account of unpaid assessment of previous years and moreover prior to the period of the lease, and that he had power to attach for the recovery of such arrears. Hence arises this issue of fact, as to whether the attachment was on account of the current year's assessment or on account of the assessment of previous years.

Now there is in the case correspondence which shows that there were arrears of previous years, and that the plaintiff was liable to pay a certain amount of such arrears. It is asserted, and the assertion is borne out by the correspondence itself, that the existence of these arrears was brought to the notice of the *mamlatdar* on the 20th of March whilst he was present in the village. Exhibit 78 is a report of the *talati* bringing the matter of arrears to the notice of the *mamlatdar*. The *mamlatdar*'s subsequent reports also show that he had made attachments by way of enforcing payment of such arrears. Unless, therefore, there is some reason for supposing that these papers, in particular the *talati*'s report which bears date the 20th of March, were prepared subsequently in order to support the case which is now put forward, there is very good reason for supposing that the *mamlatdar*'s

account of the matter is correct. I can find no good reason for supposing that these papers have been prepared subsequently, or are in any way other than they purport to be, except one, and that reason is this: that in the *panchnama* (Exhibit 80) recording the attachment it is stated twice over that the attachment is made on account of the current year's arrears. The *mamlatdar* and the *talati* both explain that this is a verbal error. It is undoubtedly the kind of error that does sometimes appear in such papers and the truth of this explanation is, I think, strongly borne out by the general circumstances of the case, because I can find nothing elsewhere either in probability, or in the events which admittedly happened, to show that the *mamlatdar* did make the attachments for the current year's assessment and not for the arrears. These arrears undoubtedly existed. There had undoubtedly been previous correspondence regarding their recovery. They had not been recovered, and in a case like the present where the *mamlatdar* rightly or wrongly had come to believe that there was contumacy in refusing to pay the proper current year's demand, it is very likely that he would inquire whether there were past arrears also, and finding that there were past arrears, and also believing it to be necessary, as his reports show, that an example should be made of those of the *khatedars* that he believed to be most contumacious, he would be very likely to deal with these past arrears. Then we find one of the witnesses for the plaintiff, a witness who is closely identified with the plaintiff's side in this matter, says that on the 20th of March the past arrears were demanded (Exhibit 56). I think, therefore, that the Trial Judge was right in arriving at the conclusion that the attachment was made on account of past arrears and not on account of the current year's assessment. It is established, then, that the attachment of the plaintiff's ornaments was for the purpose of recovering from him arrears of revenue for past years, not for the assessment of the then current year. That being so we have to consider whether the *mamlatdar* had lawful authority to recover those arrears by such attachment. First, I will assume that the provisions of the Land Revenue Code applied. Sections 150 and 154 give the power to attach in

DALUCHAND FULCHAND GANDHI v. GULABBHAI KANTHADJI.

such a case and the attachment can be made without notice. The power can be delegated to a *mamlatdar* (section 12). Even if there was no general delegation, yet the correspondence about the recovery of the arrears (Exhibits 52, 78, 61A, 88, 89 and 68), I think, probably implies a special delegation in regard to the village of Moyad-vas-Rupaji. Moreover the *mamlatdar* was acting as a subordinate of a guardian of the estate appointed by the District Judge under the Guardians and Wards Act, so the guardian would have a general power to delegate his functions. I see no good reason to suppose that a delegation by the guardian to the *mamlatdar* to attach moveables would be unlawful.

If, therefore, the guardian had the power I find no good reason to suppose either that he could not or did not delegate the power. But I do not find affirmatively on these points, we do not know enough about the case for a positive finding. We do not know even who the guardian was, whether the Collector or the Talukdari Settlement Officer; we do not know what arrangements he made, what orders he gave about the management of the property. I can only say that the *mamlatdar* is not shown to have been without the delegated power to attach and the circumstances of the case and the correspondence about the arrears do show that both he and his superior thought he had the power. That is enough for my present purpose.

So far I have assumed that the provisions of the Land Revenue Code apply. The same reasoning holds good if section 111 of that Code as modified by section 33 of Bombay Act VI of 1888 applies. This is a case of a *talukdar's* estate coming under the temporary management of a Government Officer and the Officer would be empowered to "conduct the revenue management under the rules for the management of unalienated lands not comprised within a *talukdar's* estate." Whatever this latter phrase may mean, whether the provisions of the Code or some set of rules, there would doubtless be power to attach for the recovery of arrears.

So here again we find it cannot be said positively that there was not power to attach or that the power had not been delegated to the

mamlatdar and it can positively be said that the *mamlatdar* and his superiors supposed he had the power.

If they were wrong then they made a mistake as to the law, but the law is far from simple and the circumstances to which it was to be applied were complicated. I cannot doubt that the mistake, if any, was a *bona fide* mistake and that it was made in the pursuance of the provisions of the law. The law is there and does contemplate attachment by a *mamlatdar* in certain cases. It may be that the *mamlatdar* erroneously pursued the law which in this case is somewhat elusive: but if he did his conduct is assuredly covered by the provisions of section 6 of the Revenue Jurisdiction Act (X of 1876) and the *mamlatdar* is not liable in damages.

But it is urged that all this is beside the point, because the *mamlatdar's* powers were delegated to him by a guardian duly appointed and the guardianship had come to an end on the minor *talukdar* attaining majority (section 41, Guardians and Wards Act). No doubt the guardianship had ceased some time prior to the 20th March 1911, the date of the occurrences with which we are concerned. Nevertheless the temporary management of the *talukdar's* estate in fact continued and unless that temporary management was unlawful, it would be a temporary management such as is contemplated by section 33 of Bombay Act VI of 1888 and so the reasoning set out above would still hold good. Now was this management unlawful? It is not shown to be. We do not know why the estate was not handed over to the *talukdar*, for that point has not been gone into. But we do know that some time later the *talukdar* formally asked the management of the estate by the Government Officer should continue and that it was then formally continued. That being so, we cannot assume that the informal continuance of the management was without the *talukdar's* consent. In other words, there is no good reason to suppose the management was wrongful whereas there is some reason to suppose it was not. I find nothing, therefore, in this argument.

The case of the seizure of the plaintiff's account-books is different. The *mamlatdar* does not pretend he attached the books for arrears of revenue. His account is this:

"I could see that there was more than enough

DALUCHAND FULCHAND GANDHI v. GULABBHAI KANTHADJI.

property to attach. But I thought to myself that I should not spoil any of his goods. So I advised him not to put me to the necessity of doing it and asked him to produce the money under protest if he liked. Then he went inside his house and brought to me two account-books and told me that he had no money with him in cash and that he had to bring Rs. 35 from Prantij to keep him going. Then I told him to give an ornament as he appeared to be a well-to-do man. So he went into the *parsal* and brought out a key out of a niche in that wall. Then he offered me the key and asked me to open his box; I declined and asked him to do so. Then he opened the box and took out a bundle of clothes and offered it to me. I declined. Then he opened a secret drawer in the box and gave me another bundle of ornaments in which there were about 4 ornaments (some of silver). I handed it over to my *karkun* and asked him to take it to the *chowra* and keep in charge after calling a *chowksey* and getting the ornaments weighed."

"At Dalu's house I noticed that his account-books were bulky and I asked him there as to whether he was paying any assessment. He said 'No'. So I took the books with me, at that time the list of income-tax was under preparation. It was published on 1st April 1912.

"My *karkun* wrote out a receipt for the books: Dalu signed it. Mr. Himatlal interfered and told Dalu that the receipt was improper as it stated that the books were 'produced' by him and not 'taken away' by me. So I told him that as he was not engaged in that case he should not interfere. Daluchand at once left off the books there and went away. I had not abused any one at this time either.

"I had not issued on him a notice under the Income-Tax Act. He did not protest to my taking away the books."

I agree, therefore, with the Trial Judge that the *mamlatdar* took the account-books for income-tax purposes. The Trial Judge writes:

"Now, the evidence in this case satisfies me that the *mamlatdar* demanded from the plaintiff his account-books, threatening him that he had been enjoying exemption from income-tax dishonestly. And the plaintiff

thereupon handed over the books to him, without a protest. I do not think, I can call this removal an attachment or seizure without the consent of the plaintiff. The *mamlatdar* wanted the books for lawful purposes and the plaintiff allowed the removal without a protest. The removal was thus also neither illegal nor wrongful."

I do not agree here with the Trial Judge. I hold on the *mamlatdar's* own testimony and the admitted circumstances that the plaintiff did not willingly allow the *mamlatdar* to take away the books and that the taking was against his consent. How can it have been otherwise? The whole proceeding must have been intensely irritating to the plaintiff; he was unwilling to submit to anything and from that moment to this has vigorously maintained that the *mamlatdar* acted illegally and oppressively. It seems to me to be a perfectly clear case of seizure of the books by the *mamlatdar* against the will and in spite of the protests of the plaintiff.

That being so, the seizure was unauthorized and wrongful. The Income-Tax Act does not contemplate such a thing. The view of the Trial Judge is expressed in paragraph 30 of his judgment. He finds there was no protest on the part of the plaintiff. I find there was a protest and opposition to the seizure. I do not say the *mamlatdar* acted absurdly, but that there is no law which in such circumstances or in any circumstances like them empowers a *mamlatdar* to make such a seizure. He was not pursuing the law for there was no such law to pursue; if he was pursuing anything it was a figment of his own imagination. The matter here seems to me to be quite different from that of the attachment and I cannot hold that the *mamlatdar's* conduct here is covered by section 6 of the Revenue Jurisdiction Act. But I do not think the case is one for punitive damages and the actual damages were trivial, for the books were not long detained. I would award Rs. 5 as damages and allow the plaintiff his costs throughout, to that extent allowing the claim.

SCOTT, C. J.—I concur in the conclusion arrived at by my learned brother: but I have a few words to add on the question of the authority of the *mamlatdar* to distrain

HANSMAN JHA v. BAHUJI JHA.

moveable property of the plaintiff under section 154 of the Code. In my opinion the *mamlatdar* was authorized, because he was invested with the power of making attachment of moveables by delegation from the Collector of Ahmedabad under section 12 of the Land Revenue Code and the Ahmedabad Collector's memorandum of the 6th November 1903, quoted by the learned Judge and not disputed by the appellant's Pleader. The *mamlatdar* then had authority, from 1903 onwards, the Collector's authority and that of his assistant, the Talukdari Settlement Officer, arising from section 33 of the present Talukdars Act so long as the estate continued under the management of Government Officers.

The point urged in appeal is that the Collector's management when the arrears became due was as guardian of the minor *talukdar* and that the *talukdar* having attained majority before the occurrences complained of, there was no *de jure* management by the Collector at that time. In my opinion, however, the authority to manage under the Government Resolution No. 5533 of the 8th of June 1911 issued on the application of the *talukdar* of an earlier date under section 28 of the Gujarat Talukdars' Act (Bom. Act VI of 1888) *prima facie* related to the period of five years from the date from which the management by Government Officers could only be justified by reference to section 28 of the last-mentioned Act.

The *de facto* management of the Government Officers continued uninterruptedly, notwithstanding the event of the *talukdar* attaining majority and the successful request of the *talukdar*, when made, amounted to a ratification of and authority for their management from the date of his attaining majority.

Decree varied.

CALCUTTA HIGH COURT.

APPLICATION TO PRIVY COUNCIL No. 6 OF 1914
August 2, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Holmwood.

HANSMAN JHA AND ANOTHER—

DEFENDANTS—PETITIONERS

versus

BAHUJI JHA—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLV, r. 5—Investigation as to amount or value of subject-matter of suit, who can hold.

The Court of first instance, to which reference is made under rule 5, Order XLV, Civil Procedure Code, for the purpose of settling a dispute as to the amount or value of the subject-matter of the suit, has no power to remit the investigation to some other officer: it must be carried out by that Court itself.

Application for leave to appeal to Privy Council.

Dr. Dwarka Nath Mitra and Babu Rishindra Nath Sarcar, for the Petitioner.

Mr. B. Chakravarti and Babu Chandra Shekhar Banerji, for the Opposite Party.

JUDGMENT.—In this case a reference has been made to the Court of first instance under rule 5, Order XLV of the Code of Civil Procedure, for the purpose of settling a dispute as to the amount or value of the subject-matter of the suit in the Court of first instance. The Subordinate Judge has sent back his report, but he has not proceeded as the rule requires. The rule does not empower the Court of first instance to remit the investigation to some other officer, it must be carried out by that Court.

The result in this case has been very unsatisfactory because the Subordinate Judge purports to have acted on an admission, the precise character of which we do not know except that it seems to be an admission made for the purpose of meeting the difficulty as to the value of the appeal and no more.

The case must go back to the Subordinate Judge in order that he may himself make the enquiry as is required by rule 5, Order XLV, and submit his report on the evidence produced before him.

Case remanded.

RAM AUTAR SHUKUL v. BHAGELU SAHAI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1430 OF 1915.
March 24, 1916.

Present:—Mr. Justice Walsh.
RAM AUTAR SHUKUL—DECREE-
HOLDER—APPELLANT

versus

BHAGELU SAHAI AND ANOTHER—
JUDGMENT-DEBTORS—RESPONDENTS.

Decree, final—Appeal, time for, expiry of.

A decision cannot be said to become final until the time for the last appeal allowed has expired, or if appealed, it has become final by the decree of the High Court. [p. 205, col. 1.]

Shaikh Ewaz v. Mokuna Bibi, 1 A. 132, followed.

Disa Singh v. Juala Singh, A. W. N. (1881) 165;

Karam Khan v. Nathan Khan, A. W. N. (1883) 4, distinguished.

Execution second appeal from the decision of the Additional Judge, Gorakhpur, dated the 18th August 1915.

Mr. Sital Prasad Ghosh, for the Appellant.

The Hon'ble Mr. Gokul Prasad, for the Respondents.

JUDGMENT.—In this case the present appellant had 30 days within which to deposit a certain sum of money from the date of the decree in the suit becoming final. Such decree was made on the 18th of August. The other side, being dissatisfied with the decision, applied to the Court for a copy of the decree and judgment in order to enable them to appeal. At that time in such a hurry were they to appeal that the decree against which they proposed to appeal was not even ready. On 22nd August a copy of the judgment was issued to them. On 31st August a copy of the decree was issued to them. There is no provision in the Code or in the rules as to when a decree becomes final. In my opinion the real question for determination in this appeal is, what is the meaning of the word final in the original decree of the Munsif. Under Article 152 of the Limitation Act the respondents before me, that is, the defendants in the suit, had in any case 30 days to appeal from the decree. That 30 days expired at the end of 18th September, but under section 12 of the Limitation Act they also had the time requisite for obtaining a copy of the decree. There is no definition of the "time requisite;" but it is conceded that it must be defined in each case according to the circumstances of the particular case. In

this case it is obvious, and has not been disputed, that the time requisite was 13 days, namely, the interval actually occupied, that is to say, from 18th August to 31st August. The defendants, therefore had 43 days in all to appeal from the decree of 18th August. They had that period as a matter of absolute right, and it is admitted on their behalf that during that period the decree could not become, as against them, "final" within the meaning of the decree of 18th August. That 43 days took them into the vacation, the result of which was that their right of appeal subsisted until 23rd October when the Court re-opened. The appellant in this case deposited or tendered the required sum on 28th October, that is to say, well within 30 days of the expiration of his opponent's right to appeal. By so doing in my opinion he clearly complied with the terms of the decree. It is true that his own right of appeal had been extinguished, but the intention of the Munsif's order clearly was to give him 30 days within which to find and pay the money after the decree itself had been final, in the sense that nobody could appeal against it and the rights of the parties were finally determined. I find it difficult to understand how it can be justly or reasonably held as against the plaintiff that he was required to pay the money within 30 days of the expiration of his own right of appeal. To hold that would be, in my opinion, to defeat the clear intention of the Munsif's order. The result of so holding would, it seems to me, be unjust in the highest degree, because at the time when, according to the contention of the other side, the appellant ought to make up his mind as to the payment of the money he could not possibly know whether the defendants would prosecute their appeal or not. I am, however, content to base my opinion upon one simple ground. The respondents say that they had a right to appeal on 23rd October because the decree was not then final. They say that the appellant had lost his right to deposit the money because the decree was final on 18th September. How a decree can be held to be both final and not final on the same day beats me altogether. Unfortunately the authorities on this point have got into

RASHBEHARY LAL MANDAR v. ANAND RAM.

a tangle. If the authorities relied on in the lower Appellate Court were the only authorities on the point, I should be bound, however unwillingly, to follow them. In my opinion the lower Appellate Court having those authorities before it had practically no alternative but to hold itself bound by them. They can, however, be explained away as easily ■ the contention on behalf of the respondents. In a case which, so far as I know, is the earliest recorded instance in which this question was raised, *Shaikh Ewaz v. Mokuna Bibi* (1), Mr. Justice Spankie and Mr. Justice Oldfield decided that a decision cannot be said to become final until the time for the last appeal allowed has expired, or if appealed, it has become final by the decree of the High Court. I agree entirely with that decision and propose to follow it. That was in February 1876. In November 1876 the then Chief Justice and Mr. Justice Oldfield* decided the other way. That decision may be justified on the equitable ground that the appellant who sought to deposit money had himself preferred the appeal which, he contended, prevented the decree from becoming final, and had himself withdrawn it. It is, therefore, distinguishable from the earlier case. The next case is reported as *Disa Singh v. Juala Singh* (2). It is practically indistinguishable from the present case. The Munsif originally took the view which, I think, is the right view, but the High Court overruled him, one of the Judges being Mr. Justice Oldfield who had been a party to both the previous decisions. No reasons are given in the judgment of the Court, which appears to have followed the latter of the two cases decided in 1876 to which I have referred. In doing so it overlooked the principle clearly laid down in the earlier case and misapplied the exception to it created by the latter case. This fundamental error makes the decision of no value. I think it was wrongly decided and that the subsequent cases such as *Karam Khan*

v. Nathan Khan (3) are probably attributable to it. It is an illustration of the recognised fact that once heresy creeps in unrecognised, it rapidly develops itself unless checked. In the presence of conflicting decisions upon a question of principle arrived at by the same Judge at different dates, I think I am at liberty to give effect to my own view, and I would be doing no public service if I adopt the course I originally proposed of referring the matter to another Bench. To my mind the point is almost too clear for argument. I allow the appeal, and reversing the decisions of both the Courts below, I send the case back to the first Court to enable the appellant to enforce the decree. The appellant must have his costs in all Courts, and the costs of this appeal on the higher scale.

Appeal allowed.

(3) A. W. N. (1883) 4.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 450
OF 1912.

June 15, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.RASHBEHARY LAL MANDAR —
DEFENDANT—APPELLANT

versus

ANAND RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Bengal Court of Wards Act (IX B. C. of 1879), s. 18—Court of Wards, power of, to give acknowledgment of debt and to execute promissory notes—Limitation Act (IX of 1908), s. 19—Acknowledgment of debt given by Court of Wards, validity of.

A Court of Wards has power to give an acknowledgment under section 19 of the Limitation Act so as to give a fresh start for the computation of limitation. [p. 206, col. 2.]

Beti Mahatani v. Collector of Etawah, 17 A. 198; 22 I. A. 31 (P. C.); 6 Sar. P. C. J. 551; *Ram Charan Das v. Gaya Prasad*, 30 A. 422 at p. 437; 5 A. L. J. 375 (F. B.); A. W. N. (1908) 175; 4 M. L. T. 49; *Kondamodulu Linga Reddi v. Alluri Sarvarayudu*, 6 Ind. Cas. 407; 8 M. L. T. 105; 34 M. 221; (1910) M. W. N. 453; 20 M. L. J. 808 and *Kamla Kuar v. Har Sahai*, A. W. N. (1888) 187, referred to.

Semle.—It may be doubted whether a Court of Wards has under the terms of section 18 of the Court of Wards Act power to direct the execution of a promissory note. [p. 206, col. 2.]

But a promissory note executed under its direction may in any event be used as an acknowledgment of a pre-existing debt. [p. 207, col. 1.]

(1) 1 A. 132.

(2) A. W. N. (1881) 165.

[**Hinglan Khan v. Ganga Pershad*, 1 A. 293. The judgment was in August and not in November 1876—*Ed.*]

RASHBEHARY LAL MANDAR V. ANAND RAM.

Appeal against the decree of the Subordinate Judge, Bhagalpur, dated September 30th, 1912.

Dr. Dwarkanath Mitter (with him Babu Naresh Chandra Sinha), for the Appellant.

Babu Umakali Mukerji (with him Babu Gurudas Sinha), for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant from the judgment of the learned Subordinate Judge of Bhagalpur, dated the 30th of September 1912. The plaintiffs brought the suit to recover from the defendant the sum of Rs. 11,541-2 for principal and interest due on a promissory note dated the 2nd of December 1909.

The plaintiffs have two firms, one at Bhagalpur and the other at Calcutta. Admittedly, the defendant had dealings with both these firms.

The transactions with the Bhagalpur firm of the plaintiffs were adjusted and on the 30th of Bhadra 1314 F. S., corresponding with the 21st of September 1907, the defendant executed in favour of the plaintiffs a promissory note payable on demand for Rs. 2,542 with interest at 12 annas per cent. per mensem.

The defendant states that after the execution of this promissory note he made a payment of Rs. 900. There seems to be no truth in this statement.

The goods taken from the Calcutta shop of the plaintiffs were as follows:—On the 10th of September 1906 goods of the value of Rs. 5,213-6-6; on the 12th of September 1906 goods of the value of Rs. 1,202-9-5; on the 30th of January 1907 goods of the value of Rs. 1,685-14-6, and on the 3rd of February 1907 goods of the value of Rs. 1,114-7. The plaintiffs also prove that there was an agreement to pay interest on the balance due to the Calcutta shop at the rate of 12 annas per cent. per mensem. I reject the defendant's story as to his dealings with the Calcutta shop of the plaintiffs and also as to his having paid their account in full. The payments made by the defendant on account of the moneys due to the Calcutta shop are as follows:—On the 14th November 1906 the sum of Rs. 1,000; on the 26th January 1907 the sum of Rs. 1,950, on

the 2nd of February 1907 Rs. 600; on the 30th of April 1907 Rs. 600, and on the 2nd of May 1907 the sum of Rs. 400. On the 11th November 1908 the Court of Wards took charge of the defendant's estate. The Court then issued the usual notice calling on persons claiming to be creditors of the disqualified proprietor (the defendant) to prove their debts. The plaintiffs duly appeared and produced their accounts and satisfied the Court as to the amount due to them. Accordingly, under the directions of the Court of Wards, the Manager on the 2nd of December 1909 executed the promissory note that is now sued upon.

The defendant has contended on this appeal that the Court had no power to execute a promissory note in respect of any of his debts and that the promissory note, so far as it relates to a portion of the defendant's due to the Calcutta shop, was in respect of debts that were barred by limitation.

The Court of Wards Act (Beng. LX of 1879) does not contain any express power authorising the Court to execute promissory notes. Section 18 provides that the Court "may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

It may be doubted whether the Court had under the terms of section 18 power to direct the execution of a promissory note. But there can be no doubt on the authorities that the Court has power to give an acknowledgment, so as to give a new period of limitation under section 19 of the Indian Limitation Act.

In the case of *Beti Maharani v. Collector of Etawah* (1), the Privy Council observed with reference to such an acknowledgment, "It must be taken that the Court's act would bind the ward."

In the course of his judgment in the case of *Ram Charan Das v. Gaya Prasad* (2) Banerji, J., remarked: "This Court has held in *Kamla Kuar v. Har Sahai* (3) that an

(1) 17 A. 198; 22 I. A. 31 (P. C.); 6 Sar. P. C. J. 551.

(2) 30 A. 422 at p. 437; 5 A. L. J. 375 (F. B.); A. W. N. (1908) 176; 4 M. L. T. 49.

(3) A. W. N. (1888) 187.

SAHDEO OJHA v. LACHHMINA KUAR.

acknowledgment by the Court of Wards gives a fresh start for the computation of limitation." The same view was adopted by the Madras High Court in the case of *Kondamorialu Linga Reddi v. Alluri Sarvarayudu* (4). The report of the Deputy Collector of the 20th July 1909 (Exhibit 10), the letter from the Board of Revenue of the 24th of August 1909 (Exhibit 20), the letter from the Collector of the 18th of September 1909 (Exhibit 14), and the promissory note sued on (Exhibit 6) are all clear acknowledgments of the debts due to the plaintiffs. At the date of those acknowledgments the promissory note of the 21st September 1907, with respect to dealings with the Bhagalpur firm, was clearly not barred by limitation. The earliest dealing with the Calcutta shop was the 10th September 1906. The acknowledgment by the Board of Revenue in their letter (Exhibit 20) of the 24th of August 1909 was within 3 years from the date of the debts. This suit was, therefore, in my opinion, brought within time. The present appeal, therefore, fails and must be dismissed with costs. Let the record be sent down at once.

RICHARDSON, J.—I agree.

Appeal dismissed.

(4) 6 Ind. Cas. 407; 34 M. 221; 8 M. L. T. 105; (1910) M. W. N. 453; 20 M. L. J. 808.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 186 OF 1915.

April 25, 1916.

Present:—Justice Sir George Knox, Kt.,
and Mr. Justice Lindsay.

SAHDEO OJHA AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Musammat LACHHMINA KUAR—

PLAINTIFF—RESPONDENT.

Mortgage—Redemption—Right to redeem, proof of—Prima facie evidence, sufficiency of—Suit, maintainability of.

In a suit for possession of land by redemption of mortgage, the plaintiff must produce at least *prima facie* evidence of his right to redeem, and what is sufficient *prima facie* evidence is a question to be decided in accordance with the facts of each case in which it arises. [p. 208, col. 2.]

Where, therefore, in a suit for redemption of a mortgage the plaintiff produced no evidence at all, nor did she nor her predecessor in the suit ever make any offer to redeem the mortgage set up by the defendants, although the plaintiff had notice of some of the mortgages long before the suit and where the case set up by the plaintiff amounted to a denial of the mortgages:

Held, that under the circumstances the suit was not maintainable. [p. 208, col. 2.]

First appeal from an order against the decision of the District Judge of Ghazipur, dated the 30th September 1915.

Mr. M. L. Agarwalla, for the Appellant.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.—This is an appeal against an order passed on appeal by the District Judge of Ghazipur. The appeal before the lower Court arose out of a suit for redemption originally brought by one Ram Lochan, who died during the pendency of the suit and was succeeded by his widow Lachhmina Kuar. It is necessary for the decision of the case to refer with some particularity to the contents of the plaint. In the first paragraph of the plaint it was alleged that the defendants were the mortgagees of certain property which had been mortgaged by one Bhinik Ojha, the ancestor of the plaintiff. In the second paragraph of the plaint various particulars of this mortgage transaction were set out. It was recited that the date of the mortgage was 50 years before suit; the names of the parties to the transaction were given and with regard to the amount of the mortgage-money it was stated that the plaintiff was not personally aware of the amount of the mortgage, because the defendants refused to show him the mortgage-deed; he stated, however, that as far as he could ascertain the amount was Rs. 99-15-9. The details of the mortgaged property were stated and it was said that the agreement between the parties was that the mortgagee should appropriate the profits in lieu of the interest. Paragraph 3 of the plaint is a repetition of the allegation contained in the 2nd paragraph, but it is stated more definitely that the mortgage was for Rs. 99-15-9 and had been made 50 years before suit. In the 8th paragraph of the plaint a reference was made to two deeds of mortgage, which it was alleged by the plaintiff that defendants had put forward in the course of certain proceedings in the Revenue Court

SAHDEO OJHA, v. LACHHMINA KUAR

for the correction of the *jamabandi*. One of these mortgages was expressed to have been executed in 1269 *Fasli* while the second deed was alleged to bear date 1280 *Fasli*. The plaintiff did not in any way admit that these two documents just mentioned were genuine, on the contrary he alleged that Ganga Jali and Gura Kuar had no right to encumber the property by executing the second of these deeds. In fact it was denied that the persons executing the deeds had any power to do so. The defence to this suit for redemption was a denial of mortgage set out in the plaint. The defendants put forward three deeds of mortgage (1) 1269 *Fasli*, (2) 1280 *Fasli*, and a document executed in the year 1885 A.D. The Court of first instance, after fixing issues arising on the pleadings and coming to a decision on those issues, dismissed the plaintiff's suit on the ground that the plaintiff came to Court with a definite cause of action which he failed to make out. In his judgment the Munsif observes that "It was the plaintiff's duty to prove the mortgage set up by her but she adduced no evidence on the point. Lachhmina Kuar made no attempt to prove the mortgage alleged by her which she was bound to prove."

When the case came before the District Judge he held that the suit ought not to have been dismissed. He decided that the defendants had been in possession of the property in suit as mortgagees and being of opinion that the plaintiff had not the necessary means of knowledge to state with precision the particulars of the mortgage, he thought that the plaintiff was entitled to get a decree for redemption of the mortgage or mortgages set up by the defendants. Consequently he set aside the decree of the Munsif and remanded the case to the Court of first instance under Order XXI, rule 23 for disposal on the merits.

It is contended here that the lower Appellate Court was wrong in passing the order for remand. We are of opinion that this contention is right. The learned Counsel for the plaintiff referred us to certain rulings of the Bombay High Court and other rulings, including rulings of this Court,

viz., *Parmanand Misr v. Sahib Ali* (1) and *Sheo Prasad v. Lalit Kuar* (2). Both these cases lay down the principle to be observed in dealing with suits in which possession is asked for and resisted by a plea of adverse possession and suits in which possession is asked for by redemption. It was held in *Parmanand Misr v. Sahib Ali* (1) just referred to that "In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and, therefore, a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to his property." A similar principle was laid down in *Sheo Prasad v. Lalit Kuar* (2). There the plaintiffs came into Court alleging a mortgage of the year 1854 and asking for redemption of that mortgage. It was held that when it was found that the plaintiffs had failed to prove their mortgage of 1854, they were not entitled in that suit to a decree for redemption of other mortgages which might be found to be subsisting between the parties but which formed no part of the cause of action upon which the plaintiffs came into Court.

In all cases, therefore, the plaintiff must produce at least *prima facie* evidence of his right to redeem, and what is sufficient *prima facie* evidence is a question to be decided in accordance with the facts of each case in which it arises. In the present suit the plaintiff produced no evidence at all and the suit was bound to fail. Nor did she nor her predecessor in the suit ever make any offer to redeem the mortgages set up by the defendants, although it is proved that two at least of those mortgages had been brought to plaintiff's notice long before this suit was brought. In fact the case set up by the plaintiff amounted to a denial of those mortgages. We hold that the decision of the Munsif was right and should be

(1) 11 A. 438; A. W. N. (1889) 155.

(2) 18 A. 403; A. W. N. (1896) 132.

IBRAHIM v. AKBAR.

restored. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellants will get their costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 54 OF 1915.

May 19, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, Mr. Justice Chevis and Mr. Justice Shadi Lal.

IBRAHIM AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

AKBAR AND OTHERS—DEFENDANTS—
RESPONDENTS.

Jurisdiction—Civil or Revenue Court—Suit for injunction restraining defendant from building on occupancy land—Punjab Tenancy Act (XVI of 1887), s. 77 (3).

A suit falling within the purview of section 77 (3) of the Punjab Tenancy Act must be heard by a Revenue Court whether or not, so far as the form of the suit or the particular remedy prayed for is concerned, the suit also falls within the purview of the Specific Relief Act. [p. 210, col. 1.]

Rahmun v. Hashim, 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910, dissented from.

Bahadur Khan v. Sardar, 89 P. R. 1895; *Sajawal v. Sodagar Singh*, 18 Ind. Cas. 796; 2 P. R. 1913 Rev.; 81 P. L. R. 1913; 3 P. W. R. 1913 Rev., referred to.

Therefore a suit for a perpetual injunction that the defendants, being plaintiff's occupancy tenants, be prohibited from building houses on land forming part of the occupancy tenancy is cognizable by a Revenue Court only. [p. 209, col. 1; p. 210, col. 1.]

Case referred by the Collector, Attock District at Campbellpore, for the orders of the Chief Court.

ORDER. — In this case the prayer was for a perpetual injunction that the defendants, being plaintiff's occupancy tenants, be prohibited from building houses on land forming part of the occupancy tenancy, and the question we have to decide is whether the suit is one for a Revenue or a Civil Court. Plaintiff appears to say in effect that the building of houses on the land would be a breach of the conditions on which defendants hold the land, and this appears to us to come well within the words to be found in section 77 (3) (i), Punjab Tenancy Act, namely, "any other suit between landlord and tenant

arising out of the.....conditions on which ■ tenancy is held." A suit to restrain a defendant tenant from violating the conditions on which he is tenant is plainly a suit "arising out of" those conditions. If this were all there would be no difficulty whatever; but the suit, being one for an injunction, is one under section 54, Specific Relief Act, and in the past there has been some controversy as to whether Revenue Courts can entertain suits under that Act at all.

In *Bahadur Khan v. Sardar* (1) Rivaz, J., sitting alone, in a case in which the claim was by a tenant for a declaration that he was entitled to pay cash rent, held that, notwithstanding section 45, Land Revenue Act, the suit fell under section 77 (3) (i), Tenancy Act, and that the jurisdiction of the Civil Court was barred. He stigmatized as erroneous the doctrine that all cases which fall within the purview of section 45,* Land Revenue Act, are necessarily cognizable by the Civil Court, and held that that section must be read subject to section 77 of the Tenancy Act.

Rahmun v. Hashim (2) was also a suit under section 45, Land Revenue Act, by tenants regarding the amount of rent they were liable for. There Sir Arthur Reid, C. J., ruled that the Specific Relief Act refers to "civil suits only" and makes no "limitation" in favour of Chapter VI of the Act; that *Raja Nur Khan v. Musammal Darab Khatun* (3) (Division Bench) laid down the correct rule, and not *Bahadur Khan v. Sardar* (1); and that the suit was one for a Civil Court. But if *Raja Nur Khan v. Musammal Darab Khatun* (3) is seen, it will appear that it hardly supports the view taken in the case of 1910. Section 158 (2) (vi), Land Revenue Act, excludes from Civil Courts—"the correction of any entry in a Record-of-Rights, annual record or register of mutations;" and what the Court in 1889 ruled was that a suit by a person in possession of land for a declaration that the land was

(1) 89 P. R. 1895.

(2) 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910.

(3) 25 P. R. 1889.

*"If any person considers himself aggrieved as to any rights of which he is in possession by an entry in a Record of Rights or in an annual record, he may institute a suit for a declaration of his right under Chapter VI of the Specific Relief Act, 1877."

KHEYALI PRASAD v. NAZARUL ALUM.

his, though the revenue records shewed it as belonging to another person, was not a suit for correction of an entry in a revenue record [section 158 (2) (vi) aforesaid], but was an ordinary civil suit for declaration of title. It did not rule that only Civil Courts could hear suits under the Specific Relief Act.

The matter was then discussed in *Sajawal v. Sodagar Singh* (4) by the learned Financial Commissioner, who dissented from *Rahmun v. Hashim* (2); and lastly in Civil Reference No. 3 of 1915 of the Chief Court a Judge in Chambers considered himself bound by *Rahmun v. Hashim* (2) and its interpretation of the case of 1889.

We lay it down now that there is no foundation for the idea that suits brought under the Specific Relief Act are *ipso facto* entertainable only by Civil Courts; and that on the contrary where a suit falls within the purview of any clause of section 77 (3), Punjab Tenancy Act, that suit must be heard by a Revenue Court, whether or not so far as the form of the suit, or the particular remedy prayed for, is concerned, the suit also falls within the purview of any section of the Specific Relief Act.

The papers will be returned to the Collector, who upon this ruling will no doubt proceed to dispose of the case.

Reference answered accordingly.

(4) 18 Ind. Cas. 796; 2 P. R. 1913 Rev.; 81 P. L. R. 1913; 3 P. W. R. 1913 Rev.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2360 OF 1913.

April 26, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Roe.

KHEYALI PRASAD *alias*
JAGDIP NARAIN—PLAINTIFF—APPELLANT
versus

Mullick NAZARUL ALUM, *minor*, UNDER
THE GUARDIANSHIP OF HIS FATHER

Mullick MAHARAT KARIT AND OTHERS—
DEFENDANTS 1ST AND 2ND PARTY—RESPONDENTS.

Pre-emption, accrual of right of—Sale, when complete for purposes of pre-emption—Registration of sale-deed—Pre-emptor's knowledge of sale—Performance of two talabs—Muhammadan Law—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 37—Justice, equity and good conscience, application of rules of.

The right of pre-emption cannot be exercised unless the pre-emptor has performed the ceremony of *talab-i-mowasabat* immediately on hearing of the sale. [p. 212, cols. 1 & 2.]

Per Mullick, J.—The two ceremonies of *talab-i-mowasabat* and *talab-i-istishhad* can be combined, but it is essential that the *talab-i-istishhad* should refer expressly to the *talab-i-mowasabat* as having been duly made. [p. 212, col. 1.]

A petition to the Registrar asking for stay of registration is not a sufficient compliance with Muhammadan Law in the matter of the performance of the two *talabs*. [p. 212, col. 1.]

A sale is not complete for the purposes of pre-emption till legal ownership passes from the vendor to the vendee. Whether or not there has been payment and delivery, the pre-emptor's title in the case of property worth more than Rs. 100 does not accrue till after registration. [p. 211, col. 2.]

Budhai Sirdar v. Sonaula Mridha, 23 Ind. Cas. 385; 19 C. L. J. 601; 18 C. W. N. 890; 41 C. 943, approved.

It is against equity, justice and good conscience to apply to a pre-emption case the Muhammadan Law of sale, which is no longer in force and to attach to a mere contract for sale an incident which Muhammadan lawyers intended to attach only to an actual sale. [p. 211, col. 2; p. 212, col. 1.]

Jadu Lal v. Janki Koer, 35 C. 575; *Najm-un-nissar v. Ajaib Ali Khan*, 22 A. 343; A. W. N. (1900) 102; *Janki v. Girjadat*, 7 A. 482; A. W. N. (1885) 97; *Begam v. Muhammad Yakub*, 16 A. 344; A. W. N. (1894) 101 referred to.

Per Roe, J.—The test to determine when right to pre-emption accrues is (1) has there been a real sale, (2) at what date had the pre-emptor knowledge that the sale was complete. If the sale is in the eyes of the contracting parties and the pre-emptor complete, it is not necessary for the pre-emptor to wait till registration before performing the ceremony of *mowasabat*. [p. 212, cols. 1 & 2.]

Babu Sivanandan Roy, for the Appellant.

JUDGMENT.

MULLICK, J.—(April 25th, 1916.)—The plaintiff, the pre-emptor, is a Hindu. The first party defendants are the vendees and defendant No. 4, the second party defendant, is the vendor. The plaintiff sues to enforce his right of pre-emption in an estate of which he and the defendant No. 4 are co-sharers and in which defendant No. 4 has sold his share to the first party defendants.

That the plaintiff, though a Hindu, is entitled to pre-empt has not been disputed. The learned District Judge finds that the sale was complete under the Muhammadan Law on the 14th of July 1911 on which day the *kabala* was executed. The plaintiff's story is that he came to hear of the sale at 6 A. M. on the 17th of July 1911, and that he immediately performed the *talab-i-mowasabat*; that he then went with the witnesses to the houses of the vendee and the vendor, and also to the land sold and performed the *talab-i-istishhad*; and that about 3 P. M. he went to the

KHEVALI PROSAD v. NAZRAUL ALUM.

Registry Office and put in a petition before the Sub-Registrar praying that the registration of the sale-deed might be stayed. The learned District Judge does not find when the plaintiff came to know of the sale, but he finds as a fact that the plaintiff never made either the *talab-i-mowasabat* or the *talab-i-istishhad*, and disagreeing with the Subordinate Judge he has dismissed the suit. Hence this second appeal by the plaintiff.

The contention of the learned Vakil for the appellant is that the sale was not complete till registration of the sale-deed and that the petition made to the Registrar constitutes a sufficient performance of both demands.

Now under section 37, Act XII of 1857, it is clear that there being no special custom pleaded the case must be tried on the principles of justice, equity and good conscience. According to the Allahabad High Court these principles require that not only the Muhammadan Law of pre-emption should be applied but also the Muhammadan Law of sale, which has confessedly been altered by section 54 of the Transfer of Property Act. Therefore, it has been held by that Court that the right of pre-emption arises as soon as there has been a complete sale by unconditional offer and acceptance, and that if consideration has been paid and possession transferred, registration of the sale-deed is not necessary, at all events if the formality was intentionally omitted in order to defeat pre-emption and if the circumstances are such that the purchaser could have obtained the legal ownership by means of a suit for specific performance, *Najm un-nissa v. Rajaib Ali Khan* (1); *Janki v. Girjudat* (2), (Mahmood, J., dissenting); *Begam v. Muhammad Yakub* (3) (Banerji, J. dissenting).

The Calcutta High Court have, however, expressed doubts as to the soundness of these decisions. In *Jadu Lal v. Janki Koer* (4), though not definitely deciding whether the sale became complete on the execution of the sale-deed or upon registration, a Bench of two Judges of that Court were of opinion that there were difficulties in applying the

Muhammadan Law of sale strictly and that the real solution depended in each case on the intention of the parties. The objection to this test is that it seems inequitable that the rights of the pre-emptor should depend on his ability to discover what the vendor and vendee had in their minds at the time of the execution of a conveyance to which he was not a party.

In *Budhai Sirdar v. Sonanlla Mridha* (5), however, Carnduff, J., expressed a more decided view. He was of opinion that section 54, Transfer of Property Act, had abrogated the Muhammadan Law of sale and that the pre-emption right did not accrue till after registration. He dissented from the decision of the Allahabad Court in *Janki's* (2) and *Begam's* (3) cases so far as they decided that the Muhammadan Law of sale should be strictly applied. In the case before him there was neither payment of consideration nor delivery of possession till registration, and he was satisfied that it was in accord with the spirit of the Muhammadan Law to hold that the sale became complete for the purposes of pre-emption only upon registration. In the same case Richardson, J., while agreeing with the decree of Carnduff, J., expressed the view that the application of the Muhammadan Law of sale presented great if not insuperable difficulties and he was inclined to accept the test suggested by Brett, J., in *Jadulal's* case (4), with the addition that the intention of the parties must be manifested in some unequivocal way such as delivery of possession or registration.

Adopting the reasoning of Carnduff, J., and of Sir Roland Wilson at page 412 of the 4th Edition of his 'Digest of Anglo-Muhammadan Law,' I would hold that as the sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration.

It seems to me that it would be against equity, justice and good conscience to apply in the case before us the Muhammadan Law of sale, which is no longer in force and to attach to a mere contract for sale an in-

(1) 22 A. 343; A. W. N. (1900) 102.

(2) 7 A. 482; A. W. N. (1885) 97.

(3) 16 A. 344; A. W. N. (1894) 101.

(4) 35 C. 575.

(5) 23 Ind. Cas. 385; 19 C. L. J. 601; 18 C. W. N. 890; 41 C. 943.

KHEYALI PRASAD v. NAZARUL ALUM.

cident which the Muhammadan lawyers intended to attach only to an actual sale.

Turning now to the facts before us, it would seem from the pleadings that the parties were agreed that payment of consideration and delivery of possession had taken place before the 17th July, which was the date of registration. The case made by the plaintiff in the Court of first instance was that the sale was complete on the 14th July and that he formed the *talab-i-mowasabat* as soon as he learnt of the sale at 6 A. M. on the 17th July in the shop of a sweet-seller. That case has been found to be false.

The learned Vakil for the appellant cannot challenge that finding but he now makes a new case. He contends that as the sale only became complete upon registration, the petition which the plaintiff made in person to the Sub-Registrar was a sufficient compliance with the law in the matter of the performance of the *talab-i-mowasabat* and *talab-i-istishhad*.

Now what is that petition? It does not make any reference to the *talab-i-mowasabat*. No doubt the two formalities can be combined, but it is essential that the *talab-i-istishhad* should refer expressly to the *talab-i-mowasabat* as having been duly made. This the plaintiff did not do. There is not a word in the petition about any *talab-i-mowasabat*. I cannot admit that the petition complies with the requirements of the Muhammadan Law in the matter of the two *talabs*, although it was made in the presence of witnesses and in the presence of the vendor. That being so, the plaintiff has no right to pre-empt and the suit has been rightly dismissed.

ROB, J.—I agree that the appeal should be dismissed. In my view there is not that divergence in the rulings quoted in this case, which it has been suggested by the learned Vakils on either side exists. The test in each case should be, *firstly*, has there been a real sale; *secondly*, at what date had the pre-emptor knowledge that the sale was complete. In the case of *Budhai Sirdar v. Sonaula Meidha* (5) it was clear that the sale was not complete at the time when the pre-emptor performed the ceremonies of '*mowasabat*'; no consideration had

passed, and the vendor was, in spite of the sale to Budhai, still negotiating for a sale to Sonaula. In the case of *Jadu Lal v. Janki Koer* (4) the judgment of Mr. Justice Brett shows that what was weighing chiefly in his mind was the question of fact, at what particular moment Mr. Lewis knew of a sale to Jadu Lal Sahu. This is clear from pages 586 to 589 of the judgment. It will appear that in that case also Amirul Hussain, the agent of the vendor, was, in spite of the intended sale to Jadu Lal Sabu, negotiating through Mr. Irwin with Mr. Lewis for a sale to the Bettiah Raj. In these two cases the pre-emptor could not be certain that the sale was complete until registration had actually been effected. In the case of *Begam v. Muhammad Yakub* (3) there had been a complete sale within the meaning usually attached to a sale by Muhammadans. It was held in that case that the sale in the eyes of the contracting parties and of the pre-emptor being complete, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of *mowasabat*.

That is the test that I would apply to the present case. Was the sale in the eyes of the parties complete? In paragraph 7 of the plaint we find the following sentence:—"On that very day (the 17th July) while he was at Sheikhpura he all of a sudden learnt that the defendant, second party, had really sold, by a deed of sale, dated the 14th July, his shares in *Mouzas Belchhi, et cetera*."

The plaintiff's case, therefore, as set forth in the pleadings, was that he knew that there had been a sale which was in his eyes complete, and that this knowledge came to him on the 17th July while he was at Sheikhpura. He was, therefore, required by the law of pre-emption to perform the ceremonies of *mowasabat* immediately. The case is that he did so perform those ceremonies immediately. He cannot now change the nature of his case. It has been found as a fact by the learned Subordinate Judge that he did not perform *mowasabat* immediately upon obtaining knowledge of the sale. He cannot be permitted to argue that he was not aware that the sale was complete until after re-

JAMNA BAI SAHEB MOHITAI AVERGAL v. VASANTA RAO.

gistration was effected. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL

APPEALS FROM THE MADRAS HIGH COURT.

March 21, 1916.

Present:—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

JAMNA BAI SAHEB MOHITAI AVERGAL
—DEFENDANT—APPELLANT

versus

VASANTA RAO ANANDA RAO
DHYBAR—PLAINTIFF—RESPONDENT.
VASANTA RAO ANANDA RAO
BHYBAR—PLAINTIFF—APPELLANT

versus

SETHURAM SAHEB—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Civil Procedure Code (Act XIV of 1882), s. 462—Compromise of suit on behalf of minors—Court's sanction not obtained—Bond executed by minor and adult—Liability of promisors.

By way of compromise of a suit a bond was executed by a minor jointly with another person for the payment of a certain amount. The compromise, however, was not sanctioned by Court under section 462, Civil Procedure Code, 1882:

Held, that the minor was not bound under the bond, but that his immunity could not be pleaded in bar of the claim against his co-promisor. [p. 215, col. 1.]

Quære.—Whether the minor would be liable if the terms of section 462 had been complied with? [p. 215, col. 1.]

Consolidated appeals from a judgment and decree of the Madras High Court, dated July 29th, 1910, varying a judgment and decree of the Subordinate Judge of Tanjore, dated January 19th, 1906.

FACTS.—One Sakharam Saheb Mohettey, son-in-law of the last Ruling Prince of Tanjore, died in 1875 leaving a large property. Jamna Bai Saheb, the widow of Shambhu Singh the predeceased son of the said Sakharam Saheb, and her brother Sethuram Saheb sought to establish a Will of the said Sakharam under which they claimed to benefit. One Chota Raja claimed to be the adopted son of the said Shambhu Singh and as such the grandson of the said Sakharam. He disputed the validity of the said Will. These matters which were subject of two suits were compromised and the Will was regarded as established. One Vasanta Rao then instituted a suit disputing

both the said Will and the adoption of Chota Raja and impugned the said compromise as fraudulent, claiming the estate for himself as the nearest *bandhu* of the said Sakharam. A compromise was again arranged for by which Vasanta Rao was to receive Rs. 90,000 in full satisfaction of his claim. This sum purported to be secured by a bond executed by or on behalf of Sethuram by his grandmother one Jamna Bai and the said Jamna Bai became jointly liable for the payment of the sum. It was also part of the said arrangement that Chota Raja was responsible for the payment of a moiety of Rs. 90,000 and another bond was executed by him in favour of Sethuram for the same. On an application to the Court for recording the compromise the suit was dismissed. Sethuram, Vasanta Rao and Chota Saheb were all minors and no leave of the Court was obtained prior to the compromise for the purpose. Sethuram then sued Chota Saheb for Rs. 45,000 under the said bond, but as the defendant was a minor and pleaded that he was not bound under the bond inasmuch as it was executed on his behalf during his minority, the suit was dismissed as being premature. Vasanta Rao then sued Sethuram and Jamna Bai under the bond in his favour for Rs. 90,000. Jamna Bai *inter alia* pleaded that she was not bound under the deed inasmuch as Sethuram claimed to have been exonerated on the ground of his minority at the time the said bond was executed on his behalf. The Subordinate Judge held him also liable to pay, but the High Court decided in his favour and exonerated him for liability thereunder but upheld the decree against Jamna Bai. Appeals were then preferred by Jamna Bai in respect of the decree against her and by Vasanta Rao against Sethuram in respect of his having been held as not liable under the bond to the Judicial Committee.

Messrs. *De Gruyther, K. C.*, and *Raikes*, for Jamna Bai.—As a condition precedent to the validity of this bond there must be a binding compromise involving a complete abandonment by Vasanta Rao of his rights. The compromise is not binding upon Sethuram as he has taken steps to have it set aside. If Vasanta Rao claims even against Sethuram, he is entitled to Rs. 90,000. The transaction is entire and indivisible. The bond is part of the compromise. The obliga-

JAMNA BAI SAHEB MOHITAI AVERGAL v. VASANTA RAO.

tion of the whole transaction is not severable. The result of holding otherwise will be (1) Jamna Bai will have to pay Rs. 90,000, (2) Sethuram will be altogether released and (3) Sethuram and Chota Raja will divide the whole estate while Jamna Bai will get nothing.

[SIR JOHN EDGDE: That may only show that she has been badly advised.]

A reasonable construction must be placed on the bond.

Mr. (Raikes) following.—When a suit is brought against one of several persons and later another is sued the plea of abatement is raised. I should be liable if the obligation were several, but here it is joint. The contract which is sought to enforce against me was never made by me.

Reference was made to *Kendall v. Hamilton* (1); *Ellesmere Brewery Co., v. Cooper* (2); *King v. Hoare* (3); *Underhill v. Horwood* (4).

[Their Lordships intimated that no reply was needed.]

Sir E. Richards, K. C., with Mr. Brown, for Vasanta Rao.—I ask for relief against the minor, which would endanger my claim against Jamna Bai who throughout had a distinct and separate share in the property.

The compromise is binding upon Sethuram and the leave of the Court was in effect given. The Court had all the materials before it. Under the Code of 1882 no formal order was necessary. The parties were described as minors each of whom was represented by Counsel.

[LORD SHAW: The judgment shows that the Judge considered the interests of the minor plaintiff, but there is nothing to show that he considered the interests of the minor defendant.]

In form the Judge did not make an order giving his consent; in substance he had all the facts before him. In *Manohar Lal v. Jadunath Singh* (5) there was no agreement or order and there was nothing to show that the

facts were before the Court. *Virupakshappa v. Shidappa* (6) proceeded on the ground that the Judge must have all the materials before him. In the present case he did sanction the compromise. If the compromise is not binding, what is my position? The Trial Judge held that Sethuram could not rescind the contract as he was in possession of all the property. The High Court has given ~~me~~ no relief although it has dismissed my suit against Sethuram. The contract is voidable only. Both under the Indian Contract Act and the Specific Relief Act, the party which avoids the contract is bound to put back the other party in his original position as much as possible. I could start no suit now as it shall be barred by limitation. I wish, therefore, to be allowed to continue my present suit.

[LORD SHAW: If you get your Rs. 90,000, what more do you want? Is it that you want first Rs. 90,000 out of Jamna Bai and then to go on with the suit?]

All I want is not to have the door shut to my ultimate rights. It may well be that Jamna Bai has not got any money.

[LORD SHAW: All that is gone is an action. The compromise is not gone. The case you suggest may never arise.]

I ask for relief on general grounds of equity.

Sir W. Garth, for Sethuram, was not called upon.

JUDGMENT.

SIR LAWRENCE JENKINS.—These appeals arise out of a suit on a money-bond of the 10th June 1897, expressed to be executed to the present plaintiff, Vasanta Rao, by the defendant, Sethuram Saheb, "represented by his grandmother and guardian" and by the defendant Jamna Bai.

Sethuram was then a minor and this was apparent on the face of the bond. The substantial question, therefore, now in dispute is whether Sethuram is under a personal obligation to pay the plaintiff the amount he claims, and if not, whether this furnishes Jamna Bai with an answer to the suit. The plea that the suit is premature has no real value. It does not touch the merits, and both Courts agree that the objection is not well founded. This view

(1) (1879) 4 A. C. 504 at p. 516; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97.

(2) (1896) 1 Q. B. 75 at p. 82; 65 L. J. Q. B. 173; 73 L. T. 567; 44 W. R. 254.

(3) (1844) 13 M. & W. 494 at pp. 501, 506; 2 D. & L. 382; 14 L. J. Ex. 29; 8 Jur. 1127; 153 E. R. 203; 67 R. R. 694.

(4) (1804) 10 Ves. 209; 32 E. R. 824.

(5) 33 L. A. 128; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710 (P. C.).

(6) 26 B. 109; 3 Bom. L. R. 585.

JOGESH CHUNDER PATITUNDA v. ROHINI KUMAR ROY CHOWDHURY.

is in accord with the meaning placed by the defendants themselves in their written statements on the phrase in the bond which is decisive of this point, and their Lordships see no reason to doubt its accuracy. This plea, therefore, fails. On the more important question the two Courts are not in complete agreement. The Subordinate Judge passed a decree against both defendants. The High Court on appeal upheld the decree against Jamna Bai, but dismissed the suit against Sethuram. This has led to the two present appeals. Though the circumstances connected with the passing of the bond are intricate, the real issues involved in the suit are simple. To establish Sethuram's liability the plaintiff relies on section 462 of the Code of 1882. But even if compliance with the terms of this section would have established the claim against Sethuram—a point on which no opinion is now expressed this in no way helps the plaintiff, for the requirements of the section have not been observed in protection of Sethuram. The High Court, therefore, rightly held him not liable to the plaintiff under the bond. But this furnishes Jamna Bai with no answer to the plaintiff's claim against her. Stripped of all that is not relevant, the plea advanced on her behalf is that one of two promisors can plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This is a position that cannot be maintained, and the plea has been properly rejected by the High Court. On possible developments in the future it would be wrong for their Lordships to make any pronouncement; they will, therefore, humbly advise His Majesty that each of these appeals should be dismissed. There will be no order as to costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 131
OF 1896.

September 3, 1897.

Present:—Sir Francis Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

JOGESH CHUNDER PATITUNDA AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

ROHINI KUMAR ROY CHOWDHURY AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 160, 161, 167—Wasat taluk, purchase of, by zemindar—Sale of taluk, application for, wasat taluk not entered in—Suit for possession—Estoppel—Evidence Act (I of 1872), s. 13—Record, admissibility of—Burden of proof—Benamidar, if can give notice under Bengal Tenancy Act.

The plaintiff, who was the zemindar, purchased in 1884 an under-tenure called *wasat taluk* which formed a part of the superior tenure. In 1889 he put up for sale the tenure in execution of a rent-decree but omitted to mention his own *wasat taluk* in the application for execution. The defendant purchased the tenure at the auction sale. The plaintiff sued for declaration of title and recovery of possession of the *wasat taluk*. The defendant pleaded *inter alia* that the plaintiff was estopped inasmuch as he failed to mention the *wasat taluk* in his application for execution. The plaintiff relied upon the records of an execution proceeding held in 1858:

Held, (1) that the statements in the application for execution were not sufficiently precise to prevent the plaintiff from saying that he had a protected interest in the *wasat taluk*; [p. 219, col. 1.]

(2) that the records of the execution proceeding were admissible as ancient recorded documents if the plaintiff could show that there had been a possession in accordance with the recitals in those documents; [p. 219, col. 1.]

(3) that the onus was on the plaintiff to show that the *wasat taluk* was a protected interest within the meaning of the Bengal Tenancy Act: [p. 219, col. 1.]

Held (per Banerjee), that the records of the execution proceedings were admissible also under section 13 of the Evidence Act. [p. 219, col. 2.]

Per Maclean, C. J.—A benamidar is the proper person to give the notice under section 167 of the Bengal Tenancy Act if the sale certificate were made out in his name. [p. 219, col. 1.]

Appeal against the decree of the District Judge, Backergunge, dated the 11th December, 1895, affirming that of the Subordinate Judge 1st Court Backergunge, dated the 27th September 1894.

FACTS of the case appear from the following judgment of the lower Appellate Court:—

"The plaintiff, who is the zemindar of Mouza Lebubunia, sued in his capacity of executor to his father's estate to recover possession of $7\frac{3}{4}$ annas of an under-tenure called *wasat taluk*, which he had acquired by purchase and the lands of which formed a part of the

JOGESH CHUNDER PATITUNDA v. ROHINI KUMAR ROY CHOWDHURY.

taluk or superior tenure admittedly held by the defendants in the same *mouza* under the plaintiff as *zemindar*. The plaintiff brought the *taluk* to sale in execution of ■ rent-decree; the defendants purchased it in *Chait*, 1295 B. S. In 1291 B. S., however, the plaintiff had by private *kabala* purchased the $7\frac{3}{4}$ annas of a *wasat taluk* under the said *taluk*; and so on disputes arose between the parties as regards possession of the lands covered by the alleged *wasat taluk*. In a proceeding held by the then District Magistrate under section 145, Civil Procedure Code, the plaintiff was declared to be in possession but the High Court on revision reversed that order and the defendants were decreed to be in actual possession. Hence plaintiff brought this suit to have his title declared and possession restored, alleging legal if not actual dispossession. The defendants raised various objections, the principal of which have been renewed in this Court as grounds of appeal. The grounds actually urged at the hearing of this appeal may be grouped under the following main heads:—(1) No *wasat taluk* ever existed in reality. The dealings in regard to it, disclosed in evidence, were paper transactions. It was a *benami* creation of the original *talukdars* and never had a *bona fide* existence.

(2) Merger. The former *wasat talukdars* were *benamidars* for the *talukdars* and thus the *wasat taluk*, even if it had ever existed before, became merged in the *taluk* in 1274 B. S. and subsequent years.

(3) Estoppel. The *wasat taluk* was an encumbrance on the *taluk*; and the plaintiff in his application for the sale of the *taluk* (in execution of the rent decree) made a declaration in respect of encumbrances—*Vide* Exhibit F, dated January 1889. In that he omitted to mention his own *wasat taluk* purchased by him 4 years before. He is, therefore, debarred from setting up the *wasat taluk* in detriment of the interests of the auction-purchasers of the *taluk*.

(4) Defendants have avoided the encumbrance by notice served through the Collector under section 167 of the Bengal Tenancy Act.

(5) Plaintiff has given no credible evidence that the alleged *wasat taluk* is a protected interest under section 160, Bengal Tenancy Act, and not an encumbrance under section 161.

(6) Plaintiff has failed to prove the boundaries; and the *wasat taluk* as set forth in the plaint, and the evidence shows that his boundaries are wrong. His suit should, therefore, be dismissed. It is also urged that the plaintiff has included in his boundaries all the lands of the *taluk* or more.

The points for determination refer to the above grounds of appeal. Having heard learned Pleaders on both sides and considered the evidence, oral and documentary, I proceed to record my findings as follows.

Ground No. (1). I agree with the lower Court in disbelieving the *pattah* (Exhibit 12) by which the *zemindar* is said to have created the *wasat taluk* in 1180 B. S. The *pattah*, which has been put in as an ancient document and which has for the first time seen the light in this suit, does not appear to me to be a genuine document. But the record of an old execution case (marked Exhibits 156 to 158) produced from the record room is satisfactory evidence of the fact that in 1263 B. S. (1857 A. D.) the *wasat taluk* in dispute did exist and was attached in that year as the property of one Shib Sankar, who in 1274 B. S. (A. D. 1867) conveyed the same by private *kabala* (registered) to Adyaita and Ambuja from whom the plaintiff purchased it in 1291 (A. D. 1884) for valuable consideration. The case for the defence was that the *kabala* of 1274 B. S. was ■ fictitious and *benami* transaction and that the *wasat taluk* had no previous existence. This position is, however, completely refuted by the discovery of the aforesaid execution record, the whole of which I find on careful examination to be absolutely and unquestionably genuine. The question of *benami* is quite different from the question whether the tenure had ■ separate and real existence. If the tenure was a living reality, the fact that one of its former owners purchased it *benami* would not affect the present case except perhaps on the question of merger. The evidence of fraud and collusion in the inception of the *wasat taluk* proceeds on the supposition that it was first created in 1274 B. S. and that evidence crumbles to dust at the touch of the execution record of 1863.

Then again I find that the statement of the Subordinate Judge that "there are

JOGESH CHUNDER PATITUNDA v. ROHINI KUMAR ROY CHOWDHURY.

numerous registered documents from 1274 B. S. downwards establishing the existence of the *wasat taluk* as a reality" is fully borne out by the record. It is enough to state here that it was mortgaged to the Barisal Loan Office in 1282-83 B. S. for valuable consideration. Other transactions in respect of the *wasat taluk* and instances of its publicity are proved by documentary evidence recited in the lower Court's judgment. The first main ground of appeal must, therefore, fail.

(2) This also disposes of the question of merger. Assuming what is by no means sufficiently proved by evidence that in 1294 B. S. or at any subsequent period the *talukdars* and the real holders of the *wasat taluk* were the same individuals, it does not necessarily follow that the *wasat taluk* became merged in the *taluk*. Section 111 of the Transfer of Property Act was not in existence then; and the case reported as *Womesh Chunder Goopto v. Raj Narain Roy* (1) shows that in the opinion of the High Court the doctrine of merger had no application in those days in the Mofassil. The history of the *wasat taluk* as referred to in the foregoing paragraphs shows that it had always a separate existence and was dealt with as a distinct property. The alleged identity of the *talukdar* of *wasat taluk* is, however, not proved; but I do not discuss the evidence on that point at length because the existence of the *wasat taluk* as a separate property is proved.

Grounds Nos. (3) (4) and (5) stated above refer to sections 159, 160, 161, 165, 167 of the Tenancy Act referring to avoidance of encumbrances by the auction-purchaser in execution of a rent-decree. In the present case the plaintiff *zemindar* (who had purchased the *wasat taluk*) himself brought the superior tenure (*taluk*) to sale for arrears of rent; and in accordance with practice he made a declaration in the application for execution (Exhibit F) (Vide High Court's Civil C. O. p. 32 and 33).

By that petition the plaintiff as decree-holder *zemindar* advertised the *taluk* sale, declaring there were no encumbrances on it and if the *wasat taluk* be considered as en-

cumbrance within the meaning of section 161 of Act VIII of 1885, I think it would be right to hold that the plaintiff could not as against the auction-purchasers set up an encumbrance in his own favour.

The plaintiff's answer to this is that the *wasat taluk* was not an encumbrance but a protected interest under section 160. As a matter of fact it is not the rule or practice to notify such interests.

The question arises, on whom the onus lies in this case to prove that the *wasat taluk* was or was not a protected interest, viz., that it did or did not fall under clause (a) or clause (g) of section 160.

Reported cases, *Koylashbashingy Dossee v. Goolmoni Dossee* (2), *Gobind Nath Shaha v. Reily* (3), *Rash Behari Bosu v. Hara Moni Debya* (4), have been cited to show that the onus lies on the party who asserts that the under-tenure or holding is an encumbrance.

In those cases, however, the holder of the under-tenure was in possession, and the auction-purchaser sued to oust him. The parties are differently arrayed in this case and this raised a doubt in my mind. But the plaintiff is in possession of half the under-tenure and the existence and reality of the under-tenure since 1863 being proved, I think the onus may justly be laid on the defendants to prove that the under-tenure is an encumbrance. This, in my opinion, they have failed to prove.

The *wasat taluk* not being proved to be an encumbrance, the question of notice to avoid does not arise; for it is an encumbrance only that can be avoided by notice properly served.

On the other hand if it be held that the *wasat taluk* is an incumbrance, notice or no notice, I think the plaintiff is not entitled to recover. He is estopped by his own declaration on the execution petition (Exhibit F) and if not estopped, still he cannot succeed because he is out of possession and must prove a title absolutely superior to that of the *talukdars* whom he seeks to displace. Assuming the *wasat taluk* is an encumbrance plaintiff cannot succeed. Therefore in either view of the case, the question of notice I

(2) S. C. 230; 10 C. L. R. 41.

(3) 13 C. 1.

(4) 15 C. 555.

(1) 10 W. R. 15.

JOGESH CHUNDER PATITUNDA v. ROHINI KUMAR ROY CHOWDHURY.

think does not really arise. I may, however, here state my opinion that I am inclined to differ on this point from the learned Subordinate Judge and to hold that notice given by the ostensible auction-purchaser is sufficient even though he be *benamidar* for another. The act of the *benamidar* and ostensible purchaser should, I think, be taken as the act of the beneficial owner.

I hold, however, on careful consideration that the onus of proving the *bona fide* existence of the *wasat taluk* lies on the plaintiff; and that thereafter the onus of proving that it is an encumbrance lies on the defendants. The defendants having failed to prove it, the question of the validity of the notice served does not arise. In the absence of any evidence to show that the *wasat taluk* was an encumbrance, the plaintiff as *bona fide* purchaser for value is, in my opinion, entitled to recover lost possession of $7\frac{3}{4}$ annas of the under-tenure in suit.

The appellants have complained that they were improperly prevented from producing certain documents which they cited. I think it would have been better, if the learned Subordinate Judge had allowed the defendants an opportunity of producing the quinquennial and other papers, cited in evidence though at a late stage of the case; for the plaintiff was allowed that indulgence at least on one occasion. If anything material depended on these papers, I might consider whether the case should be remanded. But taking the view I take of the case, I do not consider those papers material to the real issues. The quinquennial papers were intended to rebut the plaintiff's *pattah* (Exhibit 12) by showing that the *wasat taluk* was not mentioned in certain returns subsequent to the date of that *pattah*. But the *pattah* itself has been disbelieved by the lower Court and by me and the Court has already found that there is no credible evidence that the *wasat taluk* existed much before 1263 (1857 A. D.). So certain *dakhilas* granted by the *talukdars* and to their under-tenureholders were called for with intent to support indirectly the identity of the *talukdars* with the *wasat talukdars* at a certain date. But I have on other grounds already found that there could be no merger. I do not see that any of the documents cited would affect the grounds of this decision.

The last point relates to boundaries. The eastern and southern boundaries are not questioned. In regard to the Northern boundaries it is urged that plaintiff's witnesses Nos. 6 and 16 admitted that certain *howlas* (inferior under-tenures) included in the *wasat taluk* and situated in its north part had been taken forcible possession of by a third party, and that, therefore, the plaintiff's suit in respect of that part should be dismissed. But I think the question does not arise in this case. If the *howladar* has been dispossessed the question will be between the *howladars* and the dispossessor, or between the latter and the plaintiff. The plaintiff has sued on the boundaries of his *kabala* which are the same as those of the *kabala* of 1274 B. S, and as between the *talukdars*, and the *wasat talukdars* the boundary claimed seems to be right.

As regards the western boundary too having considered the evidence of witnesses on both sides, I come to the conclusion that the plaint is correct. From the evidence of defence witnesses Nos. 10 and 12, it appears that to the west of the *wasat taluk* are the 2 *howlas* of the Sauria Meahs (included in the *taluk*) and that there is a ditch or *khal* between those *howlas* and the *wasat taluk*. That *khal* is given by the plaintiff as the western boundary of the *wasat taluk*; and it is admitted by the defendants' witness No. 10 that the *osat taluk* together with those two *howlas* constitutes the whole *taluk*. The boundaries are also sufficiently proved by plaintiff's witnesses Nos. 6 and 16.

For these reasons I think the decision of the lower Court is correct and that there are not sufficient grounds for any interference with it. This appeal preferred by two of the defendants is accordingly dismissed with costs.

The question whether defendant No. 1 was the *benamidar* for defendant No. 2 is not very material and need not be discussed in detail. The 2nd defendant did his best to keep the plaintiff out of possession and denies his right and title. The lower Court has fully discussed the evidence on this point, and I agree with the conclusion that the 2nd defendant was the beneficial owner of the *taluk* and the moving spirit in all the transactions connected with this case.

Appeal dismissed with costs."

ILAHÍ BAKHSH v. RAHIM BAKHSH.

Dr. Rash Behary Ghose and Babu Dwarka Nath Chakrabarty, for the Appellants.

Sir Charles Paul (Advocate-General) and Babus Srinath Das and Chunder Kant Sen, for the Respondents.

JUDGMENT.

MACLEAN, C. J. — There are three questions for decision in this appeal. Upon the question whether the plaintiff is estopped by the statements in his petition, which is set out at page 28 of the paper-book, I have felt some little doubt upon the point, but on the whole I do not think that the statements are sufficiently precise to prevent the plaintiff from saying now that he has a protected interest in this *osut taluk*.

Upon the question whether the records in the attachment proceedings, Exhibits 156 to 158, are admissible as evidence in this case as against the defendants, I think that if the plaintiff can show that there has been a possession in accordance with the recitals in those documents, a possession consistent with them, then the documents, as ancient recorded documents, would be admissible.

Then upon the question, which is the main question in the case, namely, upon whom the onus of proof lies, I am unable to agree with the view taken by the Court below. The plaintiff sets up that his *osut taluk* is a protected interest within the meaning of the section of the Bengal Tenancy Act which has been referred to; the defendant, on the other hand, sets up that this is an incumbrance which he is entitled to avoid or to annul. In that state of circumstances, I do not see why the ordinary rule should not apply, namely, that the plaintiff must make out the case upon which as plaintiff he relies. The onus of making out that case must rest upon him.

There was one other short point, namely, whether the notice under section 167 of the Bengal Tenancy Act was properly given under that Act, that is to say, whether it was given by the person who ought to have given it. We are not in a position to decide that point upon the materials before us. If the sale certificate were made out in the name of the *benamidar*, then in my view he would be the proper person as the certificated purchaser to give the notice under the Act. No one can tell us in whose name the sale certificate is made out. So we cannot say whether the notice was given by the right person.

The result, in my opinion, is that there must be a remand to the lower Appellate Court and on that remand the plaintiff must make out that the interest which he says is protected is a protected interest within the meaning of the Act.

The costs of this appeal will abide the ultimate result.

BANERJEE, J. — I am of the same opinion. I only wish to add that I base my decision upon the question of the admissibility of the documents referred to in the argument, namely, Exhibits 156 to 158, not only upon the reasons mentioned in the judgment of the learned Chief Justice but also upon the ground that they are admissible under section 13 of the Evidence Act. I further wish to add that I base my decision upon the question of the burden of proof more upon the ground that the party setting up the protected incumbrance is the plaintiff in the case and he should, therefore, prove his case than upon any reasons deducible from the language of the Bengal Tenancy Act.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 110 OF 1913.

May 18, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

ILAHÍ BAKHSH AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

RAHIM BAKHSH AND OTHERS —
DEFENDANTS—RESPONDENTS.

Appeal, second—Question whether parties follow Muhammadan Law or custom, one of fact—Appeal, whether maintainable.

The question whether the parties to the case follow Muhammadan Law or custom is a question of fact and cannot be agitated in second appeal. [p. 220, col. 1.]

Muhammad Kamil v. Intiaz Fatima, 4 Ind. Cas. 457; 31 A. 557 at p. 570 (P. C.); 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 36 I. A. 210, followed.

Second appeal from the decree of the Divisional Judge, Multan, dated the 23rd October 1912, affirming that of the District Judge, Multan, dated the 30th July 1912, dismissing the claim.

Mr. C. H. Oertel, for the Appellants,

KHOBHARI SAH v. JHAMAN SAH.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—It is unnecessary to discuss this case at any length. The lower Appellate Court has held that no special custom such as that claimed by Mr. Oertel's clients is proved and that the parties follow, in the matter in dispute, the Muhammadan Law; and when application for certificate under section 41 (3), Punjab Courts Act, was made, it was definitely refused. Ground 1 of appeal, therefore, fails for want of certificate, and we cannot even go into the abstract question whether the parties follow Muhammadan Law or custom, because that question has been declared by authority, [*Muhammad Kamil v. Imtiaz Fatima* (1)] to be a question of fact.

This matter having been decided against him, Mr. Oertel frankly admitted that he could not support the appeal on the remaining grounds, the authorities being against him. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 457; 21 A. 557 at p. 570 (P. C.); 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 36 I. A. 210.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1112 OF 1914.

February 26, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

KHOBHARI SAH—PLAINTIFF—
PETITIONER

versus

JHAMAN SAH AND OTHERS—DEPENDANTS—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Agreement for disposal of suit on ascertainment of a simple fact—Adjudication of suit—Agreement to refer to arbitration.

An application presented to Court by the parties to a suit requesting it to dispose of the suit in a particular manner on ascertainment of a simple fact should be dealt with under Order XXIII, rule 3, Civil Procedure Code, and the Court should not allow either party to resile from the agreement if the result is against him. Such an agreement is not in the nature of a reference to arbitration. [p. 221, col. 1.]

Muhammad Zahur v. Chedu Lal, 14 A. 141; A. W. N. (1892) 3, distinguished.

Rule against the decision of the Subordinate Judge of Saran, dated the 9th September 1914.

Babu *Rajendra Prosad*, for the Petitioner.

Babu *Probodh Chandra Mukerjee*, for the Opposite Party.

JUDGMENT.

COXE, J.—In the suit out of which this Rule arises, the plaintiff's case was that he gave the defendant a certain amount of metal with which to prepare ornaments. He sued for the recovery of the metal, damages and the money advanced. When the case was heard, a petition was put in by both parties which runs as follows:—"It has been settled between the parties that this matter be enquired into by some Pleader who may be sent to the defendants' house, the boundaries of which are given below, so that he may see whether the defendants do the work of casting and whether bellows or signs of furnace or bellows are found in the said house. In case the aforesaid things or their signs are found to exist, a decree shall be given in favour of the plaintiffs, and in case of the said things being found not to exist, the suit shall be dismissed. The parties shall have no objection. For this reason we are sending Babu Jagat Prosanno Pleader."

For this reason, Babu Jagat Prosanno Mookerjee, Pleader, went to the house and found that the things did exist. But the learned Subordinate Judge did not decide the case in accordance with the agreement, on the ground apparently that the defendant retracted his consent, and proceeded to dispose of the suit on the merits.

The plaintiff has obtained this Rule on the opposite party to show cause why this order should not be set aside on the ground, *firstly*, that the Court below ought to have held that the petition of the 7th September 1914 was an adjustment of the suit and, *secondly*, that the Court below was in error in allowing the defendant to withdraw from the agreement.

It appears to me that the Rule should be made absolute.

It has been held that an agreement to refer a dispute to arbitration does not come within the scope of section 375, now Order XXIII, rule 2. This was held by an Appellate Bench in *Tincoory Dey v. Fakir Chand*

CASSIM AHMAD MOLLA v. EUSUF HAJI AJAM PEPARDI.

Dey (1), although the opposite view has been taken in *Pragdas Sagurmall v. Girdhardas Mathuradas* (2). But it seems to me that the agreement made in this suit comes far more closely within the terms of Order XXIII, rule 3, than an agreement to refer to arbitration. When the parties agree to refer a dispute to arbitration, there is still a great deal of judicial work to be done: evidence has to be considered and weighed and a judicial opinion arrived at. It may well be held that such an agreement does not finally dispose of the suit. But here we find that the parties agreed that the case should be finally disposed of in one way if a simple fact was found to exist, and in another way if it was found not to exist; no further judicial action was necessary. It would, I think, be unnecessary and unjust to hold that such an agreement cannot be enforced; and if such an agreement is held to be capable of enforcement, it clearly would be unreasonable to hold that the losing party should be entitled to repudiate it after the fact on which it depended, had been ascertained.

The learned Pleader for the opposite party has relied on the case of *Muhammad Zahur v Cheda Lal* (3). But in that case the agreement was of a very curious character. The parties did not agree that the suit should be disposed of in accordance with what was found as a matter of fact to exist, but merely that if a certain bond was produced, the plaintiff's testimony should be discredited to that extent; and if it was not produced, another witness should be discredited to that extent. The case could not, therefore, have been disposed of on that agreement.

An affidavit has been put in, in which it is stated that the defendant paid to the plaintiff all expenses of taking the Pleader Babu Jagat Prosanno Mookerjee to the spot, and that, thereupon, the plaintiff waived his objection to the suit being proceeded with. This argument made a great impression on us, but its effect has been entirely destroyed by the fact that the defendants have been

given a decree for this sum of money. If, therefore, it is supposed that the plaintiffs waived their objection to the suit being proceeded with on being paid the costs of the investigation, they cannot now be debarred from attacking the decision when they have been held liable for the re-payment of that money.

The only objection that was taken to the Pleader's inspection was that he examined the wrong hut. The Pleader was called and gave evidence that the defendant admitted that it was the right hut. He was not cross-examined on that point. We need not, therefore, remand the case for the investigation of this trifling matter of fact. In our opinion, the Court should have acted on the agreement and should not have allowed the losing party to resile from it.

The Rule is accordingly made absolute, the suit will be decreed in accordance with the petition of the 7th September and the plaintiff will be entitled to his costs of both Courts. We assess the hearing fee at two gold *mohurs*.

SHARFEDDIN, J.—I agree.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 2
OF 1916.

February 11, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

CASSIM AHMED MOLLA—DEFENDANT—
APPELLANT

versus

EUSUF HAJI AJAM PEPARDI AND
ANOTHER—PLAINTIFFS—RESPONDENTS.

Receivers, joint, rights and duties of—One joint Receiver, whether can give notice to quit tenancy on behalf of all—Notice to quit, validity of—Ratification—Contract Act (IX of 1872), s. 200.

A tenancy held under Joint Receivers, if terminable by a notice to quit, can be determined only by a notice given by them jointly. [p. 224, col. 2; p. 226, col. 2.]

A notice to quit given by one of two Joint Receivers on behalf of both, without the authority of the other, is invalid and cannot be rendered valid by subsequent ratification by the other Receiver. [p. 224, col. 2; p. 225, col. 1; p. 226, col. 2.]

(1) 30 C. 218; 7 C. W. N. 180.

(2) 26 B. 76; 3 Bom. L. R. 431.

(3) 14 A. 141; A. W. N. (1892) 3.

CASSIM AHMED MOLLA v. EUSUF HAJI AJAM PEPARDI.

The principle applicable to the competency of one joint tenant giving notice on behalf of all does not govern the cases of joint Receivers. [p. 224, col. 1; p. 226, col. 2.]

Per *Mookerjee, J.*—When two persons are appointed joint Receivers of an estate, they should, in the absence of a direction or indication to the contrary, meet and discuss together questions which come before them in the course of the management of the estate, and in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. [p. 225, col. 2; p. 226, col. 1.]

Appeal against the following judgment of Mr. Justice Greaves, sitting on the Original Side, dated the 22nd November 1915:—

"This is an action commenced by the two Receivers of the Estate of one Musaji Ahmed Saleji, and by their plaint the plaintiffs ask for an order against the defendant for delivery of possession of certain premises, No. 135, Lower Chitpur Road, and they also ask for damages at the rate of Rs. 570 a month from 1st May 1915. These premises were originally leased by the then Receiver of the estate of Musaji Ahmed Saleji to the defendant for a period of three years commencing from 1st February 1912, at a rental of Rs. 410 a month. The then Receiver of the estate subsequently retired from the Receivership and the plaintiffs were appointed by order, dated 1st August 1913, to act as Receivers in his place. Apparently at or about the termination of the lease, which terminated on 31st January 1915, some correspondence or negotiations took place between the plaintiffs and the defendant with regard to the defendant paying an enhanced rent for the premises. The defendant apparently was unwilling to have his rent increased in any way and after termination of the lease, he for sometime stayed on in possession of the premises as a monthly tenant according to the custom of Calcutta. On the 26th March 1915, a notice was served by Messrs. Manuel and Agarwalla, who were Attorneys for the plaintiffs, upon the defendant, giving him notice to determine his tenancy on the 1st May 1915, and the Receivers having given that notice entered into a lease of the premises in favour of one Siddick, who is admittedly an undischarged bankrupt, the lease to be for a period of three years from 1st August 1915 at a rental of Rs. 560 a month. Prior to the notice

to quit being served, correspondence passed between the plaintiffs' Attorney and the defendant or somebody acting on behalf of the defendant. In one of the letters which are contained in the bundle of correspondence before me, the defendant expressed his willingness to pay for the premises a rental of Rs. 560 a month less a sum of Rs. 17-8 per month. The plaintiffs were apparently unwilling to fall in with this offer and this suit has resulted. The issues that I have to determine are, (1) Whether the notice of ejectment was given by both Receivers, and if not, whether such notice is valid. (2) What damages, if any, are the plaintiffs entitled to?

Now it is argued with regard to the first issue that inasmuch as one of the Receivers Eusuf Hajee Ajam Pepardi was away at Surat at the time the notice was given, and the actual instructions for the notice were given not by him but by his co-receiver and co-plaintiff Haji Mohamed Jackaria, the notice is bad. I have been referred to several authorities by both sides, but, in my opinion, the answer that was given in cross-examination by Yusuf Haji Ajam Pepardi, where he says that although there was no definite arrangement with his co-Receiver yet if one was away the other attended to the business and that this was their custom although there was no arrangement to that effect, makes it clear that the notice was in fact good. It is true that they are not joint tenants and the authority to which I was referred is, in my opinion, not applicable, but having regard to the answer given by Yusuf Haji Ajam Pepardi, in my opinion as before stated, the notice of ejectment was a valid notice and must be taken to have been given on behalf of both Receivers. With regard to the second issue I am asked by the plaintiffs to award the sum of Rs. 570 a month by way of damages from 1st May 1915 when the lease in fact expired, and this figure is arrived at as being the figure which Siddick agreed to pay for the premises. Siddick as before stated is an undischarged insolvent and, therefore, I am not prepared to take that figure as being the real measure of damages in this case, but I think the defendant is tied by his own offer to pay a rental of Rs. 560 less the sum of Rs. 17-8, and so

CASSIM AHMED MOLLA v. EUSUF HAJI AJAM PEPARDI.

under the circumstances I award, as from 1st May 1915 until the premises are vacated, by way of damages the sum of Rs. 542-8 a month and I order the defendant to vacate the premises by 1st January 1916.

I should like to add before I conclude that I am not at all satisfied with the conduct of the Receivers in this case who are officers of the Court. It seems to me entirely wrong for them, who it is admitted being Bombay men knew that Siddick was an undischarged bankrupt, to have entered into a lease with him rather than to have arranged with their old tenant, which they clearly could have done to the advantage of the estate and to the prevention of this unfortunate litigation. In view of the fact that both knew that Siddick was an undischarged bankrupt, they will be liable to the estate for every penny of rent that Siddick fails to pay by reason of his financial position. I think it would be well, although, in view of the lease having been already entered into, I feel some difficulty in making an order to that effect, I say it would be well, before they give over possession of the premises to Siddick, that the Receivers should at least endeavour to arrange with Siddick that the monthly rent might be made payable in advance. So far as costs are concerned, I sympathise with the defendant, as I think he has been badly treated by the Receivers, and yet I think the costs must follow the event and the defendant must pay the costs of the suit on scale No. 2."

Messrs. Langford James and S. Ghose, for the Appellant.

Messrs. B. C. Mitter and C. C. Ghose, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal of the defendant from the judgment of Mr. Justice Greaves in which he gave judgment for the plaintiffs, and the first question which arises is stated in this way:—whether the notice of ejection was given by both Receivers, and if not, whether such notice is valid?

The plaintiffs were Receivers appointed by this Court for the purpose of managing a particular estate, and it is to be noted that in the appointment it is stated that they are appointed 'joint Receivers.'

The first question which requires attention is, whether the notice which was in fact given was given by both the Receivers.

The notice itself was dated the 26th of March 1915, and was sent by the attorneys: on the face of it, it was a notice on behalf of both the Receivers, but it appears from the evidence that at the time that the notice was given one of the Receivers, Eusuf Haji Ajam Pepardi, was not in Calcutta, and had not been in Calcutta since the 1st of March, because his own evidence is to the effect that he left Calcutta about the 1st of March and did not return till some considerable time afterwards, at all events after the 26th of March. It is material to observe what was the state of affairs when that Receiver, Mr. Eusuf, left Calcutta. At that time there was an applicant for the premises named Siddick, whereas the defendant Cassim Ahmed Molla was the existing tenant who had been in the premises for a considerable time. Now, as I understand the evidence, the position at the time Mr. Eusuf left Calcutta was this, that it was arranged that the higher offer should be accepted. Siddick had made a certain offer, and it was not certain whether the defendant, the existing tenant, would offer as much or more. The matter was undecided at the time Mr. Eusuf left Calcutta.

Now what happened afterwards? This is shown by the letters themselves which are set out in the paper-book. Apparently, almost immediately after Mr. Eusuf had left Calcutta, there was correspondence passing, and the defendant wrote on the 4th of March asking the Receivers to allow him a little more time as his master was away in his country. The answer which was sent on the same day was to this effect: "In reply to your letter dated to-day we regret to state that we cannot postpone the meeting for you now, as it was already settled in the last meeting. So you will send us your last written offer on the 5th instant before 3 P. M., if you desire to hire the same for the further period; otherwise we will comply with the offer of another, which please note." I have no doubt whatever that "another" was Siddick. On the 5th of March, the defendant made his offer which was in these terms: "Hereby I beg to inform you that I accepting the offer on terms agreed by Siddick Hossein, Esq., in respect of the above premises but with less Rs. 17-8 on account of your old

CASSIM AHMED MOLLA v. EUSUF HAJI AJAM PEPARDI.

tenant as anticipated by Receivers in meeting. I shall thank you to confirm the same and oblige." I understand that to mean that he knew what the offer which Siddick had made was, and that he was then in that letter making a similar offer except that he desired a reduction of Rs. 17-8 a month, and he asked for that reduction by reason of the fact that he had been a tenant of these premises for a considerable time. That apparently was not accepted by the Receiver who was in Calcutta, but on the contrary he wrote the next day and said, "We hereby give you notice to vacate the above premises (i. e., 135, Lower Chitpore Road) which is at present in your tenancy on or before the 31st March 1915 as it is already let to the other person. If you will fail to vacate and give us the possession of the same on 31st March 1915 we will hold you responsible for difference in rent and any other loss we shall have to undergo, which please note," so that the Receiver who was in Calcutta did not lose much time in making up his mind upon the receipt of the letter which the defendant had written on the 5th of March. Now, I am of opinion that upon that evidence it is clear that the letter which was sent on the 26th of March by the Solicitors was not sent on behalf of both Receivers; there is no evidence to show that between the 6th of March and the 26th of March any communication took place between the one Receiver and the other: and, as was pointed out by Mr. Justice Mookerjee yesterday, if, as a matter of fact, Mr. Eusuf had been consulted before the notice of ejectment was sent by his joint Receiver who was in Calcutta, nothing would have been easier than for him to have said so in his evidence and all the evidence which is given at page 10 would have been absolutely unnecessary. Therefore, on the first point I am of opinion that the letter or notice was not sent on behalf of both Receivers, and in that respect the conclusion at which I have arrived, I think, is in agreement with that of the learned Judge in the Court below. But the learned Judge goes on to say on the second branch of the first question, viz., "and if not, whether the notice is valid," that it was valid, because he says: "In my opinion the answer that was given in cross-examination by Eusuf

Haji Ajam Pepardi, where he says that although there was no definite arrangement with his co-Receiver yet if one was away the other attended to the business and that this was their custom although there was no arrangement to that effect, makes it clear that the notice was in fact good." Upon that point I regret to say that I am unable to agree with the learned Judge. Certain cases were cited to us yesterday which related to cases where the lessors were joint tenants. In my judgment, those cases have no application to this case at all, and I will shortly state the reason. In this case the plaintiffs were appointed by the Court joint Receivers and I pause to consider what the object of the Court was in appointing two gentlemen joint-Receivers. As I understand, it was that the estate might have the benefit of the opinion of both these gentlemen—the benefit of their experience and their judgment—and it was the duty of each of them to apply his mind to the different matters which might arise for decision in the course of the management of the estate. It was not open to the Receivers to carry on the Receivership in the way, as is suggested, it was done in this case according to the answer of the witness, who says: "I was going to submit—when Haji was not here I would attend business and when I was not here he would attend. There was no definite arrangement. That has been the practice always—that one acts when the other was away." The ground on which I base my judgment is that he had no business whatever to delegate the duty which was imposed upon him by the Court, in the way suggested by him, it was his duty to do it. Therefore, the notice was not given, as I have already held, on behalf of both Receivers and it was not valid for the reasons I have mentioned.

I just refer to two other matters. It was argued that even though the notice was not a valid notice at the time it was given, as it was not given on behalf of both Receivers, still it was ratified by the Receiver who was out of Calcutta. In my judgment, that argument is not a good one. Section 200 of the Indian Contract Act provides that "An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have

CASSIM AHMED MOLLA v. EUSUF HAJI AJAM PEPARDI.

the effect of subjecting ■ third person to damages, or of terminating any right or interest of ■ third person, cannot, by ratification, be made to have such effect." That section, I think, applies to this case; and, therefore, even if Eusuf, the Receiver who was out of Calcutta at the time the notice of ejectment was given, has ratified it, still the notice was given without his authority, and it was one which would have the effect of terminating the interest of the defendant and consequently it is within the section and such ratification, even if made, did not make the notice valid. I wish further to say that it seems to me that if a Receivership were to be carried on in the way in which apparently Mr. Eusuf and his joint Receiver thought it right to do in this case, most undesirable results might occur, and I do not think we could have a very much better instance than the one before us. The learned Judge has expressed the opinion that he thinks the present tenant of the premises, the defendant, has not been reasonably treated, especially having regard to the fact that the tenant whom one of the Receivers proposed to accept in his place was an undischarged bankrupt. And, in my opinion, when the existing tenant said that he was quite prepared to pay the same rent that the applicant for the tenancy was willing to pay, less Rs. 17-8 a month, that was a matter which ought to have been submitted to the judgment not only of one Receiver but of both Receivers. I think it is quite possible that if it had been submitted to the Receiver who was out of Calcutta at the time, this difficulty would never have arisen.

For these reasons I think this appeal should be allowed, and the decree which was made in the Court below reversed, with costs of this appeal and in the Court below.

WOODROFFE, J.—In my opinion the notice to quit served on the defendant was not a valid notice and I agree that the appeal should be allowed as stated in the judgment of the learned Chief Justice.

MOOKERJEE, J.—The facts material for the determination of the questions raised before us lie in a narrow compass, and may be

briefly recapitulated. On the 1st August 1913, the respondents, Eusuf Haji Ajam Pepardi and Haji Mahomed Jackaria, were appointed joint Receivers in respect of the estate of Musaji Ahmed Saleji. On the 26th March 1915, their Solicitor gave a notice to the defendant, who was the tenant of ■ house comprised in the estate, that he must vacate the premises on the 30th April 1915. As the defendant did not act upon this notice to quit, the two Receivers instituted the present suit on the 1st June 1915, with a view to eject him. He resisted the claim on the ground, amongst others, that his tenancy had not been validly terminated by a legal notice to quit. Mr. Justice Greaves overruled this contention and made a decree for ejectment in favour of the plaintiffs. On the present appeal, that decree has been assailed on the ground that there was no legal notice to quit sufficient to terminate the tenancy. This raises two questions, namely, *first*, was the notice in fact given on behalf of both the Receivers, and, *secondly*, if it was not so given, was it sufficient to terminate the tenancy.

As regards the *first* question, I feel no doubt upon the evidence that the notice, though it purports to be on behalf of both the Receivers, was in reality given by only one of them. One of the two Receivers, Pepardi, had left Calcutta on the 1st March 1915. There is no evidence to show that before he left he and his co-Receiver had decided that a notice to quit should be served on the defendant. The negotiations which followed, show plainly that the matter was still open for consideration; and there is no room for doubt that the notice was given at the instance of Jackaria alone, who was in Calcutta, while his co-Receiver was away in Surat in the Presidency of Bombay.

As regards the *second* question, namely, whether a notice given by one of two joint Receivers, on behalf of both, is a valid notice and is sufficient to terminate the tenancy, the answer depends upon the true legal position of joint Receivers. When two persons are appointed joint Receivers, unless there is a direction or an indication to the contrary in the order of appointment, the intention of the Court must

CASSIM AHMED MOLLA v. EUSUF HAJI AJAM PEPARDI.

be deemed to be that they, — officers of the Court, should meet and discuss together the questions which come before them for determination in the course of the management of the estate, and that in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. The very object of appointment of joint Receivers would be defeated, if one were held competent to delegate his functions to the other, as appears to have been done in the case before us. Pepardi frankly admitted in the course of his deposition that when Jackaria was not in Calcutta, he himself would attend to business, and when he was away, Jackaria would attend, and added that "one acts when the other is away;" obviously, this was radically wrong. On the view I take of the true legal position of joint Receivers, it is plain that a tenancy held under them, if terminable, must be determined by a notice to quit given by them jointly.

On behalf of the respondents, reliance, however, has been placed on a familiar class of decisions, which show that where there is a demise by joint tenants, one may give notice on behalf of all: *Doe d. Aslin v. Summersett* (1); *Doe d. Kindersley v. Hughes* (2); *Alford v. Vickery* (3). This doctrine is confined in England to a Common Law notice to suit, and does not, in my opinion, apply to the case of joint Receivers. As explained by Lord Ellenborough, C. J. in *Right d. Fisher v. Cuthell* (4), the principle of these decisions is that every act done by one joint tenant for the benefit of himself and his companion shall bind the other, but not those which prejudice the other. To the same effect are the observations of Lord Tenterden in *Doe d. Aslin v. Summersett* (1) and of Baron Parke in *Doe d. Kindersley v. Hughes* (2), namely, that a notice to quit given by one of several joint tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree. This exposition makes it manifest

that the principle applicable to joint tenants does not govern cases of joint Receivers. Consequently, the notice to quit in the case before us was bad in its inception.

In this view, the respondents have argued, as a last resort, that as the two Receivers have joined in the institution of this suit on the basis that the notice was validly given on behalf of both of them, Pepardi must be deemed to have ratified the action of Jackaria so that no question can arise as to the legality of the notice. In my opinion, there is no force in this contention, which is completely answered by section 200 of the Indian Contract Act and Illustration (b) appended thereto: "A holds a lease from B, terminable on three months' notice. C, an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A." This embodies the principle that rights of property cannot be changed retrospectively by ratification of an act inoperative at the time, or, as has sometimes been said to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself. This is in accord with the balance of authority in English Law [*Right d. Fisher v. Cuthell* (4); *Doe d. Mann v. Walters* (5); *Doe d. Lyster v. Goldwin*; (6); *Seaward v. Drew* (7)], though expressions apparently capable of interpretation in support of the contrary view may be found in isolated cases: *Goodtitle d. King v. Woodward* (8); *Doe d. Rhodes v. Robinson* (9). It is, I think, incontestable that if the notice is given by an unauthorised person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the landlord when it is served.

The position in this case, consequently, is that there was no valid notice to quit and the alleged ratification is of no avail to the plaintiffs, so that the tenancy of the defendant still subsists and the claim for eject-

(1) (1830) 1 B. & Ad. 135; 8 L. J. (o. s.) K. B. 369; 109 E. R. 735.

(2) (1840) 7 M. & W. 139; 10 L. J. Ex. 185; 151 E. R. 711; 56 R. R. 669.

(3) (1842) Car. & Mar. 280; 66 R. R. 867.

(4) (1804) 5 East. 491; 7 R. R. 752; 2 Marsh. 83; 5 Esp. 149; 102 E. R. 1158.

(5) (1830) 10 B. & C. 626; 5 M. & Ry. 357; 8 L. J. o. s. K. B. 247; 34 R. R. 522; 109 E. R. 583.

(6) (1841) 2 Q. B. 143; 1 G. & D. 463; 10 L. J. Q. B. 275; 114 E. R. 57; 57 R. R. 621.

(7) (1898) 67 L. J. Q. B. 322; 78 L. T. 19; 14 T. L. R. 200.

(8) (1820) 3 B. & Ald. 689; 106 E. R. 613.

(9) (1837) 3 Bing. (N. C.) 677; 4 Scott. 396; 3 Hodges, 54; 6 L. J. C. P. 235; 1 Jur. 316; 132 E. R. 571; 43 R. R. 758.

ANILA BALA DASÍ v. RAJENDRA NATH DALAL.

ment is premature. The result is that this appeal must be allowed, the decree of Greaves, J., reversed, and the suit dismissed with costs throughout.

Appeal allowed; Suit dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 932 OF 1915.

November 25, 1915.

Present:—Justice Sir Herbert Holmwood, Kt.,
and Mr. Justice Mullick.

ANILA BALA DASÍ—PETITIONER—

versus

RAJENDRA NATH DALAL AND ANOTHER—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XI, applicability of to Probate proceedings—Discovery, power to direct, on submission of interrogatories—Probate and Administration Act (V of 1881), s. 55.

Order XI of the Code of Civil Procedure applies to proceedings in Probate and a Probate Court can, on submission of interrogatories, direct the executors to make a full discovery of the assets of the testator by an affidavit sworn by them. [p. 227, col. 2.]

But until the interrogatories are filed, the Court is absolutely without any power in the matter. [p. 228, col. 1.]

Semle. In matters of Probate the strictest relevancy in the interrogatories may not be required, but the Court should exclude whatever is offensive or improper. [p. 227, col. 2; p. 228, col. 1.]

Rule against an order of the District Judge, 24-Pargannas, dated the 6th August 1915.

Dr. Dwarka Nath Mitter and Babu Satish Chandra Ghatak, for the Petitioner.

Babus Jogendra Nath Mukherjee, Sarat Chandra Mukherjee and Paresh Nath Mukherjee, for the Opposite Party.

JUDGMENT. This was a Rule calling upon the opposite party to show cause why the order of the Court referred to in the petition should not be set aside and the opposite party directed to make a full discovery of the assets of the deceased by an affidavit sworn by them personally in the form required by law.

It appears that a petition was filed before the learned Judge, averring that the inventory filed by the other side as executors to her husband's estate, which alleged that only forty-seven thousand Rupees came into their

hands in cash, was erroneous and that as a matter of fact they obtained a lakh of Rupees or more and it asked the District Judge to direct the opposite party to make a full discovery of the assets of the deceased by an affidavit sworn by the opposite party personally. The learned Judge refused the application, on the ground that there appeared to him to be nothing in the Probate Act which would enable him to make any such discovery. He apparently did not have it brought to his notice that section 55 of the Probate and Administration Act lays down that "The proceedings of the Court of the District Judge in relation to the granting of Probate and Letters of Administration shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit by the Code of Civil Procedure." There is, therefore, no doubt that Order XI of the present Code of Civil Procedure applies to proceedings in Probate. Under that Order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. The affidavit which the petitioner desires to obtain can, therefore, only be obtained by the first method, namely, by interrogatories; and it is laid down clearly in Order XI, rule 2, that on application for leave to deliver interrogatories the particular interrogatory proposed to be delivered shall be submitted to the Court; and in the case before us no interrogatories whatever were submitted to the Court; and it has been held in England, and the same rule applies in this country, that under this rule the Judge has not any power to settle interrogatories, but he can only decide what should be administered. Until the interrogatories are filed it is impossible for him to settle whether there is anything offensive, improper or irrelevant in those interrogatories; and the dicta that have been laid before us from English cases with regard to the more extensive powers of the Court in matters of Probate, seem to us to imply that possibly in such matters the Judge would not be astute to insist upon the strictest relevancy, but he certainly would be obliged to exclude anything offensive or improper in the same way as in any other case. It may be that in matters of Probate

SARADA PRASAD ROY v. MUHAMMAD YUSUF.

the strictest relevancy in the interrogatories may not be required, but this is a matter for the Judge to decide when the interrogatories are filed before him. Until the interrogatories are filed he is absolutely without any power whatever in the matter.

We are, therefore, unable to help the petitioner upon the present Rule. As there is no provision of limitation applying to such proceedings, we can see no reason why he should not file a proper petition with proper interrogatories as laid down in Order XI of the Code of Civil Procedure, and we have no doubt that if he does so, the Judge will give them the proper attention in the exercise of his judicial discretion and administer such as may be according to law.

With these remarks the Rule is discharged. The opposite party is entitled to his costs of this hearing, which we assess at one gold mohur.

Rule discharged.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3903
OF 1912.

April 17, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

SARADA PRASAD ROY CHOUDHURY
AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Nawab Khan Bahadur Khaja MUHAMMAD
YUSUF AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Fishery, right of—Union of two rivers—Fishery owners, rights of, in united waters.

Where a stream or river flows into another, the owners of the fishery rights in the former river do not necessarily become entitled to share in the fishery in the mingled waters of the two rivers. The test to be applied to determine the right is, whether the invading river has lost or retained its identity in the united waters. No hard and fast rules can be laid down to ascertain the conditions in which the river may be said to have lost or retained its identity, though in extreme cases, as where one river is insignificant in size in proportion to the other, the matter is easily decided. [p. 231, col. 1]

Srinath Roy v. Dinabandhu Sen, 25 Ind. Cas. 467; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 325; 16 Bom. L. R. 901 (P. C.); 42 C. 489; 41 I. A. 221, distinguished.

Nobin Chunder Roy Chowdhury v. Radha Pearce *proba*, 6 W. R. 17, referred to.

Appeal against the decree of the District Judge, Dacca, dated the 13th August 1912, affirming that of the Subordinate Judge, 4th Court, Dacca, dated the 17th December 1910.

FACTS material to the case will appear from the following extracts from the judgment of the District Judge:—

"This is a fishery dispute. The waters of the Turag and Mirpur rivers meet and fall into the Buriganga river by one channel from the north. Plaintiffs, who claim fishery rights in the whole of the Turag river, assert that this channel is a part of the Turag. Defendants deny that it is a part of the Turag and claim it as appertaining to the Buriganga fishery, of which defendant No. 1 has obtained a thirty years' lease from defendant No. 2, the Secretary of State. Defendants say that the northern part of the channel, where it leaves the Mirpur river, is called Mirpur Khal, and that the southern part, which also carries off the waters of the Turag, is called Maspara river. The Mirpur is really a branch of the Turag river, which bifurcates some seven miles before it reaches the Buriganga. But the two branches meet again at the commencement of what the defendants call Maspara river. The western branch is called the Turag and it once had a separate outlet into the Buriganga at Turag village. But this has now been silted up, and the waters flow through two *khals* to the eastern channel. The Revenue Survey map gives the name of Turag to the common channel as well as to the western branch, but the *thak* maps describe the common channel as Maspara river * *. The quinquennial papers of 1802 show that *Julkur* Turag formed part of the plaintiffs' estate No. 27, but the boundaries of the fishery are not given, and it is clear that they do not cover the whole river.

"In 1861 Government attempted to resume the Turag fishery * *; the portion included in Estate No. 27 was released to the plaintiffs' predecessors but it was not demarcated ***."

The Buriganga was settled with the defendant No. 1 first for five years and then for 30 years in 1900. Disputes broke out between him and plaintiffs, and section 145 proceedings were drawn up. On June 20th, 1906, defendant No. 1 was declared to be in

SARADA PRASAD ROY v. MUHAMMAD YUSUF.

possession of the disputed channel. The plaintiffs then filed this suit on 22nd of June 1909 for recovery of possession on declaration of title and cancelment of the order under section 145, Criminal Procedure Code, basing their claims mainly on (i) release or grant by the proceedings of 1861, or alternatively (ii) adverse possession under section 26 of the present Limitation Act. They failed to establish their title in the opinion of both the Courts below and their suit was dismissed. They then preferred this second appeal to the High Court.

Sir *Rashbehary Ghose* (with *Babu Jogesh Chandra Roy*), for the Appellants.—There was no provision in the older Acts of Limitation corresponding to clause (2) of section 26 of the Act of 1908. Hence incorporeal rights could be acquired before the present Act came into force, by 20 years' adverse possession even against the Government. The rule of 60 years' limitation (Article 149 of Act XV of 1877) applied only to suits *by or on behalf of the Secretary of State for India*.

The Revenue Survey map of 1857 shows the disputed channel as part of the Turag. No effect has been given to this map, which was specially prepared for the purposes of revenue. The District Judge himself finds that the channel is stated for the first time in 1892 as forming part of the Buriganga fishery. But he infers from a judgment of the High Court in 1864, not *inter partes*, that the High Court held it to be at that time a part of the Buriganga fishery.

The entire channel has been found as a matter of fact to have been in the possession of the plaintiffs save a part claimed by another *zemindar*.

The learned Judge erred with regard to the right "to follow the river," laid down by the Privy Council in *Srinath Roy v. Dinabandhu Sen* (1) overruling the earlier case on the point, *Nobin Chunder Roy Chowdhury v. Radha Pearee Debia* (2). It is the waters of the Turag that, being obstructed

elsewhere, discharged themselves through a small creek and transformed it into a river. The waters over which the right of fishery is claimed, is a part of the river [*Ahmadi Begum v. Mahasy Taraknath Ghosh* (3).] The river did not lose its identity by changing its course.

In the grant of the *julkur*, "Julkur Turag" is the primary description. The whole of the river is implied. The boundaries are mere matters of description. At most there have been some irregularities in the description. Grant of Blackare will imply the grant of the whole of it, even though there are slight inaccuracies in the boundaries given. The fundamental idea should be looked into and given effect to.

The District Judge was under a serious misapprehension as to our claim. He says we never claimed any portion beyond the Mirpur bridge, by construing a word meaning "up to and not including" which according to us means "upto and including."

Babu Ram Chandra Mitter (with *Babus Mahendranath Roy* and *Prakas Chandra Pakrasi*), for the Respondents. Even admitting that 20 years would have sufficed against the Crown, the plaintiffs must have come to Court within two years of interruption. Though an interest in land comes under Article 144 (12 years), yet in the case of easements two years is the rule of limitation. *Lokenath Bidyadhur Mohapatra v. Jahania Bibi* (4).

The law as regards acquisition of easements before the present Act was passed, was uncertain. The earlier cases are for the 20 years' rule: *Kurupam Zemindar v. Merangi Zemindar* (5); *Chundee Churn Roy v. Shib Chunder* (6); *Arzan v. Rakhal Chunder Roy* (7) more recent cases are to the contrary: *Secretary of State v. Mathura Bhai* (8).

Enactments limiting rights are not to apply to the Crown unless specially mentioned. (Kent's Commentaries, section 20). The

(1) 25 Ind. Cas. 467; 42 C. 439; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 335; 16 Bom. L. R. 901 (P. C.); 41 I. A. 221.

(2) 6 W. R. 17.

(3) 21 Ind. Cas. 233; 17 C. W. N. 1173 at p. 1173; 18 C. L. J. 393.

(4) 12 Ind. Cas. 305; 14 C. L. J. 572.

(5) 5 M. 253; 6 Ind. Jur. 465.

(6) 5 C. 945; 6 C. L. R. 269; 3 Shome L. R. 123.

(7) 10 C. 214.

(8) 14 B. 213.

SARADA PRASAD ROY v. MUHAMMAD YUSUF.

maxim that time does not run against the Crown has been approved of in *Abhay Charan v. Dwarka Nath Malo* (9).

Judgment not *inter partes* has been admitted as evidence of a *transaction*, as the Judge himself says, and not as a conclusive finding of fact.

That plaintiffs' men have occasionally fished in the channel, is no evidence of possession.

So whatever may be the law as to the time of acquisition of easements, there has been no *adverse possession* in this case. Further, the appellants cannot rely on grant or (release) as they have remained out of possession for more than 12 years.

As regards the right to follow the river, the case in 42 Calcutta at page 520 bottom and page 521 top [*Srinath Roy v. Dinabandhu Sen* (1)] shows that it could be allowed "within the up stream and the down stream limits." Moreover here the discharge of waters is over an area in which we have subsisting rights. Further, boundaries here are very definitely given so as to form essential parts of the grant and the western part of the Turag has accordingly been never claimed by the plaintiffs; boundaries here are not, therefore, mere matters of description. If the plaintiffs were allowed to follow the *waters*, they will no doubt soon claim the entire Buriganga.

Dr. Ghose, in reply.—The lower Courts seriously misunderstood our case and have proceeded on inadmissible evidence.

JUDGMENT.

BEACHCROFT, J.—The Buriganga is a large river in the Dacca District. One of its tributaries, flowing into it from the north, is the Turag river. About seven miles from the Buriganga, the Turag bifurcates. The western branch, after bifurcation, appears to have been always known as the Turag and fell into the Buriganga in the neighbourhood of village Bhakurta. The eastern branch, to which or to parts of which different names have been given such as Saparia river, Mirpore river and Maspara river, joins the main river not very much further down. The plaintiffs are the owners of the fishery in the branch which went by

the name of the Turag, while the defendants owned the Buriganga fishery, which included the channel in dispute.

The western branch no longer falls into the Buriganga near Bhakurta. The mouth of that branch silted up many years ago and the Turag took a new course to the east and having joined the eastern branch near village Mirpore now discharges its waters into the Buriganga through the last half mile or so of the eastern branch. It is the fishery in this last stretch of water from Mirpore village to the Buriganga that is in dispute in this case. Both Courts have dismissed the plaintiffs' suit for declaration of title and possession, finding that title has not been proved.

It is now argued on appeal, on the authority of the case, *Srinath Roy v. Dinabandhu Sen* (1) that the plaintiffs, as owners of Turag fishery, were entitled to follow the river where it changed its course and, therefore, they are entitled to at least a share in the fishery, from Mirpore down to the Buriganga.

In any attempt to apply the decision referred to to the present case, it must be remembered that in the case before the Privy Council the river under discussion had made for itself a new channel where none existed.

The principle enunciated in that case will apply to the Turag fishery up to the point where the Turag branch joins the eastern branch, but there the parallel between the two cases stops.

At first sight it would seem a simple solution to say that the owners of the two fisheries should share in the fishery in the united waters. Now, apart from the objection that the result would be that the invaded fishery would for a certain portion of its length lose the character of a several fishery, there are practical difficulties in the way of adopting this apparently simple solution. In the first place there would be the difficulty of estimating the respective shares to be allotted to the two fisheries; the benefit, if any, to the invaded fishery might vary at different seasons of the year. It is not by any means certain that the invaded fishery would be benefited by the addition of the waters of the invading river. There would be an opportunity for more fish to come into the fishery, but there would be a corresponding opportunity for more to

(9) 11 Ind. Cas. 180; 39 C. 53 at p. 57; 15 C. W. N. 372.

ABDUL KARIM v. ISLAMUNNISSA BIBI.

go out. The influx of the new river might be positively injurious to the existing fishery, the whole natural advantages of which it might affect, or even destroy. There would be nothing to prevent the owner of the invading river placing a barrier across his river to prevent the exit of fish from his river, while enjoying a share in the fishery in the mingled waters of the two rivers.

I am aware of only one case in which a similar question has been decided, the case of *Nobin Chunder Roy Chowdhury v. Radha Pearee Debia* (2). In that case it was decided that a person's rights were not increased because his river flowed through a channel in which another had a fishery. This ~~was~~ was referred to in the case of *Srinath Roy v. Dinabandhu Sen* (1), and it was distinguished from other cases cited on the ground that the dispute was between the owners of two fisheries, and not between the owner of a fishery and the owner of the subjacent soil over which the river had been diverted.

In my opinion, the solution of the question lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity. In extreme cases the answer would probably not be difficult. In the case where the invading river was insignificant in size in proportion to the invaded river, there would probably be no hesitation in saying that the former river had lost its identity. At the other end of the scale we might have the case of the invading river being so powerful as to destroy the channel of the invaded river and divert it into a new course. In that case the answer would probably be that the invaded river and not the invader had lost its identity. It is in intermediate cases that difficulty would be felt. It is impossible to prescribe any hard and fast rules for the purposes of ascertaining the conditions in which the river may be said to have retained or lost its identity. And I feel the less inclination to attempt to do so as this aspect of the matter was not made the subject of any detailed discussion before us. And there is another equally weighty reason for not making the attempt, namely, that the lower Courts were not asked to consider the plaintiffs' right from this point of view at all. If we were to give effect to the argument we should have to remand the case for findings, for which fresh evidence would have to

be taken. That would, in my opinion, be unjustifiable, as the case made by the plaintiffs in their plaint was that the whole of the eastern branch of the Turag below the bifurcation down to the Buriganga was included in their fishery.

That case having failed and the attempt to establish title by adverse possession having failed, the plaintiffs have been driven to set up a new case and as that new case would depend on fresh evidence it is too late to entertain it now.

I think the appeal should be dismissed with costs to be divided half and half between the Government and the Nawab.

D. CHATTERJEE, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.
EXECUTION SECOND APPEAL No. 1047
OF 1915.

February 28, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

ABDUL KARIM—PETITIONER—
APPELLANT

versus

Musammât ISLAMUNNISSA BIBI AND
OTHERS—OPPOSITE PARTY—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 165, 181—
"Person" in Art. 165, whether includes judgment-debtor—Execution of decree—Judgment-debtor dispossessed of land outside decree—Remedy of judgment-debtor—Application for restoration of possession—Period of limitation—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 100—Interpretation of Statute—Technical matter.*

An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights under the decree is a question arising between the parties to the suit within the meaning of section 47 of the Civil Procedure Code. [p. 232, col. 1.]

Therefore, if in execution of a decree for possession of land, a judgment-debtor is dispossessed of land which is outside the decree, his only remedy is an application for restoration of possession under section 47 and if he does not avail of this remedy he loses his land, inasmuch as he cannot bring a separate suit. [p. 233, col. 2.]

The period of limitation for such an application by the judgment-debtor is 3 years under Article 181 and not 30 days under Article 165 of the Limitation Act, inasmuch as the word "person" in the latter Article is not used in any other sense than that of a person who can make an application

ABDUL KARIM v. ISLAMUNNISSA BIBI.

under Order XXI, rule 100, Civil Procedure Code, and, therefore, does not include a judgment-debtor. [p. 233, col. 1.]

In a technical matter, when the language relied upon does not cover the case, it is of the highest importance to realise the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation, unless it is driven to do so by the irresistible force of language. [p. 233, col. 2.]

Ratnam Ayyar v. Krishna Doss Vital Doss, 21 M. 494; 8 M. L. J. 75; *Har Din Singh v. Lachman Singh*, 25 A. 343; A. W. N. (1900) 59; *Raja Ram v. Itraj Kunwar*, 24 Ind. Cas. 137; 17 O. C. 94, not followed.

Execution second appeal from the decision of the Additional District Judge of Saharanpur, dated the 29th of April 1915.

Mr. Haribans Sahai (with him Mr. Kailas Nath Katju, for the Hon'ble Dr. Tej Bahadur Sopru), for the Appellant.

Mr. Nehal Chand, for the Respondents.

JUDGMENT.

WALSH, J.—In this case an application was made to the Subordinate Judge by the judgment-debtors under section 47 of the Civil Procedure Code, complaining of a seizure of immoveable property belonging to them, made by the decree-holders in excess of their rights under the decree. The Subordinate Judge, after an elaborate inquiry, has found as a fact that the decree-holders took advantage of some ambiguous language in the decree, and deliberately and dishonestly seized more than their decree entitled them to seize.

The decree was dated the 31st March 1911. The improper seizure took place on the 19th November 1911. The application in question was made to the Subordinate Judge on the 7th July 1913. This delay of nineteen months was due to the judgment-debtors having mistaken their rights and wasted time over a fruitless application. The reason, however, for the delay is immaterial. The delay itself has given rise to the question we have to decide.

The improper seizure by the decree-holders in excess of their rights under the decree was clearly a question arising between the parties to the suit within the meaning of section 17. The application of the judgment-debtors was clearly made under that section.

On appeals being brought by both the decree-holders and the judgment-debtors, the District Judge, holding himself, as we think

quite properly, bound by certain authorities mentioned hereafter, decided that the judgment-debtors' application was time-barred, on the ground that Article 165 of the Limitation Act applied to it and that the time limit of 30 days had run out.

We are clearly of opinion that when the matter is closely examined this view is untenable.

In a technical matter of this kind, when the language relied upon does not in express terms cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation, unless it is driven to do so by the irresistible force of language.

Now in the ordinary course of things a person who is wrongfully dispossessed of immoveable property has a remedy by a suit for possession only. In matters arising out of the execution of decrees, possibly because they are the indirect result of the active interference of the Court itself, the Legislature has provided two exceptions. The judgment-debtor must apply to the Court under section 47. If he is dispossessed of land which is outside the decree, and if he does not so apply, he loses his land. He cannot bring a suit. He is worse off than the ordinary person wrongfully dispossessed. On the other hand, if a third person outside the suit is unfortunately the victim of some mistake in the decree itself, or by the decree-holder, he may apply to the Court in a summary manner, and if he is right he may be put back into possession. That is expressly provided by Order XXI, rules 100 and 101. Such a person is better off than the ordinary person wrongfully dispossessed. He can bring a suit, of course, within 12 years; but he can, if he pleases, apply summarily for possession. That is a privilege of a peculiar and special character, from which the judgment-debtor is excluded in express terms.

It is not surprising to find such a privilege accompanied by certain restrictions. By Article 165 of the Limitation Act of 1908 (the Article now in question) such an application must be made within 30 days. The Article is in these terms:—

ABDUL KARIM v. ISLAMUNNISSA BIBI.

Description of application.—Under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.

Period of limitation.—Thirty days, from the date of dispossession."

Now that is a precise and compendious description of the right given, and the application allowed, to "a person other than the judgment-debtor" by Order XXI, rules 100, 101. It certainly applies to such an application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the Legislature enacted Article 165, it had the provisions now contained in Order XXI, rules 100, 101 in mind. That is to say it intended Article 165 to apply to such an application.

The argument for the view adopted in the reported cases, and followed by the District Judge in this case, is that the words are wide enough to include a judgment-debtor. Separated from their context this is true. A judgment-debtor is a "person"; in such a case as this, moreover, the judgment-debtor in his application under section 47 is complaining of the same sort of act as an applicant under Order XXI, rule 100, would have to complain of. But the moment it is realized that what the Schedule to the Limitation Act consists of is an enumeration of suits, appeals, and applications of various kinds, and that the language of Article 165 is merely a definition or description of an application, all difficulty as to the use of the word "person" disappears. In our opinion the word "person" in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by Order XXI, rule 100, to make an application of that description.

To hold otherwise would result in this, that if a judgment-debtor applied to the Court under Order XXI, rule 100, adopting the language of Article 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying under section 47 for more than 30 days, the language of the Article is to be applied to him.

If anything were required, outside the context in which the Article is used, to assist us to an interpretation of it, we should be entitled, indeed in our opinion we should be bound, to recognize that to hold, as has been held by the District Judge in this case involves depriving the judgment-debtors for ever of all title to a considerable portion of immoveable property, because they did not make a summary application with regard to its seizure within 30 days. Such a result in the case of a person already in straitened circumstances appears to us to be something which it is safe to assume that the Legislature never intended, and which it certainly never enacted in direct terms.

We are aware that this decision involves our departing from two authorities of some standing to each of which, we need hardly say, we have given every consideration.

The first case is that decided by the Madras Court, *Ratnam Ayyar v. Krishna Doss Vital Doss* (1). No reasons are given in the judgment nor was the decision necessary for the determination of that case. The second case was decided by this Court in the year 1900, *Har Din Singh v. Lachman Singh* (2). In that case the appellant, who succeeded in upholding the view from which we are dissenting, also succeeded on the merits. It is not unlikely that the considerations which have weighed with us were over shadowed by the precedent which the Madras Court had already created, and by the argument on the substantial merits of the case. Another authority was cited to us from Oudh *Raja Ram v. Itraj Kunwar* (3). There the Judicial Commissioner, while apparently entertaining doubts of his own, seems to have felt himself unable to break away from the two authorities we have mentioned.

We may add that we are not unmindful of the fact that in certain other cases of applications which may be made by a judgment-debtor, such as an application for setting aside a sale, the judgment-debtor is limited to 30 days. There are obvious reasons why such an application, if made at all, should be made promptly. But it is suffi-

(1) 21 M. 494; 8 M. L. J. 75.

(2) 25 A. 343; A. W. N. (1900) 59.

(3) 24 Ind. Cas. 137; 17 O. C. 94.

DAT PRASAD SINGH v. GOPAL RAM.

cient to say that each case must turn upon the language used, and that in the case of an application to set aside a sale, the limitation is expressly provided in unmistakable language. The learned District Judge had before him appeals by both parties challenging the decision of the first Court on the merits. He has disposed of both appeals on the preliminary finding that the application of the present appellants was time-barred. We, therefore, set aside the decrees of the lower Appellate Court and direct that Court to re-admit both the appeals on to its pending file and dispose of them according to law. The costs of this appeal on the higher scale and the costs in the Court below will abide the event.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1419 OF 1914.

December 1, 1915.

Present:—Mr. Justice Piggott.

DAT PRASAD SINGH—DEFENDANT—
APPELLANT

versus

GOPAL RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 47, 97—Non-occupancy tenant—paying above Rs. 100 rent—Enhancement of rent—Registered agreement, necessity of.

In a suit for the ejectment of a non-occupancy tenant a compromise was arrived at between the *zemindar* and the tenant, under which the *zemindar* dropped the ejectment proceedings allowing the tenant to acquire occupancy rights and the tenant agreed to pay a rent of Rs. 200 instead of Rs. 180 per annum. The compromise was endorsed on a paper bearing a general stamp of Re. 0-8-0 and filed in the Court of the Assistant Collector but not registered. The suit was dismissed but the terms of the compromise were not embodied in the decree. In a suit for rent:

Held, that under section 47 of the Tenancy Act the original rent of Rs. 180 could be enhanced only by registered agreement between the parties and that section 97 of the Act did not apply to the circumstances of the case. [p. 234, col. 2.]

Second appeal from a decree of the District Judge, Aligarh.

Mr. Jang Bahadur Lal, for the Appellant.

Mr. Gulzari Lal, for the Respondents.

JUDGMENT.—The sole question for determination in this appeal is whether the plaintiffs-respondents, as tenants of a certain holding, are bound to pay to the defendant-appellant an annual rent of Rs. 180

or of Rs. 200. It is clearly established that in the year 1907 the present defendant was taking steps for the ejectment of these plaintiffs from their holding. A compromise was arrived at, under which the *zemindar* consented to drop the ejectment proceedings, thereby allowing the tenants to acquire occupancy rights, and the latter agreed to pay a rent of Rs. 200, instead of Rs. 180, per annum. The compromise embodying the above terms was endorsed upon a paper bearing a general stamp of Re. 0-8-0, but the document was not registered under the provisions of the Indian Registration Act of 1877. It was filed in the Court of the Assistant Collector who was conducting the ejectment proceedings. That officer proceeded to dismiss the ejectment suit accordingly, but has not framed his decree so as to embody the terms of the compromise therein and make it binding on the parties. Under section 47 of the Tenancy Act, II of 1901, the original rent of Rs. 180 per annum payable by these plaintiffs could be enhanced by agreement between the parties, only if the agreement in question were made by a registered instrument. In connection with this provision, the Legislature, in section 97 of the same Act, has made certain arrangements for the registration of leases, counterparts, or agreements with respect to a tenancy otherwise than under the Indian Registration Act, 1877. I should have been glad to apply the provisions of that section to the present case if possible, but there are two difficulties in the way. The agreement stipulates for a rent exceeding Rs. 100 annually. It is contended that the enhancement for which the agreement stipulates is only Rs. 20 annually, but I am unable to understand the provisions of the section in this sense. Moreover, the Assistant Collector's endorsement on this document seems to fall short of satisfying the requirements of the second clause of section 97 above referred to. It is certainly not in the prescribed form laid down by the Government Notification No. ²⁴⁴⁸_{1-203F} dated the 18th of August 1902 (*vide* U. P. Gazette of the 23rd of August 1902, page 554). It is difficult to say that the endorsement, as it stands, contains a statement that the Assistant Collector satisfied himself as to the identity of the parties and their acquaintance with, as well ■

J. B. ROSS v. C. R. SCRIVEN.

their assent to, the terms of the agreement. He may have done so; but his proceedings rather suggest that his attention was chiefly directed towards satisfying himself that the agent of the *zemindar*, who was the plaintiff in his Court, consented to the dismissal of the ejectment suit then pending.

The result is an unfortunate one, but I cannot see my way to interfering with the judgment of the Court below. There has been a suggestion that the doctrine of estoppel might be applied in favour of the defendant-appellant, but the case seems to be covered by the ruling which has been relied on by the learned District Judge. This appeal, therefore, fails and I dismiss it. Under the circumstances I decline to make any order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 40
OF 1916.

April 19, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe, Kt.,
and Justice Sir Ashutosh Mookerjee, Kt.
J. B. ROSS AND CO. — DEFENDANTS—

APPELLANTS

versus

C. R. SCRIVEN AND OTHERS — PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 6, O. VIII, rr. 3, 5, O. XXXVII, r. 2, O. XLI, rr. 23, 25—Suit, first hearing of—Ex parte decree, passing of, without evidence—Jurisdiction—O. VIII, r. 5, scope of—Admission by non-traverse—Verified plaint, whether legal evidence—Penal Code (Act XLV of 1860), ss. 191, 193—Breach of contract—Unliquidated damages, suit for—Strict proof of claim, necessity of, even when undefended—High Court—Power to remand case.

No decree can legally be given without evidence in a case where the defendant is *ex parte* or does not choose to contest, except in suits on negotiable instruments governed by the provisions of Order XXXVII, rule 2, Civil Procedure Code. [p. 238, col. 1; p. 240, col. 1; p. 242, col. 2.]

A Court cannot, except in the said class of suits, dispense with evidence either on the principle of admission by non-traverse under Order VIII, rule 5, or on the ground that a verified plaint is itself legal evidence. [p. 238, cols. 1 & 2; p. 240, cols. 1 & 2; p. 242, cols. 1 & 2.]

Order VIII, rule 5, Civil Procedure Code, is limited in its application to cases where there is, in fact, a pleading of the defendant before the Court. [p. 238, col. 1; p. 240, col. 2; p. 242, col. 1.]

Per Sanderson, C. J., and Mookerjee, J.—It is especially necessary in an undefended action for unliquidated damages based on a breach of contract,

wherein the quantum of damages is either wilfully or unintentionally inflated, that the plaintiff should be required to offer proof of all the material averments in his plaint, that is, not only the cause of action upon which he relies, but also the actual amount of damages which he has sustained. [p. 239, col. 1; p. 243, col. 2.]

Per Sanderson, C. J.—The fundamental principle is that the plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. The only exceptions to this are cases provided for in Order XXXVII, rule 2, Civil Procedure Code. [p. 237, col. 2.]

The language of section 191, Indian Penal Code, does not justify the inference that a verified plaint must be taken to be legal evidence of the facts contained in it. The object of the verification is to insist on a guarantee that a false or totally trivial claim is not put before the Court. Section 191, Indian Penal Code, was framed in the way in which it stands only with the intention of bringing verifications of statements in pleadings by a person knowing them to be untrue within section 193, Indian Penal Code. [p. 239, col. 1.]

Per Woodroffe, J.—A decree cannot be given on pleadings without evidence in undefended cases. Verification does not dispense with evidence. It is merely a form of giving authenticity to the pleadings. The object of the verification of the plaint is to fix on the plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. [p. 240, cols. 1 & 2.]

Gulstain v. Hutchison, 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945; *Basdeo v. John Smidt*, 22 A. 55 at p. 60; A. W. N. (1899) 172, referred to.

Because a false verification may be the basis of a prosecution under section 193, Indian Penal Code, and comes within the definition of 'false evidence' for the purposes of the Penal Code, it does not make a verification evidence on which a decree can be founded in a civil suit. [p. 240, col. 2.]

Order VIII, rule 5, is really a rule of construction of the defendant's pleading. This rule does not apply where there is no written statement at all. The law says, as a rule of construction, that if there is a written statement and the fact as alleged in the plaint is not denied, then the written statement must be so construed as to be taken to have admitted such allegation. The rule does not justify the passing of a decree on no evidence where there is no written statement. [p. 240, col. 2.]

The words 'proceed *ex parte*' in Order IX, rule 6, Civil Procedure Code, mean 'proceed to take and determine evidence, i.e., in defendant's absence by the taking of evidence' [p. 241, col. 1.]

Per Mookerjee, J.—It is an elementary principle which forms the basis of all legal procedure that no litigant is entitled to obtain relief from a Court of Justice unless he establishes to the satisfaction of the Court that his claim is well founded. [p. 241, col. 2.]

A verification is required with a view to discourage, if not to prevent, the institution of false suits; the Legislature never contemplated that verified statements should be treated as evidence on behalf of a plaintiff against a defendant. The inference may legitimately be drawn from the

J. B. ROSS v. C. R. SCRIVEN.

language used in section 191 read with section 193, Indian Penal Code, that a verified statement would not be 'evidence' but for the special provision of section 191 which has been enacted for a special purpose. [p. 242, col. 2; p. 243, col. 1.]

Queen-Empress v. Mehrban Singh, 6 A. 626 and *Basdeo v. John Smidt*, 22 A. 55 at p. 60; A. W. N. (1899) 172, referred to.

Great caution should be exercised when suits are heard *ex parte*. [p. 243, col. 2.]

Amritnath v. Dhunpat Singh, 8 B. L. R. 41; 15 W. R. 503, relied on.

The powers of the High Court as to remand are not restricted by the provisions of Order XXI, rules 23, 25, Civil Procedure Code, and the High Court can always make an order of remand if the exigencies of a case demand it. [p. 243, col. 2.]

Appeal from a judgment and decree of Mr. Justice Fletcher sitting on the original side of the High Court.

FACTS of the case appear from the judgment.

Mr. Langford James (with him Mr. D. C. Ghosh, instructed by Messrs. Pugh & Co.), for the Appellants, after stating the facts of the case and mentioning that the defendants' application to appear to defend the case was rejected by the learned Judge, contended that the *ex parte* decree was made without jurisdiction as no evidence was taken by the learned Judge in support of the plaintiffs' case.

[SANDERSON, C. J.—Was any defence put in this case?]

No. No appearance was entered. No defence was put in.

[MOOKERJEE, J.—Was an application made by the defendant for leave to defend?]

Yes. But that application was refused.

[SANDERSON, C. J.—Probably the defendant was not entitled to appear.]

On paying the sum of Rs. 31 he could have got leave to defend if he had appeared in Chambers. But he did not appear in Chambers. Whether he appeared or not, the plaintiff was not entitled to a decree without adducing evidence in support of his case. It has been invariably the practice of the Original Side to take some evidence in support of the plaintiff's case in undefended cases before making an *ex parte* decree. Mr. Justice Fletcher has made a departure from that practice. The only cases in which decrees could be made without any evidence are suits on negotiable instruments, summary procedure for which is prescribed under Order XXXVII, Civil Procedure Code. The fact that a special procedure has been prescribed

by the Legislature under Order XXXVII for suits of a special nature shows that in every other suit no decree could be made legally without any evidence. Order VIII, rule 5, which might be relied upon in support of the judgment, applies to cases where a written statement was filed. If Order VIII, rule 5, applied to undefended cases as Mr. Justice Fletcher seems to hold, then under Order XII, rule 6, one could apply for judgment in undefended suits without doing anything. He referred to section 58 of the Evidence Act and *Jonardan Dobey v. Ramdhone Singh* (1), *Galstaun v. Hutchison* (2), *Amritanath v. Dhunpat Singh* (3).

[WOODROFFE, J.—What do you ask us to do? Do you ask the case to be remanded supposing your appeal is allowed?]

The case at any rate should be remanded for a proper trial in accordance with law. But I may go further and ask your Lordships to dismiss the suit as the plaintiff did not give any evidence in support of his case.

Mr. Buckland (instructed by Mr. J. N. Taylor), for the Respondent, argued that no oral evidence was necessary in this case. The allegations in the plaint which were duly verified by the plaintiff, were amply sufficient to prove the plaintiff's case. Under Order VIII, rule 5, the allegations in the plaint, unless denied by the defendant, should be deemed to have been admitted. He also referred to Order VIII, rule 3, and said that it supports his contention that everything in the plaint unless specifically denied must be taken as admitted. Under Order XV, rule 1, the Court may pronounce judgment at once where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact. Where the defendant does not appear and the suit goes undefended, no issue arises in the case and the Court can very well make an *ex parte* decree without any evidence.

[MOOKERJEE, J.—Is it necessary that there should be an appearance or pleading of the defendant in order that an issue may be raised?]

No. But the practice has been that when a plaint is admitted the defendant is directed to file his written statement. It cannot be said that in this case the

(1) 23 C. 738.

(2) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.

(3) 8 B. L. R. 44; 15 W. R. 503.

J. B. ROSS v. C. R. SCRIVEN.

decree was made without any evidence. The plaint, verified in accordance with law, was some evidence on which a Court could act in making an *ex parte* decree and whether the facts entitling the plaintiff to a decree were proved or not, was for the Judge to determine. The question of proof is a matter for the Evidence Act and has nothing to do with the procedure applicable in making an *ex parte* decree. He referred to section 3 of the Evidence Act and section 47 of the Divorce Act, *Basdeo v. John Smidt* (4) and Phipson on Evidence, 3rd Edition, page 216, and submitted that for a false verification of plaint there is a punishment prescribed under the Penal Code, so there is no reason why verified pleadings could not be acted upon by a Court in deciding an undefended case.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants in this case, J. B. Ross & Co., against the judgment which was given by the learned Judge in the Court below in favour of the plaintiffs under these circumstances: The action was brought for unliquidated damages arising upon an alleged breach of contract, which was made between the plaintiffs and the defendants. The damages claimed were based upon the ordinary rule, *viz.*, the difference between the contract price and the market price at the time the contract ought to have been performed. The summons was served, but the defendants did not enter appearance within the time specified in the summons, nor did they put in a written statement of defence within the time mentioned in the summons. Thereupon, the case was put upon the list of undefended cases, and it came before the learned Judge in due course. Then an application was made to the learned Judge on behalf of defendants for leave to appear and defend. The application was based upon the ground that the gentleman representing the defendant firm had been away and that he had sent a telegram which was not delivered to his attorney in the way it had been sent, and that through that mistake the attorney understood that he had no instructions to defend, whereas, as a matter of fact, the defendant had given

instructions to his attorney to appear; and the result was that no steps were taken to defend the suit. The learned Judge having refused the defendants leave to appear, proceeded to give judgment for the plaintiffs without hearing any evidence, for the full amount claimed; and the question which has been raised in this appeal is, whether the learned Judge was entitled so to do.

Now, I am of opinion, in spite of the ingenious and able argument which has been addressed to us by Mr. Buckland on behalf of the plaintiffs, that the learned Judge had no jurisdiction to make the decree which he in fact did.

The fundamental principle is that the plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. There are certain rules, made under the powers of the Civil Procedure Code, expressly limited to certain cases in which proof, in the ordinary sense of the word, by the plaintiff of his case is dispensed with, and those rules are contained in Order XXXVII, rule 2, of the Civil Procedure Code. That is a rule which is limited to bills of exchange, *hundis* or promissory notes, and it provides that "All suits upon bills of exchange, *hundis* or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed." Then it goes on to provide in clause (2) that "In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons", and so on. Now this rule created an exception to the ordinary fundamental rule to which I have referred; and, in my opinion, one of the reasons why that exception was made was because of the special nature of the documents mentioned in that rule, namely, negotiable instruments such as bills of exchange, *hundis* or promissory

(4) 22 A. 55 at p. 60; A. W. N. (1899) 172.

J. B. ROSS v. C. R. SCRIVEN.

notes. It is a procedure which is somewhat analogous to the procedure under Order III, rule 6, of the rules which are applicable to England, but it is of a much more limited nature: and, it is only in a case of that limited nature, such as where the plaintiff sues upon bills of exchange, &c., and in respect of which he files his verified plaint, and the defendant asks for leave to appear and defend, but fails to obtain it, that the allegations in the plaint shall be deemed to be admitted. As far as I am aware, in the rules which are applicable to this Court there is no other provision under which *proof* by the plaintiff, in the ordinary course, as we understand it, in support of his claim, can be dispensed with.

Reliance was placed by the learned Counsel who argued this case for the plaintiffs, upon two points. He said that there was evidence in this case and that the evidence consisted in the plaint which was verified in accordance with the rules of the Court, and he relied first upon Order VIII, rule 5.

In my judgment Order VIII, rule 5, does not apply to this case at all. That rule says, "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact...to be proved otherwise than by such admission." I think it is clear from the wording of that rule that it is only intended to apply to a case where a pleading has been put in by the defendant, and I think the short answer to the learned Counsel's argument on that point is that the rule is not intended to apply to a case where the defendant has not put in a written statement. It should be noted that in this case where the claim is for unliquidated damages, even if a written statement had been put in, it would not have been necessary for the defendants to deny specifically the damages: it would have been quite sufficient if they had pleaded generally to the damages, and in that case even though all other material facts were admitted in the defence, there would still have been the necessity for some enquiry to be made either by the Court which heard the case, or by the Official Referee or some other person to

whom the Court might refer the enquiry, to ascertain the amount of damages to which the plaintiffs would be entitled.

The *other* point is that if the learned Counsel was not right in relying on Order VIII, rule 5, still there was some evidence in the case, because the plaint in itself constituted *evidence*, inasmuch as it had been verified in accordance with the rules of the Court.

Speaking for myself, I ~~am~~ not prepared to accede to that argument. First of all, I think the rule is that the plaintiff must give the best evidence he can; and, if the plaintiff were alive and could come to Court, it would be necessary for him to prove his case by producing evidence in the ordinary and well-recognised way, and I should have thought that the Court would not be justified in allowing the plaint to be put in ~~as~~ evidence of the facts on which he wished to rely. It is to be pointed out that the plaint is not verified by an affidavit: it is simply verified either by the signature of the party or parties or by some person who is authorised to verify on his or their behalf. But it is said by Mr. Buckland that section 191 of the Indian Penal Code shows that the plaint ought to be considered as *evidence* in the case; and there it was that I think he showed considerable ingenuity in advancing the argument which he did in favour of the plaintiffs. I am bound to say that I do not think that the argument is a good one, and for this reason. The point is, that the plaint is *evidence* because it is to be verified in accordance with the rules. If we look at section 191 of the Indian Penal Code, we find this: "Whoever being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." Therefore he argues that inasmuch as the plaintiff, if he verified a statement in his plaint which he either knew or believed to be false, might be proceeded against under section 193, because he would have been taken to have given *false evidence*, his plaint ought to be considered ~~as~~ evidence in the case. The answer to that is this. I think that the object of the Legislature is pretty clear. First of all the object of the rule insisting upon the verification of

J. B. ROSS v. O. R. SCRIVEN.

the plaint is clear, namely, that it was thought desirable to insist upon some guarantee that a false or totally trivial claim should not be put before the Court. There would be no such guarantee by simply requiring a man to make a verification of the claim, unless there was some sanction. Mr. Buckland says that the sanction is section 191. I think it is clear that section 191 was framed in the way in which it stands for this reason. It was the obvious intention of the Legislature to bring such a case, namely, the verification of statements in the pleadings by a person who knew them to be untrue, within section 193. Section 193 deals with the case of a man intentionally giving false evidence and the method the Legislature employed for bringing such case as I have referred to, within section 193 was to say that if a man, being bound by law to make a declaration upon any subject, makes any statement which is false to his knowledge he shall be deemed to give false evidence. The words are, "he is said to give false evidence," and those words are employed simply for the purpose of bringing the case within section 193, and for no other purpose. With great deference to the learned Counsel, I think it would be unreasonable to conclude from that section that it was ever intended that a plaint which has got the usual verification by the plaintiff could be adopted by a Court of Justice as sufficient proof of the facts which ■■■ contained in the plaint.

Therefore, I am of opinion that the two grounds upon which the learned Counsel has relied cannot be upheld.

Before I conclude my judgment, I would like to say one word, from the general point of view. Of course, if we had found in the rules or in the Statutes any provision giving the learned Judge a jurisdiction to deal with the case in the way he has done, we should have been bound to follow it. But I cannot myself help saying that it would be undesirable if ■ suit such as this were adjudicated upon without any evidence in the real sense of the word given by the plaintiff, where claim is for unliquidated damages. The learned Counsel, in the course of his argument when I put the question to him, had to

admit that in a very large number of cases where the claim is for unliquidated damages, the damages are inflated. It may be that in some cases they are intentionally inflated, but in most cases they are quite unintentionally inflated. The question of the proper measure of damages is one of the most difficult questions that a Court of Justice has to deal with and in many cases of unliquidated damages, the amount which is put in the statement of claim is found to be wrong when the case comes to be investigated, and the amount of damages to which the plaintiff is actually entitled is different from that which the plaintiff has inserted in his plaint. Therefore, it shows the desirability and necessity in such cases, when the defendant does not appear, that the plaintiff should be called upon to prove all the material facts which are necessary for the proof of his case, that is, not only the cause of action upon which he relies but also the actual amount of damages which he has in fact sustained. I think that if this course is not pursued, injustice may be done.

The appeal is, therefore, allowed.

With regard to costs of the appeal I do not see any reason for interfering with the ordinary rule that costs should follow the event. Therefore, the appeal is allowed with costs.

The facts upon which the defendants rely have been verified by an affidavit, and the learned Counsel for the plaintiffs frankly admitted that he had no reason to suppose that they were not as stated in the affidavit.

Therefore, I think that this case should be remanded for hearing and that the defendants should have leave to put in a written statement of defence, and to call such evidence as they may think desirable, in support of their case. With regard to the costs of the application for stay of execution, in my judgment each party should pay his own costs.

WOODROFFE, J.—In my opinion, no decree can legally be given in any case without evidence except in cases of suits governed by the provisions of Order XXXVII of the Civil Procedure Code. According to rule 2, sub-rule 2, of that Order in default of obtaining leave to appear and defend

J. B. ROSS v. C. R. SCRIVEN.

or of appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons. This, in my opinion, is strong evidence of the intention of the Legislature that it is only in such cases that the allegations in the plaint should be deemed to be admitted and amount to proof on which a decree may be founded when there is no written statement and the defendant does not appear.

The procedure in this country is not that which prevails in England. In my experience the practice sought to be upheld by the respondents has not hitherto prevailed in this Court where it has always been the practice in undefended cases to take evidence as defined in the Evidence Act, viz., oral statements of witnesses and documents proved before the Court. The *cursus curiæ* may be looked at when interpreting the terms of the Civil Procedure Code. There is, in my opinion, nothing in the decision [*Galstaun v. Hutchison* (2)], to which I was a party and in which judgment was also delivered by the late Chief Justice, which justifies the contention which has been advanced by the respondent before us. In this case the plaintiff gave evidence and proved his claim but a question of stamp arose. The defendant entered appearance but did not file a written statement. The Code, however, is clear. The case does not fall under Order XXXVII; for the suit was based upon an alleged breach of contract claiming unliquidated damages.

The decree has been sought to be justified by an application of rule 5, Order VIII of the Civil Procedure Code, and by the argument that verification of pleadings dispenses with evidence. As all pleadings in this Court are verified this latter contention is simply a re-statement of the argument that a decree can be given on pleadings without evidence in undefended cases. This contention is a novel one. Verification does not, in my opinion, dispense with evidence. But it is merely a form of giving authenticity to the pleadings. The object of the verification of the plaint is to fix on the plaintiff the responsibility for the statements

which it contains and to afford a guarantee of his good faith. See the case of *Basdeo v. John Smidt* (4). Verification in my opinion is not evidence on which a suit can be decreed, whether the adversary does or does not appear. Because a false verification may be the basis of a prosecution under section 193 of the Penal Code and comes within the definition of "false evidence" for the purposes of the Penal Code, it does not make a verification evidence on which a decree can be founded in a civil suit.

Moreover, for evidence on which a decree can be founded in a civil suit under Order XIX of the Code the Court may allow facts to be proved by affidavit, but the Code expressly stipulates that the affidavit must be confined to facts within the personal knowledge of the deponent, except in cases of interlocutory applications on which he is permitted to speak to his own belief. This knowledge, by no means always exists in the case of verification of pleadings; and the present case is an illustration in point—the plaint having been verified by the attorney of the plaintiffs who states that the allegations in the plaint are based on information received by him and believed by him to be true.

It is then said that under Order VIII, rule 5, this procedure can be justified. This rule, in my opinion, has obviously no application. Order VIII is headed, as appears from the title of the Chapter, "Written statement and set-off," and the rule assumes existence of a pleading of the defendant; for it states "that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." This section is really a rule of construction of the defendant's pleading. It cannot be said that a fact is admitted until one looks at the written statement. This rule does not apply where there is no written statement at all. The law says, as a rule of construction, that if there is a written statement and the fact as alleged in the plaint is not denied, then the written statement must be so construed as to be taken to have admitted such allegation. The rule does not, in my opinion, justify the passing of a decree

J. B. ROSS v. C. R. SCRIVEN.

on no evidence where there is no written statement.

Under Order IX, rule 6, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served the Court may proceed *ex parte*. "Proceed *ex parte*" means "proceed to take and determine evidence" and this is what the summons in the suit says. The summons does not say that on failure to appear the plaintiff is entitled to a judgment by default, but on the defendant's failure to appear the case will be heard and determined *ex parte*, that is, in his absence by the taking of evidence.

In my opinion, the decree having been made without evidence cannot be supported. As the plaintiff did not tender any evidence, strictly speaking the suit should be dismissed. But Mr. Langford James, who appears on behalf of the appellants, does not insist on this or contend that we have no power to remand. So I need not discuss this question.

The decree will, therefore, be set aside and the case will be remanded in order to be re-heard after giving the defendants an opportunity of filing a written statement and of adducing evidence. The circumstances on which reliance is placed as entitling the defendants to defend the suit are not contested.

In my opinion the appellant is entitled to his costs of this appeal.

MOOKERJEE, J.—I am clearly of opinion that there has been no trial of this suit in conformity with the procedure prescribed by the Legislature, and that the decree in favour of the plaintiffs cannot possibly be supported. Mr. Buckland, who has made a strenuous endeavour to support the decision under appeal, has conceded that the procedure adopted for the trial of this suit is novel; but he has argued that novelty did not necessarily indicate departure from law. This may be conceded. But when recourse is had to a novel procedure, which has escaped the attention of generations of Judges, if the legality of the procedure is called in question, the matter undoubtedly deserves careful scrutiny.

The very brief history of this litigation which involves a sum of over Rs. 17,000,

may be stated in a few words. On the 24th January 1916, the plaintiffs lodged the plaint in this Court for recovery of Rs. 17,578-13-8 from the defendants as liquidated damages for breach of a contract alleged to have been made on the 21st December 1914. Summons is said to have been served upon one of the partners of the defendant firm on the 10th February 1916. The suit came on for trial on the 13th March 1916. Up to that stage, the defendants had not entered appearance or filed a written statement; but Mr. Gregory appeared on that day on their behalf and asked for leave to defend. Leave was peremptorily refused. The plaintiffs, however, did not adduce any evidence; and the following order was thereupon recorded:—"Judgment for the amount claimed, 6 per cent. on decree. Costs on scale No. 1." We are now invited to set aside this decree as not founded on any legal evidence.

It is an elementary principle, which forms the basis of all legal procedure, that no litigant is entitled to obtain relief from a Court of Justice unless he establishes to the satisfaction of the Court that his claim is well founded. Tested in the light of this principle, how does the claim of the plaintiffs stand? They examined no witnesses; how did they then profess to have established their claim to the satisfaction of the Trial Judge? The judgment itself does not throw any light on this point. But Mr. Buckland has invoked the assistance of two doctrines, *viz.*, *first*, the principle of admission by non-traverse, and, *secondly*, the principle that allegations in a plaint duly verified form legal evidence, whereon a judgment may properly be based.

As regards the *first* branch of this contention, the principle invoked is embodied in rule 5 of Order VIII of the Code of Civil Procedure, and is expressed in these terms:—"Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, except as against a person under disability, provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." The plain reading of the rule, which is really a rule

J. B. ROSS v. C. R. SCRIVEN.

of construction of pleadings, is that it is limited in its application to cases where there is in fact a pleading of the defendant. Mr. Buckland contended that it was not logical to distinguish between cases where there is a pleading by the defendant and cases where there is no pleading by the defendant. We are not concerned, however, with the question whether the principle embodied in rule 5, which, I may observe parenthetically, was for the first time introduced into the Code of this country in 1908 [*Musammatt Anundmoyee Chowdhoorayan v. Sheeb Chunder Roy* (5)], can or cannot be defended on logical grounds; we have to apply it as we find it framed by the Legislature, and, in my opinion, its very phraseology shows that it has no application to the present case. Apart from this, the plaintiffs have to overcome an additional difficulty, because rule 3 lays down that "It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages." This rule is based on Order XIX, rule 17, of the rules of the Supreme Court of England. That rule must be read with Order XXI, rule 4, which is in these terms: "No denial or defence shall be necessary as to damages claimed or their amount: but they shall be deemed to be put in issue in all cases, unless expressly admitted." Although there is no provision in our Code corresponding to Order XXI, rule 4, of the Rules of the Supreme Court of England, I think we can legitimately put the same construction upon Order VIII, rule 3, as has been put in England upon Order XIX, rule 17. That interpretation will be found explained by Mr. Justice Hawkins in the case of *Wood v. Earl of Durham* (6). It is plain that in the present case, even if the defendants had entered appearance and filed a written statement, it would not have been obligatory upon them to plead specifically as to the amount of damages; and merely because they did not

appear, they cannot be in a worse position than what they would have occupied if they had appeared and filed a written statement. I may add that if the contention of the respondents were to prevail, the provisions of Order XXXVII which are applicable to special classes of negotiable instruments, would be entirely superfluous. If what is contended by the respondents is well founded and can be legitimately done in all classes of cases, why should the Legislature provide a special procedure in Order XXXVII? I, therefore, hold without hesitation that the plaintiffs are not entitled to succeed on the basis of implied admission of their claim by the defendants.

As regards the *second* branch of the contention, it has been argued that as the plaint was duly verified, all the allegations therein must be deemed to be *evidence* in favour of the plaintiffs against the defendants and should be treated as material for the basis of the judgment of the Court. In support of this contention, reliance has been placed upon the decision of the Allahabad High Court in the case of *Queen-Empress v. Mehrban Singh* (7). In my opinion, that argument rests on no solid foundation. A comparison of the terms of sections 191 and 193 of the Indian Penal Code shows that a person who makes a false affidavit is deemed to give false evidence, in order that he may be punished under section 193 of the Indian Penal Code. Indeed, the inference may be legitimately drawn from the language used in section 191 read with section 193 that a verified statement would not be "evidence" but for the special provision of section 191 which has been enacted for a special purpose.

In this connection, reference may usefully be made to the procedure prescribed by the Legislature for the trial of a suit in which the defendant does not appear. Order IX, rule 6, lays down that "where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then, if it is proved that the summons was duly served the Court may proceed *ex parte*." The next stage is described in Order XVIII, rule 2, which lays down that "on the day fixed for hearing of the suit or on any

(5) 9 M. L. A. 287 at pp. 291, 302; 2 W. R. 19; 1 Auth. P. C. J. 455; 1 Sar. P. C. J. 854; 19 E. R. 750.

(6) 21 Q. B. D. 501 at p. 508; 57 L. J. Q. B. 547; 59 L. T. 142; 37 W. R. 222.

(7) 6 A. 626.

J. B. ROSS v. C. R. SCRIVEN.

other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." If the contention of the respondents were well founded, the Legislature would no doubt have stated that where the defendant has not appeared, the case may be decreed on the basis of the allegation made in the verified plaint. Reference has been made in the course of argument to the decision of the Allahabad High Court in *Basdeo v. John Smidt* (4), which explains the value and object of verification. That certainly does not support the contention of the respondents. A verification is required with a view to discourage, if not to prevent, the institution of false suits; the Legislature never contemplated that verified statements should be treated as evidence on behalf of the plaintiff against the defendant. This view is confirmed on an examination of the provisions of the Code as to the use of affidavits in evidence. Order XIX defines the circumstances in which affidavits may be used as evidence and specifies the limitations subject to which this is permissible. If the contention of the respondents were to prevail, the provisions of Order XIX would be superfluous. It is worthy of note that section 96, sub-section 2, of the Code of Civil Procedure allows an appeal from ■ original decree passed *ex parte*: it is difficult to conceive how such an appeal can be of any assistance to the defendant, if there is no evidence on the record.

Reference has also been made to section 47 of the Divorce Act, which, I should have thought, was against the view put forward by the respondents. If a verified plaint could always be treated as evidence, it was superfluous to make a special provision in the Divorce Act.

In my judgment, there is no possible escape from the conclusion that there is no legal evidence on the record on which the decree made in favour of the plaintiffs may be supported.

The question *next* arises, what course should now be pursued. Mr. Langford James, in my opinion, would have been perfectly justified if he had seriously pressed his contention that, ■ the plaintiffs are not shown to have offered or, indeed, to have been even ready with any evidence in the Trial Court,

the appeal should be allowed and the suit should stand dismissed. I am reluctant, however, to adopt this course, on the present occasion, for I feel doubtful how far the conduct of the plaintiffs might or might not have been affected by the novel procedure, which, we were informed in the course of the argument, was adopted in the Trial Court. That we are entitled to remand the case for trial, is, I think, obvious. Section 564 of the Civil Procedure Code of 1882, which provided that the Appellate Court shall not remand ■ case for a second decision except as provided in section 562, does not re-appear in the Code of 1908. Consequently, although there is ■ provision in the Code for remand in certain specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if the exigencies of the case demand that such an order should be made, I am also of opinion that on remand, the defendants should have an opportunity to file a written statement; no useful purpose will be gained if this matter is left open.

I desire to add, *finally*, that great caution should be exercised when suits are heard *ex parte*. This observation is, in my opinion, of universal application: *Amritnath v. Dhunpat Singh* (2). But it applies with special force to cases of the description now before us, where unliquidated damages are claimed on the allegation that there has been ■ breach of contract. I entirely agree with the Chief Justice in the weighty observations he has made ■ to the exaggerated claims usually put forward in cases of this character, and the necessity for careful scrutiny into all such claims, before a decree is made in favour of the plaintiffs.

On these grounds I concur in the view that this appeal must be allowed with costs, the decree made by Mr. Justice Fletcher reversed and the case remanded for trial.

Appeal allowed.

JAI KISHEN JOSHI v. BUDHANAND JOSHI.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE No. 86
OF 1915.

December 11, 1915.

Present:—Mr. Justice Tudball and
Mr. Justice Piggott.

JAI KISHEN JOSHI—PLAINTIFF

versus

BUDHANAND JOSHI—DEFENDANT.

Mortgage—Redemption by one co-owner—Transfer of Property Act (IV of 1882), s. 95—Sale by owner who redeemed property—Adverse claim set up—Suit for redemption by another co-owner—Limitation Act (IX of 1908), Sch. I, Arts. 144, 124, 148.

One A made a usufructuary mortgage to D on the 13th of August 1860. He left several sons, of whom J made a mortgage to B's father and paid off D. J's mortgagee remained in possession till May 1898, when J sold the property to B who remained in possession, till the present suit for redemption of the mortgage of 1860 was brought by K, son of F, one of the sons of A. It being assumed that J was separate though the family property had not been divided:

Held, that under the circumstances the suit was barred by Article 144 of Schedule I of the Limitation Act, inasmuch as when J redeemed D's mortgage, J became only a charge-holder and not a mortgagee, and asserted a title in himself adversely to the true owners and sold the property to B, and that Article 138 or 145 of the Limitation Act did not apply. [p. 246, col. 1; p. 247, col. 1.]

Reference by the Local Government under rule 17 of the Kumaon Rules, 1894.

Pandit Baldev Ram Dax (with him Dr. Surendro Nath Sen), for the Plaintiff.

Mr. M. L. Agarwala, for the Defendant.

JUDGMENT.

TUDBALL, J.—This is a reference by the Local Government under rule 17 of the Rules and Orders relating to the Kumaon Division, 1894.

One Debi Dat Joshi had four sons: (1) Krishna Nand, (2) Yangya Dat, (3) Narotam, (4) Jai Dat, defendant No. 2. The first is dead and his son Chandramani has also died without issue.

The plaintiff, Jai Krishna, is the son of the second son. The third has died without issue. Jai Dat, defendant No. 2, is the fourth.

The property now in suit is part of the family property. On 13th August 1860, Debi Dat Joshi gave a usufructuary mortgage of this and other property to one Debi Dat Panth for a sum of over Rs. 400.

After the former's death, the defendant Jai Dat repaid Rs. 100 out of the mortgage-debt to the mortgagee, who thereupon released to him the property now in suit. Jai Dat, to obtain this sum, made a similar mortgage of this same property for the sum of Rs. 100 in favour of Jai Krishna Joshi (deceased), father of defendant No. 1, Buddhi Ballabh Joshi.

This was on 13th December 1877, and for a period of ten years. In the deed, Jai Dat clearly stated that the mortgaged property belonged to himself, that it was his *maurusi* village and he owned this share; that it had been mortgaged by his father to Debi Dat Panth and as the latter was pressing for payment he, therefore, mortgaged it, in order to be able to pay off Debi Dat Panth. He agreed that when he paid off the mortgage-money he would also repay to his mortgagee whatever sum the latter had paid to Government revenue during the running of the mortgage.

For nearly twenty-one years his mortgagee remained in possession *as such* until the 26th May 1898. On this latter date Jai Dat Joshi being unable to pay off the debt sold the property to the defendant No. 1, Buddhi Ballabh Joshi, the son of the mortgagee, for the sum of Rs. 300. Of this Rs. 236 paid off the debt and the vendor took the balance in cash. From that date the vendee has remained in possession until the present suit was brought in the year 1912, *i. e.*, some fourteen years afterwards.

The suit is one to redeem the mortgage of 1860 created by Debi Dat Joshi and the plaintiff claims possession of the whole of the property on payment of Rs. 100. The Court of first instance decreed the claim on payment of Rs. 328-8-6. The Courts of first and second appeal dismissed the suit. In the reference to this Court we are asked our opinion as to (1) whether or not the case should be remanded to the Court of first appeal for re-decision of the appeal as that Court has failed to decide the issue whether Jai Dat Joshi had a right to represent the joint family or not; (2) the correctness or otherwise of the decision of the Court of second appeal. There has been great confusion in the pleadings in the case. In the order of reference it is assumed that the family was joint whereas in the argu-

JAI KISHEN JOSHI V. BUDHANAND JOSHI.

ment before ■ that is a disputed fact. The defendant's case is that the family was joint and Jai Dat Joshi acted throughout as the managing member. The plaintiff's case is not clear from the pleadings in the various plaints filed. In this Court on his behalf it is stated that the family had separated but the property had not been divided.

No issue whatever was framed as to whether the defendant Jai Dat was or was not the managing member of the joint family. The Court of first instance assumed that the family was joint and in its finding on the fourth issue—"how do the mortgage of 1877 and the sale of 1898 affect plaintiff's right of redemption"—it remarked: "I am not satisfied that he was the manager of the joint family."

Assuming for the moment that the family was joint and that Jai Dat was not the managing member, the facts are that one member of a joint family mortgaged a part of the family property in 1877, paid off a prior mortgage-debt due thereon from the family and then in 1898 sold the property to the second mortgagee who has been in possession for over twelve years.

As a person interested in the mortgaged property he had power to redeem the mortgage of 1860 and that mortgage no longer exists and cannot now be redeemed. There is no question of "subrogation" in the matter. The second mortgagee paid his money to Jai Dat as the deed shows, and the latter paid off the first mortgagee. If the principle did at all operate it would do so for the benefit of the second mortgagee. The defendant No. 1 does not seek to stand upon the first mortgage. In the circumstances assumed it is clear that he, having purchased from a member of the family incompetent to sell, has held adversely to the joint family for over twelve years and the suit against him must fail.

Next, if we assume that the family was joint and that Jai Dat was its managing member, no suit for redemption of the mortgage of 1860 can lie and the defendant has clearly held adversely against the joint family since the date of his purchase. In this aspect the suit must equally fail.

Assuming, however, that the family was separate (though the properties had not

been divided among the co-owners) other considerations arise.

When in 1877 Jai Dat redeemed the mortgage of 1860 he acquired a charge on the plaintiff's share for the latter's share of the debt paid (*vide* section 95 of the Transfer of Property Act). This Statute no doubt was not then in force, but it did not on this point make any alteration in the law of mortgage as previously administered. If Jai Dat had not dealt further with the property but had merely taken possession and held it, the plaintiff would [under the ruling of this Court in *Ashfaq Ahmad v. Wazir Ali* (1)] have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jai Dat on payment of his share of the debt. Article 148 of Schedule II of the Limitation Act of 1877 was applied by the Full Bench of this Court to a suit of such a nature, though that Article in terms applies only to a suit to redeem a mortgage; whereas section 95 of the Transfer of Property Act shows that the co-owner redeeming merely acquires a charge which is very different from a mortgage. In any case the co-owner thus suing cannot sue to redeem the original mortgage but only to recover his own share of the property redeemed by payment of his share of the expense. In the case before us, however, the matter is complicated by the transfer by Jai Dat, *i.e.*, the mortgage of 1877 and the sale of 1898.

In the case of each of these he purported to transfer property belonging to himself and his transferee has held for thirty-one years as mortgagee and fourteen years as vendee.

Either Article 144 or Article 134 of the Second Schedule of the Limitation Act will apply to a suit for possession of the plaintiff's share. On behalf of the plaintiff, it is urged that he is in the position of a mortgagor suing to recover possession of property from a transferee from his mortgagee and that Article 134 would apply and, therefore, under the rulings of this Court, there must be a finding as to whether the transferee took in good faith and in ignorance of the plaintiff's rights or with a full knowledge of those rights,

(1) 14 A. 1; 11 A. 423; A. W. N. (1891) 211 (F. B.).

JAI KISHEN JOSHI v. BUDHANAND JOSHI.

and, therefore, the suit should be remanded to the Court of first appeal for ■ finding on that question of fact. On behalf of the defendant, however, it is urged that Article 134 does not apply, as this is no case of a transfer by a mortgagee; that the decision in *Ashfaq Ahmad v. Wazir Ali* (1) can only be applied to a suit by one co-owner to redeem his share from the co-owner who has paid off the mortgagee and its principle should not be extended to Article 134, where the suit is one between the co-owner and ■ third person, a transferee, and that section 95 of the Transfer of Property Act clearly shows that Jai Dat was merely a charge-holder and not a mortgagee and that Article 144 is the only Article which can and ought to apply. In my opinion, section 95 of the Transfer of Property Act clearly shows that Jai Dat became merely a charge-holder when he paid off the mortgage of 1860. The fact that, as regards his co-owners, his position became analogous to that of a mortgagee, does not make him ■ mortgagee when the law clearly states that he is only ■ charge-holder.

In my opinion, Article 144 applies. The defendant-appellant has held adversely clearly from the year 1898. There is no question of fraud or collusion. The contending defendant has held the property some thirty-five years prior to suit as usufructuary mortgagee and vendee from Jai Dat and the plaintiff has remained silent and unquestioning. Both mortgage and sale-deed were registered. It, therefore, is clear to my mind that whether the family was joint or separate the suit was bound to fail. I would, therefore, answer the two questions as follows: 1) It is unnecessary, in the circumstances of this case, to have any finding on the question as to whether Jai Dat Joshi represented the family or not; though it is obvious that the suit could not be decreed against the defendant until a decision thereon had been reached. (2) The decree of the Commissioner is correct though perhaps not for the reasons stated by him.

I would order the plaintiff to pay all costs in all Courts.

PIGGOTT, J.—I concur generally. It is obviously useless to remand the suit if it

is barred by limitation on the facts stated by the plaintiff himself. The ■■■ for the latter is only arguable on the assumption that Jai Dat and his brothers had separated but had left the property in suit undivided. Assuming these facts, the question is whether the plaintiff can invoke the principles laid down by this Court in *Ashfaq Ahmad v. Wazir Ali* (1) so as to save limitation. The point may be stated thus:—“If the holder of ■ charge under section 95 of the Transfer of Property Act (No. IV of 1882) is in possession of the property which is the subject of that charge, what is the limitation applicable to a suit by the owners of the said property for recovery of possession on payment of the charge?” The question is not free from difficulty and the view taken by this Court has not been universally accepted. The operation of Article 144 of the Schedule to the Indian Limitation Act can only be avoided by bringing the case under the operation of some other Article of the Schedule. If Article 144 be applied, then the further question would arise as to the circumstances under which the possession of the charge-holder becomes adverse to that of the owners. This Court saw ■ way out of the difficulty by laying down the principle that the possession of the charge-holder should be regarded ■ that of the original mortgagee, the provisions of Article 148 of the Schedule to the Limitation Act being applied so as to permit the owners to sue for possession by redemption of the charge within sixty years of the date of the original mortgage. The question then before the Court was one of limitation only; it was not laid down that the possession of the charge-holder should be regarded as in all respects equivalent to the possession of ■ mortgagee. That point was not considered at all. In the present case the charge-holder has been claiming title in himself adversely to the persons whom we must, for the sake of argument, regard as the true owners, ever since he redeemed the original mortgage. He has himself transferred the property in suit, first by way of mortgage and then by way of sale. The present suit is not against the alleged charge-holder only, but principally against his

NGA KYE v. NGA KYU.

transferee. It seems to me obviously impossible to apply the provisions of Article 148 to the present suit; nor is such application necessitated by any principle laid down in the case of *Ashfaq Ahmad v. Wazir Ali* (1). It follows that the present suit ■■■ only be saved from the operation of Article 144 by bringing it under Article 134. On this point I have felt some doubts. It is very difficult to apply Article 134 on its strict wording; the only doubt in my mind is whether the learned Judges who decided the case of *Ashfaq Ahmad v. Wazir Ali* (1), would not have regarded its application ■■■ legitimate extension of the principle which they laid down as to the charge-holder's stepping into the shoes of the original mortgagee. On the whole, I think it sufficient to say that I am not prepared to dissent from the view taken by my learned colleague. For one thing I do not think it worth while to do so on the facts of the present case; the application of Article 134 might necessitate a remand for ■■■ further finding as to the *bona fides* of the transferee-defendant and the payment of consideration, but I do not feel any serious doubt that it would result in the dismissal of the suit. Accepting Article 144 of the Schedule as the proper Article to be applied, I can feel no doubt whatever that the possession of the principal defendant has been adverse to the plaintiff for more than the statutory period of twelve years. I concur, therefore, in answering the reference as proposed by my learned colleague.

Reference answered accordingly.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 8 OF 1915.

January 10, 1916.

Present:—Mr. Saunders, A. J. C.

NGA KYE—APPLICANT

versus

NGA KYU AND ANOTHER —

RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 55 (3), (4), 47, 115, 145—Surety for judgment-debtor's filing

insolvency application and his production—Party to suit—Failure of judgment-debtor to apply and appear—Forfeiture of security bond, application for—Rejection of application—Revision.

An order made under section 55 (4), Civil Procedure Code, rejecting an application for forfeiture of ■ security bond owing to the judgment-debtor's failure to file an application in insolvency and appear in Court, is appealable and no petition lies against it to the High Court under section 115, Civil Procedure Code [p. 248, col. 2]

Banna Mul v. Jamna Das, 15 A. 183; A. W. N. (1893) 68, distinguished

Section 145, Civil Procedure Code, 1908, amplifies very considerably the provisions of section 253 of the old Code, so as to make a surety, who has executed a bond under section 55 (4), ■ party to the suit within the meaning of section 47. [p. 248, cols 1 & 2.]

Mr. A. C. Mukerjee, for the Applicant.

Mr. J. C. Chatterjee, for the Respondents.

JUDGMENT.—The applicant, having obtained ■ decree against one Maung Kyu, proceeded to execute it by arresting the judgment-debtor. The judgment-debtor then signified his desire to apply for the protection of the Insolvency Court. He was released on security, Maung Lon Tu being the surety and undertaking to produce him on the 5th of September, that is to say, one month after the date of the bond. He did not apply to be declared insolvent, and the decree-holder then applied to the Court to proceed against the surety. Notice was given to the surety, who showed cause by stating that the judgment-debtor was too ill to appear in Court, and after recording evidence the Judge recorded an order that the surety's explanation was reasonable and the bond would not be forfeited. Against this order the decree-holder comes to this Court in revision.

The first question which was raised was whether the decree-holder should not have appealed against the order of the Township Court. The order of the Township Court directing the judgment-debtor to furnish security was issued under section 55 (3) and (4) of the Code of Civil Procedure. It is contended for the respondent that section 55 is to be read with section 145 of the Code of Civil Procedure, that the bond was for the fulfilment of the condition imposed on the judgment-debtor, that the decree or order might, therefore, be executed against the surety to the extent to which he had rendered himself personally liable in the manner provided for the exe-

WASAWA SINGH v. S. MAHANA SINGH.

cution of decrees, and the surety should, therefore, for the purpose of appeal, be deemed to be a party within the meaning of section 47.

The applicant relies upon the case of *Banna Mal v. Jamna Das* (1), in which it was held that a surety for a judgment-debtor, who had been released in order to enable him to apply to be adjudged insolvent, was entitled to be discharged from his bond upon the judgment-debtor making such application, and the Court which executed the decree having refused to release the surety, the High Court interfered in revision holding that no appeal lay from the order of the Township Court. But this judgment was delivered in 1883 when the Code of Civil Procedure of 1882 was in force, and the High Court held that the only sureties who would be considered parties to the suit with reference to clause (c) of section 244, corresponding with section 47 of the present Code, were sureties who had rendered themselves liable for the amount of the decree. Section 336 of the Code of 1882, which corresponds with section 55 of the present Code, provided in the case of a surety for a judgment-debtor who failed to apply to be declared insolvent that his security might be realized in the manner provided by section 253, and section 253, corresponding with section 145 of the present Code, provided that whenever a person had, before the passing of a decree in the original suit, become liable as surety for the performance of the same or of any part thereof, the decree might be executed against him to the extent to which he had rendered himself personally liable, in the same manner as against the defendant. It is clear that section 145 of the present Code amplifies very considerably the provisions which were contained in section 253 of the old Code, and in providing that a surety for the fulfilment of any condition imposed on any person renders himself liable to have the decree executed against him to the extent to which he has rendered himself personally liable and shall be deemed a party within the meaning of section 47, I think, there can be no doubt that it was intended to extend the provisions of section

47 to a case like the present. It is noticeable that the last sentence of section 336 of the Code of 1882, which provided the manner in which the security was to be realized, has been omitted in section 55 of the present Code, the reason apparently being that this provision comes within section 145. This being so, I think it is clear that the applicant's remedy lay in an appeal and that no application to revise the order of the Township Court under section 115 of the Code of Civil Procedure is maintainable.

The applicant asks that his application may be returned to him for presentation to the Appellate Court. But no grounds for doing so have been shown, and there appears to be no reason why this should be done.

The application is dismissed with costs.

Application dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 192
OF 1914-1915.

December 16, 1915.

Present:—Sir M. W. Fenton, Kt., F. C.

WASAWA SINGH—DEFENDANT—
PETITIONER

versus

S. MAHANA SINGH—PLAINTIFF—
RESPONDENT.

Punjab Tenancy Act (XVI of 1887), ss. 58, 74, 77 (3) (b), 60—Landlord and tenant—Sub-lease created by occupancy tenant—Ejectment of sub-tenant, suit by landlord for—Improvements, tenant's claim for—Award of compensation in decree or by executing Court—Planting trees, whether 'improvement'.

A sub-letting by an occupancy tenant operates to create a relationship of landlord and tenant between the landlord and the sub-tenant under the terms of section 58 (2) of the Punjab Tenancy Act. [p. 249, col. 2.]

Such a sub-tenant is liable to be ejected by the landlord on the death without heirs of the occupancy tenant who created the sub-lease as a tenant holding under a time-expired contract. The suit is one in ejectment, however the plaint may be worded, and is not a suit under section 77 (3) (b) of the Act. [p. 249, col. 2.]

The Court ordering the sub-tenant's ejectment is bound to award him compensation for improvements effected by him. The award can also be made by the executing Court where it is omitted in the decree. [p. 249, col. 2.]

The planting of trees by a tenant constitutes an 'improvement' within the definition of that term in the Punjab Tenancy Act. [p. 249, col. 1.]

(1) 25 A. 183; A. W. (1883) 68.

NGA KYET SEIN v. MI KYIN MYA.

Petition against the order of the Commissioner, Lahore, dated 12th March 1915, reversing that of the Collector, Amritsar, dated 17th August 1914, allowing the tenant one month to remove the trees by reversing the order of the Assistant Collector, 1st grade, dated the 12th June 1914, rejecting application of the tenant for permission to remove the fruit-bearing trees.

Lala Bhagwan Das, for the Petitioner.
debtor.

Hon'ble Rai Bahadar Bakhshi Sohan Lal,
for the Respondent.

JUDGMENT.—The applicant Wasawa Singh was sub-tenant of an occupancy tenant holding under a lease. The occupancy tenant died and there being no heir entitled to succeed the occupancy rights were extinguished, and as a consequence the period of Wasawa Singh's sub-lease determined. The landlord sued and obtained a decree for Wasawa Singh's ejectment. In execution proceedings Wasawa Singh claimed to cut down and remove the fruit trees which he had planted. This claim was allowed by the Collector, whose order has been set aside by the Commissioner. Wasawa Singh applies for revision. The case having thus come before me I must hold that the original Court was guilty of an irregularity justifying revision in not awarding compensation for improvements to Wasawa Singh when ordering his ejectment. The planting of trees constitutes an "improvement" within the Tenancy Act definition of the term, and when the trees are fruits trees the claim to compensation is strengthened.

The obligation of a Court to award compensation extends only to ejectment cases. There is no such obligation to grant compensation to a person against whom a decree for possession is given in a suit under section 77 (3) (b) of the Tenancy Act. The important question in this case, therefore, is whether Wasawa Singh was a tenant or a person who could be dispossessed under clause (b) of section 77 (3). This clause relates to suits "by a landlord to set aside a transfer made of a right of occupancy or to dispossess a person to whom such a transfer has been made."

Now it is obvious that this clause must be read in conjunction with section 60 of the Act, and that it relates only to cases in

which transfers have been made in contravention of the provisions of Chapter V of the Tenancy Act. A sub-letting by an occupancy tenant may under section 58 be lawfully and legitimately made and the sub-lease to Wasawa Singh was, at any rate for the first seven years of its occupancy, a transfer made not in contravention of, but in conformity with, the provisions of Chapter V of the Tenancy Act. Not only so but, as will be gathered from clause (2) of section 58, such a sub-letting by an occupancy tenant operates to create a relationship of landlord and tenant between the landlord and the sub-tenant. This relationship accordingly subsisted between plaintiff and Wasawa Singh on the death of the occupancy tenant, Wasawa Singh thereby falling into the position of a tenant holding under a contract the term of which had expired. He was not a trespasser, but a tenant liable to be ejected by notice or by suit and the suit in which the landlord did eject him must be regarded, notwithstanding any averment in the plaint to the contrary, as an ejectment suit, in which the defendant's claim to compensation for improvement should have been dealt with. I am informed that ejectment has actually been carried out. In these circumstances the proper course is for the Court which is executing or has executed the decree, to determine the question of the compensation due to Wasawa Singh for the trees which he planted, and to make an award accordingly under section 74 of the Tenancy Act. I direct now that this be done.

Revision allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 199 OF 1915.

February 1, 1916.

Present:—Mr. McColl, A. J. C.

NGA KYET SEIN—PLAINTIFF—
APPELLANT

versus

MI KYIN MYA AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 11, 1—Action for slander—Appeal, second—Death of party—Second appeal, whether abates.

JAWAHIR SINGH V. MEHR SINGH.

The expression 'right to sue' in Order XXII, rule 1, Civil Procedure Code, means the right to seek relief.

The plaintiff in an action for slander was awarded damages in a certain amount. The decree was, however, set aside on appeal. The plaintiff then filed a second appeal, and, while it was pending, the defendant died:

Held, that as the plaintiff was trying to recover the benefit which accrued to his estate in consequence of the decree of the first Court and of which he was deprived by the decree of the lower Appellate Court, the second appeal did not abate:

Gopal Ganesh Abhyankar v. Ramchandra Sadashiv Sahasrabudhe, 26 B. 597; 4 Bom. L. R. 325 and *Paramen Chetty v. Sundararaja Naick*, 26 M. 499, referred to.

Mr. C. G. S. Pilay, for the Appellant.

Mr. S. Vasudevan, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued Maung Chu Ni for damages for slander and obtained a decree for Rs. 100 and costs. On appeal this decree was set aside and the suit was dismissed. The plaintiff-appellant then appealed to this Court and after the appeal was filed, Maung Chu Ni died and his legal representatives were brought on to the record. Their Advocate now takes a preliminary objection that as the right to sue does not survive, the appeal must abate.

It is contended on the other hand that as the plaintiff-appellant obtained a decree in the Court of first instance thereby potentially increasing his wealth, he must have the right to get rid of the decree of the lower Appellate Court which has deprived him of that benefit. Reliance is placed on *Gopal Ganesh Abhyankar v. Ramchandra Sadashiv Sahasrabudhe* (1).

In that case the position was reversed; the plaintiff having lost in the first Court obtained a decree for damages in the lower Appellate Court. One of the Judges before whom the second appeal came was of the opinion that no distinction should be drawn between an appeal by a plaintiff and an appeal by a defendant and that in the case of an action for slander an appeal must abate on the death of one of the parties whichever side appealed, but the majority of the Judges held that though in such a case an appeal by a plaintiff must abate, an appeal by a defendant did not because his estate was affected by the decree.

(1) 26 B. 597; 4 Bom. L. R. 325.

It seems to me that though the position is reversed the same principle applies in the present case. If the defendant had died during the pendency of the first appeal, his legal representatives would have been entitled to prosecute that appeal on the authority of the ruling above cited, which was followed in *Paramen Chetty v. Sundararaja Naick* (2), and on their succeeding the plaintiff-appellant would undoubtedly have had a right to contest the correctness of the decision in this Court, because if the right to continue the appeal in the lower Court survived it could not be extinguished by the judgment. I am unable to see on what principle the fact that the defendant died after the second appeal was filed and not during the pendency of the first appeal, can make a difference. In the Bombay case *Fulton, J.*, interpreted "the right to sue" as the "right to seek relief." If, therefore, the "right to sue" in the case of the first appeal meant the defendant's right to appeal against a decree which affected his estate, I do not see why in the present appeal the words should refer back to the original cause of action. The plaintiff-appellant is not now endeavouring to enforce his personal right of immunity from slander, but to recover the benefit which accrued to his estate in consequence of the judgment of the Township Court and of which he has been deprived by the judgment of the lower Appellate Court.

I am of opinion, therefore, that the appeal does not abate and it will now be heard on the merits.

(2) 26 M. 499.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 447 of 1915.

November 23, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

JAWAHIR SINGH AND OTHERS—

DEFENDANTS—PETITIONERS

versus

MEHR SINGH PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II—Award,

ALI MAHAMUD v. AFTABUDDIN BHUYA.

submission of, before due date—Limitation Act (IX of 1908), Sch. I, Art. 158

The presenting of an award, without the knowledge of the parties, before the date fixed by Court for its filing is not submission of the award to the Court within the meaning of Article 158, Schedule I, of the Limitation Act.

Sahib Rai v. Chait Ram, 28 Ind. Cas. 427; 30 P. W. R. 195; 96 P. L. R. 1915, distinguished.

The submission will be deemed to have been made only on the date fixed by Court for its filing, and the ten days' time for filing objections should be counted from that date.

Petition, under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, Rawalpindi, dated the 19th February 1915, affirming that of the Munsif, 1st class, Gujarkhan, dated the 19th January 1915, overruling the objections to award.

Lala Raghunath Sahai (for Mr. B. R. Puri), for the Petitioners.

Mr. Badr-ul-Din Kuresh, for the Respondent.

JUDGMENT.—In this case the matter in dispute between the parties was referred to an arbitrator. Time for submission of the award was extended to 14th December 1914, that is to say, the arbitrator was directed to file his award on that day—14th December 1914. As a matter of fact he presented his award on the 9th December, apparently without the knowledge of the parties. On 14th December the Court allowed 10 days for filing of objections, and the present petitioner filed objections on the 2nd of January 1915, 24th December being a holiday and Court re-opening for the first time on the 2nd January. The learned Munsif held that these objections were put in too late, counting 10 days allowed by Article 158 of the Limitation Schedule from 9th December 1914. On appeal I am referred to *Sahib Rai v. Chait Ram* (1), a decision by the Hon'ble Mr. Justice Shah Din. The facts there were not exactly in accordance with the present case. In the present case I would put the matter like this. Inasmuch as the Court directed the arbitrator to file his award on the 14th December his presenting his award on the 9th December to the Court, without the knowledge of the parties, was not a submission of the award to the Court on the 9th December within the meaning of the Article 158 afore-

said. Reasonably interpreted, the submission to the Court took place on 14th December, the date on which the Court was ready to receive the award and on which date it had arranged for the parties to be present. The mere fact that a scrap of paper was in the hands of the *ahlmad* on the 9th December is nothing.

It follows that the objections were within time and I allow the revision and set aside the judgment and decree of both the lower Courts and direct the Munsif to hear the petition of objections and to decide the case according to law.

Revision allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 4176 OF 1913.

February 11, 1915.

Present:—Mr. Justice Richardson and Mr. Justice Mullick.

ALI MAHAMUD—DEFENDANT No. 1—
APPELLANT

versus

AFTABUDDIN BHUYA AND ANOTHER—
PLAINTIFFS RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 12—Bengal Validating Act (B. C. I of 1903), effect of—Permanent tenure, transfer of, whether affected by non-payment of landlord's fee—Absence of notice to landlord—Rent-decree against transferor—Non-joinder of purchaser—Decree, whether binding on purchaser.

Under the Validating Act (B. C. I of 1903) a transfer of the whole or a portion of a permanent tenure may be complete upon registration, although the landlord's fee is not paid and no notice of the transfer is given to him. [p. 252, col. 2.]

Kristo Bulluv Ghose v. Kristo Lal Singh, 16 C. 642, *Chintamani Dutt v. Rash Behari Mondal*, 19 C. 17, *Hemendra Nath Mukerji v. Kumar Nath Roy*, 12 C. W. N. 478 and *Girish Chandra Guho v. Khagendra Nath*, 9 Ind. Cas. 1001; 16 C. W. N. 64; 13 C. L. J. 613, referred to.

But if such a transferee allows the transferor (the original tenure-holder) to represent him to the landlord, he cannot take exception to the sale of his interest in execution of a decree for arrears of rent in a suit brought by the landlord against the original tenure-holder without making the transferee a party thereto. [p. 252, col. 2.]

Appeal from a decision of the Subordinate Judge, Tipperah, dated the 18th June 1913, modifying that of the Munsif, Comilla, dated the 31st May 1912.

(1) 28 Ind. Cas. 427; 30 P. W. R. 1915; 96 P. L. R. 1915.

ALI MAHAMUD V. AFTABUDDIN BHUYA.

Babu U. K. Roy, for the Appellant.

Moulvi Nuruddin Ahmed, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent brought by the plaintiffs as owners of a separate three-annas share in a certain *dar putni* tenure against the defendants as their tenants. The learned Munsif dismissed the suit, on the ground that the plaintiffs had failed to establish their title to the share of the *dar-putni* which they claimed. In the lower Appellate Court the learned Subordinate Judge has found on the facts that the plaintiffs have made out their title and has given the plaintiffs a decree for arrears of rent at the rate admitted by the defendants.

Before us there is no dispute, and under the circumstances there could be no dispute, that plaintiff No. 1 at any rate is entitled to rent in respect of a two-annas share of the *dar-putni*. The argument which has been addressed to us by the learned Vakil for the defendant No. 1, the appellant before us, has been confined to the defence raised below that Charu, the predecessor of the defendants, purchased one anna out of the three annas in respect of which the plaintiffs claim rent and that in respect of that one-anna share no rent is due from the defendants. It appears that the three-annas share of the *dar-putni* was sold in execution of a decree for arrears of rent and was purchased by the plaintiffs' vendor. The latter sold two annas to plaintiff No. 1 and one anna to plaintiff No. 2. *Prima facie*, therefore, on the facts found by the learned Subordinate Judge there appears to be no answer to the suit. The defendants, however, alleged that the one-anna share was sold to their predecessor before the institution of the rent-suit. The question, therefore, arises whether the sale in execution passed that one-anna share to the plaintiffs' vendor. It is common ground that Charu was not a party to the decree in execution of which the rent-sale was held. It has been further found that Charu, though he purchased by a registered instrument, did not pay the landlord's fee prescribed by section 12 of the Bengal Tenancy Act. In the view taken by the learned Subordinate Judge the fee not having been paid and no notice of the transfer having been given to the superior landlord, the *putnidar*, the latter was competent to bring a suit

against the original tenants without joining Charu.

In this appeal it has been contended that regard being had to the Validating Act (Act I B. C. of 1903), the landlord was bound by the transfer although his fee was not paid and although no notice of the transfer was given to him. This contention is founded on the cases of *Kristo Bullu Ghose v. Kristo Lal Singh* (1), *Chintamoni Dutt v. Rash Behari Mondal* (2), *Hemendra Nath Mukerji v. Kumar Nath Roy* (3) and *Girish Chandra Guha v. Khagendra Nath* (4). The authority of this series of cases is undeniable and the result seems to be that a transfer may be complete upon registration although the landlord's fee is not paid and no notice of the transfer is given to him. Upon this part of the case the judgment of the learned Subordinate Judge may be open to just criticism. But the argument addressed to us overlooks a further finding of the Subordinate Judge upon a question of fact.

By his purchase Charu became one of a number of co-sharers in the *dar-putni* and the Subordinate Judge finds that Charu and his heirs "allowed Asok to represent them to the landlords." Asok was Charu's vendor and the finding is based partly on the fact that subsequent to Charu's purchase he and his heirs paid rent in Asok's name. All that the Validating Act says is that a transfer is not to be deemed invalid "merely on the ground that the landlord's fee prescribed by the said section 12 or 13 has not been paid." Here the subsequent conduct of Charu and his heirs introduces a new element into the case. We are concluded by the Subordinate Judge's findings on questions of fact, and on the facts as found, the superior landlords were at liberty to frame their suit for arrears of rent in the manner in which they did frame it and the appellant-defendant cannot now take advantage of the fact that Charu was not impleaded.

The result is that the conclusion at which the Subordinate Judge arrived cannot be successfully assailed in second appeal and the appeal must be dismissed with costs.

Appeal dismissed.

(1) 16 C. 642.

(2) 19 C. 17.

(3) 12 C. W. N. 478.

(4) 9 Ind. Cas. 1001; 16 C. W. N. 64; 13 C. L. J. 613.

MANGAL SINGH v. MANGAL SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1926 OF 1912.

November 25, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.

MANGAL SINGH AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

MANGAL SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 120—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900)—Joint Hindu family—Alienation by father—Suit by son contesting it—Alienation and alienor's death prior to 1900—Limitation.

A suit by a Hindu to declare that a sale of ancestral land by his father does not bind him, is governed by Article 120 of the Limitation Act, 1877, where both the alienation and the alienor's death occurred before the passing of the Punjab Limitation (Ancestral Land Alienation) Act, I of 1900.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 15th August 1912, affirming that of the Subordinate Judge, 2nd class, Hoshiarpur, dated the 11th May 1912, dismissing the suit.

Mr. Nanak Chand, for the Appellants.

Mr. Nand Lal, for the Respondents.

JUDGMENT.—Plaintiffs, alleging themselves to have been throughout in possession, ■■■■ for ■ decree declaring that ■ sale of certain *shamilat* land effected by their father on the 18th of March 1893 shall not affect their rights or be held valid against them. Both the Courts have held that the suit is barred by limitation, and after hearing Mr. Nanak Chand we are of opinion that this decision is correct. The sale took place and the alienor died some years prior to Punjab Act I of 1900 coming into force and consequently the cause of action had accrued and time had begun to run under the Limitation Act XV of 1877. It has been found that the plaintiffs were aware of the sale at the time of the mutation proceedings in March 1900, and consequently the present suit, which was not instituted till October 1911, is barred under Article 120 of the last mentioned Act. Mr. Nanak Chand urged before us that the plaintiffs were minors in 1900, but this plea was not put forward in either of the Courts below, nor is it referred to in the grounds of appeal. We cannot, therefore, allow it to be raised at this late stage. The appeal is consequently dismissed with costs.

Appeal dismissed.

AMRITA LAL KUNDU v. ANUKUL CHANDRA DAS.

CALCUTTA HIGH COURT.

CIVIL RULE No. 694 OF 1915.

August 30, 1915.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice, and Mr. Justice Holmwood.

AMRITA LAL KUNDU—JUDGMENT-
DEBTOR—PETITIONER

versus

ANUKUL CHANDRA DAS—DECREE-
HOLDER—OPPOSITE PARTY.

Company—Voluntary liquidation—Attachment prior to liquidation—Property, whether vests in liquidator—Sale—Distribution of proceeds—Civil Procedure Code (Act V of 1908), s. 73.

The property of a limited liability company attached before its liquidation does not vest in the liquidator. The powers of the liquidator differ in this respect from those of the Receiver of an insolvent's estate in whom the property vests under the Provincial Insolvency Act. [p. 254, col. 2.]

The proceeds of a sale held in pursuance of the attachment must, therefore, be distributed in the manner provided for by the Civil Procedure Code. [p. 254, col. 2.]

Civil Rule against the order of the Small Cause Court Judge, Howrah, dated the 19th June 1915.

FACTS will appear from the following petition of the liquidator:—

"1. That the Howrah Engineering Co., Limited, is a company with limited liabilities registered under the Indian Companies Act, having its registered office at No. 26, Benares Road, Salkea, Howrah.

2. That the said company had been doing its business tolerably well, when on account of the war it began to suffer losses and to keep up the work going it borrowed Rs. 5,000 from Babu Birbhadra Chandra Roy Choudhury after executing a mortgage-bond in his favour with possession.

3. That the work of the company went on as before and a clerk looked after the business of the company on behalf of the said mortgagee Birbhadra Babu.

4. That one Anukul Chandra Das got a decree against the company for a sum of Rs. 300 in the Court of the Small Causes at Howrah and in execution of the said decree attached and removed some of the working machineries of the said company to Court, thus stopping the work of the company.

5. That thereupon the said company at an extraordinary meeting of the share-holders of the company passed a resolution for voluntary winding up of the said company, and the said resolution was confirmed on the 15th of May 1915 and your petitioner was

AMRITA LAL KUNDU v. ANUKUL CHANDRA DAS.

appointed liquidator therefor under the Indian Companies Act, VII of 1913.

6. That in the meantime the mortgagee who had filed a claim in the above execution case withdrew it on the appointment of the liquidator in respect of the assets of the said company.

7. That thereafter on the 29th May 1915, your petitioner as liquidator with respect to the assets of the said company filed an application before the learned Small Cause Court Judge, Howrah, in the above execution case, to the effect that the Howrah Engineering Company having gone into liquidation your petitioner was appointed liquidator and as such under the Indian Companies Act, VII of 1913, he was entitled to have possession of all the properties belonging to the company, including those brought in Court in execution of decree against the company, and prayed for release of the machineries that were then in the Howrah Court.

8. That thereupon the learned Judge fixed the hearing of the above application on the 19th June next, and your petitioner made on 31st May a further application praying for the postponement of sale till the hearing of the application.

9. That on the 19th of June, the date fixed for hearing the application, your petitioner filed an application for time accompanied by the receipt granted by the Registrar of the Joint Stock Companies to file Registrar's certificate of liquidation of the aforesaid company; but the learned Judge dismissed the application for time, remarking that he would hear the arguments of your petitioner's Vakil on the assumption that such a certificate was filed but ultimately rejected the other petitions also dated the 29th and 31st of May last, by his order dated the 19th of June 1915.

That your petitioner being aggrieved by the aforesaid order of the learned Small Cause Court Judge, dated the 19th June 1915, begs to move this Hon'ble Court on the following amongst other

GROUND.

1. For that the Court below acted without jurisdiction in dismissing the application for time under the circumstances set forth above.

2. For that the Court below acted without

jurisdiction in dismissing your petitioner's applications, dated the 29th and 31st May, praying for release of the goods contrary to the provisions of the Indian Companies Act, VII of 1913.

3. For that the Court below failed to exercise the jurisdiction vested in it by the Companies Act.

4. For that in view of the sections 171 and 215 of the Indian Companies Act, VII of 1913, the Court below had no jurisdiction to proceed with the execution case, and to hold sale thereunder.

5. For that the Court below ought to have directed the decree-holder to appear before the liquidator for the settlement of his decree."

Babu Jnanendra Nath Sarkar (with him Babu Bhupendra Nath Basu), for the Appellant.

Babu Ramani Mohan Chatterjee, for the Respondent.

JUDGMENT.—We must discharge the Rule. Though the matter is by no means clear, we feel that apart from any defect of jurisdiction the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure. The proceeds came into Court before the application was made to us to pass an order in favour of the liquidator. The liquidator's argument before us has been to a certain degree based upon the idea that the property of the company vested in the liquidator. It is better that that idea should be at once removed. The liquidator of a company differs in this respect from the Official Assignee in that the property of the company does not vest in him. I am of course leaving out of consideration the possible vesting of the property of an unregistered company under a vesting order.

The opposite party will get his costs of this Rule. We assess the hearing fee at one gold mohur.

Rule discharged.

MULK SHAH v. TARA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 457 OF 1914.

November 28, 1915.

Present:—Mr. Justice Leslie Jones.

MULK SHAH—PLAINTIFF—APPELLANT

versus

TARA SINGH—DEFENDANT—

RESPONDENT.

Foreign judgment, suit on—Scope of enquiry—Foreign judgment being contrary to natural justice—Civil Procedure Code (Act V of 1908), s. 13.

Suits based on foreign judgments should not be dismissed on the ground that they are contrary to natural justice merely because such rules as obtain in British India are not, in a more rough and ready Court of a Foreign State, regarded as being of imperative force even if, in such a State, they are of legal application. [p. 255, cols. 1 & 2.]

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 19th November 1913, affirming that of the Munsif, 1st class, Gujrat, dated the 7th December 1910, dismissing the claim.

Mr. *Fazal-i-Hussain* and *Mehta Bahadar Chand* for Mr. *Shah Nawaz*, for the Appellant.

Hon'ble *Rai Bahadur Bakhshi Sohan Lal*, for the Respondent.

JUDGMENT.—*Mian Gulab Singh* was formerly Prime Minister of the State of Poonch, in which his son *Tara Singh* was employed as a *Tahsildar*. *Mian Gulab Singh* held a sub-jagir in the Kangra District and not long before his death he executed a deed registered in the District of Hoshiarpur by which he bequeathed his rights as *jagirdar* to his sons *Tara Singh* and *Hari Singh*. At the end of this deed it was further recited that he had orally gifted the whole of the rest of his property to the said sons. When *Mian Gulab Singh* died in 1896, the question of this sub-jagir was referred to the Punjab Government with the result that *Raja Jai Singh* was permitted to resume it on the ground that *Tara Singh* and *Hari Singh* were not the legitimate sons of *Mian Gulab Singh*.

In 1897 the legal widows of *Mian Gulab Singh* transferred all their property, consisting of houses, shops and a garden in the Poonch State, to the *Raja of Poonch* in lieu of debts which had been incurred by *Mian Gulab Singh* with a firm in *Amritsar* of which the *Raja* was the real owner. According to the said deed these debts had amounted to a sum of Rs. 26,000 out of

which Rs. 5,000 had already been paid off, and as the property conveyed was only worth Rs. 10,000, the *Raja* remitted the balance.

In 1898 *Tara Singh* executed a promissory note of Rs. 1,500 in favour of one *Mulk Shah*. In 1900 *Mulk Shah* instituted a suit in the Poonch State for the recovery of the sum due on the basis of the promissory note in the Court of *Lala Mokand Lal*, Subordinate Judge, from whom he obtained a decree in 1902 after considerable delay and appeals on intermediate points to *Lala Piare Lal*, Chief Judge of the State. *Tara Singh* then filed an appeal in the Court of the Chief Judge. Thereupon *Mulk Shah* petitioned the *Raja*, who is himself the High Court of Poonch, to transfer the case to his own Court on the ground that the Chief Judge had already shown by his orders and remarks in the intermediate appeals that he was prejudiced against the plaintiff. This petition was rejected by the *Raja*, who declined to transfer the appeal remarking that if the case was decided against the defendant-appellant by the Chief Judge he would still have a right of appeal to the *Raja's Court*.

The Chief Judge himself, however, brought the matter before the *Raja* again. He reported that the plaintiff was evidently of the opinion that he would not get a fair trial in his (the Chief Judge's) Court and although he expressed himself as being entirely unbiassed against the plaintiff, he still thought that in the circumstances it would be better that the case should be transferred. He pointed out that if the case was to be transferred at all it must be transferred to the *Raja's own Court*, because there was no Court of jurisdiction co-ordinate with that of the Chief Judge and that if the appeal was heard by any other Court, the case would eventually come back to the Chief Judge himself.

As a result of this recommendation by the Chief Judge the *Raja* decided to hear the appeal himself and dismissed it in August 1904. The decree-holder then proceeded to take out execution in the Poonch State, where he recovered part of the decretal amount from *Tara Singh* who continued to occupy his position as *Tahsildar* in the State until 1907. The decree, however, was not wholly

MULK SHAH V. TARA SINGH.

satisfied in Poonch and the plaintiff accordingly instituted a suit in the Court of the Munsif of Gujrat in 1909 for the recovery of the balance making the Poonch decree his cause of action the Munsif dismissed the plaintiff's suit on the grounds that the proceedings of the Raja of Poonch were contrary to natural justice and that Lala Mokand Lal, who presided over the Court of first instance in Poonch, ought not to have given the decree on the record before him which the Munsif examined on its merits. The plaintiff then appealed to the Divisional Judge of Jhelum who dismissed the appeal concurring with the finding of the Munsif that the judgment of the Raja was contrary to natural justice. The plaintiff has now preferred a second appeal to this Court.

The decision of the Divisional Judge is founded on the view that the Raja of Poonch was strongly interested against Tara Singh owing to the fact that he (the Raja) was in possession of what remained of the property of Mian Gulab Singh, and that for that reason the Raja ought not to have entertained the appeal himself. He was, also, apparently of the opinion that the Raja had deliberately arranged that the appeal should be heard by himself in preference to the Chief Judge of his State.

In the first place stress is laid on the fact that with the object of obtaining funds for the prosecution of his suit in Poonch the plaintiff borrowed the sum of Rs. 200 from the State treasury, which under the orders of the Raja he was afterwards compelled to refund from the recoveries which he effected in execution. It does not, however, appear that this transaction was of any exceptional character and the orders regarding it were entirely open and above board. It is quite plain that if the Raja had been instigating Mulk Shah to bring his suit or had been giving him any special and exceptional assistance the transaction would have been conducted in a very different way.

Nor am I able to see why it should be supposed that the Raja had quarrelled with Tara Singh regarding the conveyance of property by the widows of Mian Gulab Singh or entertained any inimical feeling towards him on that account. As already

stated Tara Singh was still in his employment as a State Official and continued as such until 1907. There is no evidence that Tara Singh intended to bring a suit against the Raja relying on the registered deed executed by Mian Gulab Singh and to this day no such suit has been brought; nor again is there any reason to suppose that if such a suit had been brought, the Raja had any reason to fear its consequences. Counsel for the defendant-respondent has not attempted to argue that such a suit would have been likely to meet with any success, nor has the Divisional Judge given any opinion to that effect. Counsel for the appellant suggests that there is a rule in the Poonch State that immoveable property cannot be alienated without the permission of the Raja. There is nothing on the record to shew that this is the case, but it would seem from the Gazetteer of Kashmir that that rule holds good in Kashmir and the two States are, I believe, run on similar lines. However that may be, it is admitted by Counsel for the respondent that Mian Gulab Singh was governed by Customary Law and if so, he would not have been able to alienate his property to his illegitimate sons unless it was self-acquired and there were no collaterals. It has not been contended before me either that there were no collaterals or that the property was self acquired. Nor has it been alleged that the debt which the widows satisfied was not due. If it was due the Raja would, I imagine, have been able to claim the property equally from the illegitimate sons in satisfaction of it. It has not been suggested that they could have saved the property by reason of the principle enunciated in *Jagdeep Singh v. Narain Singh* (1), a ruling which is not likely to have been anticipated in the Poonch State.

Again, as appears from the deed to which I have already referred, the gift therein alleged was oral, and there is no evidence that possession ever passed. Nor is there even an allegation that it passed so. In the circumstances I find it most impossible to believe that the Raja was prejudiced against Tara Singh on account of the deed

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912 (F. B.); 173 P. L. R. 1912.

GANESHA v. NAGESHAR BAKHSH SINGH.

of 1897 or had anything to fear from him ■■■ account of it.

The Divisional Judge supposes that the action of the Raja of Poonch amounted to a denial of natural justice.

It ■■■ to me, on the other hand, that his action in his refusing to entertain the appeal of Tara Singh himself and in then hearing it on the recommendation of the Chief Judge of the State was just what might have been expected in similar circumstances of any Court in British India. If he had taken the slightest interest in the case brought by Mulk Shah against Tara Singh or had instigated and aided Mulk Shah to bring the suit and had been determined that he should succeed, it is not in the least likely that he would have allowed it to drag out its long course in the lower Courts. If again he entertained enmity towards Tara Singh he would hardly, I imagine, have retained him in his service until seven years after the suit, in which he is supposed to have been so interested, was instituted. I do not, of course, suggest that even if the Raja had entertained any such grudge against Tara Singh he would have acted in the perverted way in which it might have been possible for him to act. In my opinion, however, his action was quite straightforward and I do not believe that he was in any way biassed against Tara Singh or that there was any real reason why he should not have entertained Tara Singh's appeal himself.

Lastly, Counsel for the respondent, relying on *Collector of Moradabad v. Harbans Singh* (2) and *Ramji Das v. Mokandi Lal* (3), desires me to consider the decision of the Poonch State on its merits. I may remark that the criticisms made on that record by the Munsif who tried the present suit as ■ Court of first instance relate largely to rules of evidence and procedure. It is quite possible that such rules as obtained in British India would not in a more rough and ready Court of ■ foreign State be regarded ■ being of imperative force even if in such a State they are of legal application. But whether they have any force or not or whether or not they have been disregarded, it is impossible

to hold, ■ Counsel for the respondent argues that in the face of the proceedings they are founded on an incorrect view of laws in force in British India; and for the rest it is only necessary to say that the rulings cited by Counsel for the respondent relate to cases under Act XIV of 1882 decided with reference to the provisions of the concluding portion of section 14 of that Act and that that part of section 14 of Act XIV of 1882 has disappeared from section 13 of Act V of 1908.

For these reasons I accept the appeal of the plaintiff-appellant, who will accordingly get the decree for the relief claimed with costs throughout.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 OF 1914.

December 17, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

Musammatt GANESHA AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

Thakur NAGESHAR BAKHSH SINGH—
DEFENDANT—RESPONDENT.

Hindu Law—Widow—Settlement decree in favour of widow—Reversioners' right in property decreed in favour of Hindu widow at Settlement—Adverse possession against widow—Confiscation of proprietary rights in Oudh, effect of.

One G and his ancestors were in possession of a village which they had obtained under a *birt-deed* from a *taluqdar*. After the annexation of Oudh, the first summary settlement was made with G. Thereafter G died and his interest devolved on his nephew S and on the death of the latter the entire family property devolved on his widows, R and M. R and M jointly with the widow of G claimed the village at the Regular Settlement on the strength of its having been granted to the ancestors of their husbands by the *taluqdar*. The Settlement Court granted them a decree subject to the rights of their co-sharers:

Held, that as all the three ladies lived jointly and the widow of G never set up any title adverse to R and M, her joint enjoyment of the property with them was not prejudicial to their interests; [p. 261, col. 1.]

Held, further, that the widows were given the village as representing a certain stock or body of proprietors with the details or particulars of which

(2) 21 A. 17; A. W. N. (1898) 183.

(3) 102 P. R. (1892).

GANESHA V. NAGESHAR BAKESH SINGH.

the Government did not care to concern itself, that the settlement decree did not confer on them greater rights than they had before the confiscation, that their possession even after the decree was only as Hindu widows, and that the rights of reversioners were not prejudicially affected by the decree. [p. 259, col. 2; p. 261, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 23rd December 1913.

Pandit Gokaran Nath Misra, for the Appellants.

Mr. Muhammad Nasim, Babus Sarju Prasad, Ram Chandra and Bisheshwar Nath, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of possession of *Mauza Sonahra* by the cancelment of a sale-deed executed by *Musammât Rani*, *Musammât Maharani* and *Musammât Basanta* in favour of *Thakur Mritanjaya Bakhsh Singh*, the father of the defendant-respondent, on the 30th December 1871. The village in question originally belonged to *Santokhi*, to whom it was granted under a *birt patta* by *Raja Dat Singh*, the *taluqdar* of the village, in 1128 *Pastî*. From *Santokhi* the property passed to his lineal male descendants, the last of whom were *Gokaran*, his great-grandson, representing one branch of his line, and *Sheo Dayal*, his great-grandson, representing another branch of his line. The Summary Settlement was made with *Gokaran*. *Gokaran* died sometime in 1857, leaving a widow *Musammât Basanta*. *Sheo Dayal* died in 1865, leaving two widows, *Musammât Rani* and *Musammât Maharani*, and a daughter by the former, named *Musammât Ganesha*. On the 30th December 1871, *Musammât Basanta*, *Musammât Rani* and *Musammât Maharani* sold the village in dispute to the father of the defendant-respondent. *Musammât Basanta* died in 1885, *Musammât Maharani* in 1888, and *Musammât Rani* in 1908. *Musammât Ganesha*, the daughter of *Sheo Dayal*, is alive and is one of the plaintiffs to the suit. She has a son, *Kedar Nath*, who is also one of the plaintiffs.

The plaintiffs allege that *Gokaran* and *Sheo Dayal* were living as members of a joint Hindu family, that *Gokaran* was succeeded by *Sheo Dayal*, on whose death *Musammât Rani*, *Musammât Maharani* and

Musammât Basanta got possession of the village ■ Hindu widows and *guzara*-holders without any power of alienation, and that the sale-deed aforesaid was forged by the father of the defendant-respondent in collusion with *Mathura*, the agent of the said ladies, to whom some *muafi* land was given by the father of the defendant-respondent in return, without any consideration having been paid to the ladies. They further allege that even if the sale-deed was executed by the ladies, it was without any consideration and executed for no legal necessity and was not binding on the plaintiffs.

It is not now disputed by the defendant that *Sheo Dayal* survived *Gokaran*, but it is asserted that they lived separately. It is urged in defence that the vendors were the absolute owners of the village sold, by virtue of a decree, obtained by them from the Settlement Court and a custom obtaining in the family of their husbands, that *Musammât Basanta* was in proprietary possession of the village in question from more than 12 years prior to the sale, that the plaintiffs had no right to claim any interest by inheritance from *Musammât Basanta* or her husband, and that the sale-deed in question was executed by the vendors for valid consideration to pay off ancestral debts and to meet the marriage expenses of *Musammât Ganesha*. It is further pleaded that *Kedar Nath* had in any event no right to sue in the lifetime of his mother, *Musammât Ganesha*, and that both *Kedar Nath* and *Musammât Ganesha* were estopped from disputing the genuineness and legality of the sale-deed by reason of an agreement, executed by *Musammât Ganesha* in ratification of the sale, and certain admissions made by her afterwards.

The learned Subordinate Judge found that the sale-deed in question was validly executed by the vendors, that they were the absolute owners of the property sold by virtue of a settlement decree and a custom obtaining in the family of their husbands, and that the plaintiffs were estopped from questioning its genuineness or legality. He further found that *Kedar Nath* had no right to sue. He did not decide the question of legal necessity or discuss the evidence, adduced as to the jointness of, or separation between *Gokaran* and *Sheo Dayal*.

GANESHA v. NAGESHAR BAKHSR SINGH.

In appeal, it is contended that the ladies in question were in possession of the properties in dispute ■ Hindu widows and had no absolute right of transfer, that the sale sought to be impeached was effected without consideration or legal necessity, and that *Musammât Ganesha* was a minor on the date of the alleged ratification and was not estopped from questioning the sale.

It appears that the descendants of Santokhi were in possession of two villages, Sonahra and Harsinghpur, both of which were obtained under a *birt-deed* from Raja Dat Singh, the Basain Taluqdar of Gonda. After the annexation of Oudh, the First Settlement was made in 1856 with Gokaran. There are no papers on the record to show with whom the second Summary Settlement was effected, but it is in evidence that in 1861 Sheo Dayal claimed a right to hold the village in direct engagement with the Government to the exclusion of Rae Sadhan Lal, an assignee for life of the Government revenue from the Nawabi time, but was unsuccessful (Exhibit 13). There is also considerable evidence to show that Gokaran and Sheo Dayal lived jointly in Harsinghpur, and on the death of Gokaran Sheo Dayal got possession of the said villages and remained in occupation thereof till his death. Several witnesses of the plaintiffs, including Basau, Inderjit, Tulshi Ram and Ramphal, depose to that effect. The witnesses, adduced by the defendant, assert that Gokaran, and after him his widow, *Musammât Basanta*, lived at Harsinghpur, while Sheo Dayal lived with his family at Sakatpur, and that the rents of the villages used to be realized by them from the tenants separately. But in the mortgage-deed, executed by the widows of Gokaran and Sheo Dayal shortly after the death of the latter, they described themselves as residents of Harsinghpur (Exhibit A23). In the suit filed by them in the Settlement Court (Exhibit A27) as well as in the Settlement *Khewats* (Exhibit A4 and A5) *Musammât Basanta*, *Musammât Rani* and *Musammât Maharani* were similarly described as residents of Harsinghpur, and it is remarkable that even in 1871, by which time they appear to have removed themselves to Sakatpur, they described themselves as residents of one and the same place— (Exhibit A1). Most of the witnesses, who have given evidence for the

defendants, are either their tenants or residents of other villages, and their evidence on the question of separation cannot be trusted.

The interest of Gokaran, therefore, devolved after his death on his nephew, Sheo Dayal, and on the death of the latter, the entire family property devolved on his widows, *Musammât Rani* and *Musammât Maharani*, subject to the right of *Musammât Basanta* to maintenance. *Musammât Basanta* was, however, the most elderly and senior lady in the family, and as such, she was entitled to consideration and respect. Sheo joined *Musammât Rani* and *Musammât Maharani* in obtaining a decree from the Settlement Court in regard to the village in dispute on the 6th December 1869 (Exhibit 5.) In their plaint, the ladies claimed the village on the strength of an antecedent title, describing it as having been granted to the ancestors of their husbands by Raja Dat Singh. The decree granted by the Settlement Court expressly stated that the village was granted to them subject to the rights of their co-sharers (*ba hifz huquq digar shurakai unke*). In other words, while conceding superior proprietary rights (*haq ala*), as distinguished from an under-proprietary tenure, it declared that the village was to go to the ladies and to all other persons who might be entitled to the same on the strength of their antecedent rights. The ladies were given the village as representing a certain stock or body of proprietors with the details or particulars of which the Government, when releasing the property, did not care to concern itself. No grant to an indefinite or indeterminate body of individuals could be effective, and the object of the reservation of the rights of co-sharers evidently was to leave the antecedent title of persons, not claiming adversely to the persons who got the decree, undisturbed. The ladies represented a certain interest in the property, and the remainder of the proprietary interest, to whomsoever it belonged, was protected by the decree.

In the case of estates granted by *sanads*, the terms of the *sanad* specifically declared that what was granted was a full proprietary title. The nature of that right was further defined by section 3 of Act I of 1869 and the Crown Grants Act (XV of 1895). In the case of other properties, however, the

GANESHA V. NAGESHAR BAKHSI SINGH.

policy of the Government of India at one time was to treat the second Summary Settlement as a final adjustment of all antecedent rights, for in Circular Letter No. 31 of 1859, issued on the 28th January 1859, the Government of India observed:—

“By the terms of the Proclamation of the Right Honourable the Governor-General, issued in March, 1853, the rights of all landholders, save a few specially exempted, were declared to be confiscated; and by this Act all claims to estates at once ceased to be valid. Nevertheless, with due consideration for the interest of the people, we proceed to restore the ancient possessions to the people, subject to certain conditions which (it) had the right to impose. The primary condition of all land tenures in Oudh was the recognition of the superior right of *taluqdars*. In making the settlement of lands, every case has been carefully examined by the Deputy Commissioners and Special Commissioners of Revenue, and has been also rigidly scrutinized by the Chief Commissioner; the rights which he now confers on each holder of land are the free and incontestible grant from the paramount power, and cannot be called into question by Subordinate Officers; it has been ordinarily the custom in making Summary Settlements of revenue to enter into engagements with actual occupants, leaving the question of disputed right to be adjudicated at some future Settlement. Such a course may have been adopted by some of the officers now employed, but if so adopted, it is entirely wrong. The rights and claims of all parties have been duly weighed, their conduct during the rebellion, and their positions as regards *taluqdars*, fully considered, and the decision in each case which has received the confirmation of the Chief Commissioner's approval is considered to be final and lasting”—(Oudh Papers for 1859, pages 28-29).

But the policy of finality was subsequently abandoned as regards *zemindars* and others, not being *taluqdars*, by the Government of India, and in a letter issued on the 10th October 1859, which was afterwards appended to Act 1 of 1869, it was directed:—“As regards *zemindars* and others, not being *taluqdars*, with whom a Summary Settlement has been made, the orders con-

veyed in the Limitation Circular No. 31 of the 28th January 1859 must not be strictly observed. Opportunity must be allowed at the next Settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner.” These instructions were repeated by the Chief Commissioner of Oudh in paragraph 7 of Circular No. 6 of 1862—(Banerjee's Settlement Circulars, page 42).

A distinction was thus made between the rights, conferred on *taluqdars* by grants, and those conferred or conceded after an enquiry into previous titles on *zemindars* and others, not being *taluqdars*, by settlement decree, and as pointed out by their Lordships of the Privy Council in *Jehan Kadr v. Afsar Bannu Begum* (1), the aim of the Government in making that enquiry was to avoid making an arbitrary, or wholly new, redistribution of property. Their Lordships were dealing in that case with the Sobrawan property, which was not the subject of any grant, and in discussing the effect of the settlement decree, they observed: “The first observation on these proceedings is that the Settlement Courts were clearly inquiring into the old titles as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. Lincoln suggests, whether in 1863 that effect was realized to the minds of the Government officers, as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they enquired who would be entitled, if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three lower Settlement Courts had been engaged with regard to Sahrawan, when the case came before Sir Charles Wingfield as the highest Court of Appeal.”

(1) 12 C. 1; 12 L. A. 124; 9 Ind. Jur. 322; 4 Sar. P. C. J. 630; Refique & Jackson's P. O. No. 91.

GANESHA V. NAGESHAR BAKHSI SINGH.

This determination is shown in the instructions, contained in Circular No. 46 of 1864, which directed:—

"Settlement Officers will understand that a decree declaring that the proprietary right in a village rests in a certain person or persons must issue in regard to every village in a *parganah* before the revised assessment is declared; such decree will in no way affect the rights of persons, claiming to share in the rights and interests of the decree-holders; but it would be better if the decree were so worded as to reserve the rights of such claimants"—(Banerjee's Settlement Circulars, page 155).

The reservation of the rights of claimants to share in the rights and interests of the decree-holders obviously left the rights of the reversioners untouched, where the decree-holder was a Hindu widow ordinarily entitled only to a life-estate. The reversioners could have had no right to claim the possession of the estate at the time of the Regular Settlement, because the intermediate life-estate-holders were then in existence, till whose deaths it would have been impossible to say to whom the remainder of the rights, not represented by the widow's estate, would eventually go. The decree did not profess to confer on the widows greater rights than they had before. The names of *Musammât Basanta*, *Musammât Rani* and *Musammât Maharani* were entered in the revenue papers in pursuance of the settlement decree, but as they lived jointly, and *Musammât Basanta* never set up any title adverse to *Musammât Rani* or *Musammât Maharani*, her joint enjoyment of the property with *Musammât Rani* and *Musammât Maharani* was not prejudicial to the interests of the latter. The entry of the name of *Musammât Basanta* in regard to a half share was merely nominal, and by itself does not carry much weight. The three ladies lived amicably, and dealt with the property jointly. On the 9th November 1865, they jointly mortgaged the property in dispute with *Thakur Raghobar Singh*, describing the same as having been acquired by their predecessors-in-interest under a *birt patra* granted by *Raja Dat Singh* in 1128 *Fasli* (Exhibit A23). In 1872, the three ladies jointly redeemed the said

mortgage through Court (Exhibits A24 and A25). *Musammât Basanta* died in or about 1885 without asserting any adverse right, and her possession cannot, therefore, be deemed to have invested her with an adverse title. *Musammât Maharani* died next. The last surviving female was *Musammât Rani* who died in 1908. *Musammât Ganesha* is, therefore, entitled to claim the property as the reversionary heir of *Musammât Rani*, the last life-estate-holder, and unless the vendee succeeds in establishing that there was a legal necessity for the sale, she is entitled to get possession of it. She has brought the suit within 12 years from the date of her death. Her son, *Kedar Nath*, has, however, no right of suit during her lifetime.

As regards the plea of estoppel, reliance is placed on certain proceedings instituted by *Nidha*, who sued as the reversioner of *Sheo Dayal* to set aside a Will, made by *Musammât Rani* in favour of *Musammât Ganesha* in respect of *Mouza Harsinghpur*. In that suit *Musammât Ganesha* pleaded that *Musammât Rani* was entitled to an absolute estate. But that admission does not necessarily bind her as against other persons, for it was made for the purpose of that case, and as laid down in section 31 of the Indian Evidence Act cannot be regarded as conclusive. The sale had taken place long before that statement was made. The father of the defendant-respondent was in no way misled by it, and, as pointed out by their Lordships of the Privy Council in *Har Shankar Partab Singh v. Lal Raghuraj Singh* (2), statements of that character, though they may lead to temporary success of the persons making the statement as against others, fall short of founding an estoppel.

The agreement, purporting to have been executed by *Musammât Ganesha* and certain other relations of the vendors on the 22nd December 1872, upholding the sale is also relied on partly in support of the plea of estoppel and partly in proof of the legal necessity for the sale. It is clear, however, from the defendant's own witnesses that

(2) 29 A. 519 (P. C.) 2 M. L. T. 391; 6 C. L. J. 13; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 34 I. A. 125.

GANESHA v. NAGESHAR BAKHSH SINGH.

Musammât Ganesha was a minor on the date of the said agreement, and was not in a position to express her assent to the sale, so as to bind her interest or that of her reversioners. The defendant states that Musammât Ganesha was then about 18 or 19 years old, but in cross-examination his witnesses have made statements which indicate that she was much younger. According to the witnesses of the plaintiffs, she was five or six months old when Sheo Dayal died. At the time of the agreement she was a married girl, but if she was, as stated by Hardwar, a witness for the defendant, 24 or 25 years old, when Musammât Basanta died in 1885, her age could not have been much different from what the plaintiffs' witnesses describe it to have been. As a minor, she was not competent to ratify a sale-deed, and we are not satisfied, even if she had attained majority at the time she executed the agreement, that she thoroughly understood its purport or realized, on account of her tender age, the consequences of what she was doing. She was under the control and influence of her husband, Sant Bakhsh, who was the grandson of Mathura, the agent of the vendors, through whom the sale had been negotiated. She was a *pardanashin* lady and had no opportunity of obtaining independent advice, and on either ground the agreement cannot be enforced as against her.

It only remains to notice the plea of custom, raised by the defendant in support of the right of the vendors to transfer the village. The *wajib-ul-arz* on which reliance is placed in support of that custom was dictated by Mathura, the agent of the ladies, with the object of indicating whether a right of pre-emption existed in the village. The *wajib-ul-arz* stated that every co-sharer had a right to transfer his share by means of a mortgage or sale, but so long as any of the co-sharers of the village wanted to purchase, a stranger had no right. It went on to say that there were female co-sharers in the village, but gave no details as to the rule of succession in regard to them. An absolute right of transfer, asserted by Hindu widows or their agents, does not necessarily derogate from the rights of the reversioners to impeach the transfer, when it is made. The agent was making the statement on behalf of the ladies in their interest,

and the *wajib-ul-arz*, as expressive of the wishes of the ladies or indicative of the occasion when a right of pre-emption could be exercised, was of little value to support a custom vesting the widows with an absolute estate. In *Anant Singh v. Durga Singh* (3) their Lordships of the Privy Council pointed out that there was no class of evidence that was more likely to vary in value according to circumstances than that of the *wajib ul-arz*, and that observation applies as cogently to the *wajib-ul-arz* now in question as to many others, for the object of the *wajib-ul-arz* was to indicate the occasion when a right of pre-emption could be exercised rather than to signify the nature of the rights which the transferors possessed or were competent to convey.

A reference to such a custom in the proceedings instituted by Nidha against the ladies is also of little weight, as the findings therein were based on the same *wajib ul arz* (Exhibit A20). The final judgment in that case, moreover, rested on the ground that Musammât Ganesha was entitled to inherit and made no reference to any such custom (Exhibit 10). The instances, on which the learned Subordinate Judge relies in proof of the custom, are the acts of these ladies themselves, beginning with the sale of 1871, which the plaintiffs are now impugning. An act which is impugned and anything done subsequent to it cannot be cited in justification of the act itself. No independent instances have been cited in support of the custom.

The findings of the learned Subordinate Judge on the points dealt with by him cannot, therefore, be supported. The question of consideration and legal necessity have not been decided. The evidence dealing with these points was recorded by the learned Subordinate Judge in a very unsatisfactory manner, and in places cannot be properly read. The other grounds are not pressed.

We direct the Court below accordingly to determine after taking such additional evidence as the parties may adduce—Where

(3) 6 Ind. Cas. 787; 13 O. C. 163; 14 C. W. N. 770 (P. C.); 7 A. L. J. 704; 32 A. 363; 12 C. L. J. 38; 12 Bom. L. R. 504; 8 M. L. T. 79; 20 M. L. J. 604; (1910) M. W. N. 324; 37 I. A. 191.

NARESH CHANDRA BOSE v. HIRA LAL BOSE.

ther the sale in question was effected for consideration and for legal necessity, and, if so, to what extent.

Two months' time will be allowed for a return of the finding, and ten days will be allowed to the parties from the date of the finding for filing objections.

Case remitted.

CALCUTTA HIGH COURT.

CIVIL RULE No. 627 OF 1915.

November 25, 1915.

Present:—Mr. Justice Holmwood and

Mr. Justice Mullick.

NARESH CHANDRA BOSE—PLAINTIFF—
PETITIONER*versus*HIRA LAL BOSE AND OTHERS—DEFENDANTS
—OPPOSITE PARTY.

*Calcutta Improvement Act (V B. C. of 1911), s. 71—
Land Acquisition Act (I of 1894), s. 53—Special
Tribunal, power of, to call for records of other Courts.*

The power to call for records from another Court is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal which has been constituted a Court under the Land Acquisition Act, I of 1894, to hear cases from the orders of the Calcutta Improvement Trust.

Babus Mohendra Nath Roy, Gunada Charan Sen, Monmotha Nath Roy and Surendra Nath Das Gupta, for the Petitioner.

Babu Ram Churn Mitter, for the Government.

JUDGMENT.—The question that is raised in this Rule is one of considerable importance to the public having dealings with the Special Tribunal constituted to hear cases from the orders of the Calcutta Improvement Trust. It is perfectly clear that some *modus operandi* must be devised by which the Tribunal may have access to land acquisition and other records that are necessary for the purpose of their business. But there appeared to be technical difficulties under the law. We, therefore, asked the learned Government Pleader, Babu Ram Churn Mitter, to give us his assistance in the matter, and we have also heard the learned Vakil Babu Mohendra Nath Roy for the petitioner, and it appears to us fairly clear that in the exercise

ABHOY PADO BOSE v. MANAGING COMMITTEE, ETC.

of our powers of supervision under the Charter, we ought to give directions to the lower Court in the same way in which ■ Bench of this Court appears to have done in the case of *Golap Coomary Dossee v. Soondur Narain Deo* (1). There the Court also dealt with administrative orders of this Court. Now as the shortest way to get over the difficulty, we may point out that the Special Tribunal has been constituted a Court under the Land Acquisition Act, 1894, and under section 53 of that Act the Land Acquisition Court is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under that Code. It is not necessary to follow the learned Judge in the Court below to the extent of holding that the Special Tribunal would be able to compel the production of records from another Court. It is this power of compulsion which seems to have been a stumbling block in the learned Judge's mind. Nobody ever heard of an attempt to compel a Court to send its records to another Court, and we are not apprehensive that any such question will ever arise. The power to call for records is a power which is undoubtedly inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal.

For these reasons we think that the Rule should be made absolute and the District Judge should be directed to send the record asked for by the President of the Tribunal.

We make no order as to costs.

Rule made absolute.

(1) 4 C. L. R. 36.

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ODDH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 421 OF 1914.

January 5, 1916.

Present:—Mr. Lindsay, J. C.

ABHOY PADO BOSE—PLAINTIFF—
APPELLANT*versus*

THE MANAGING COMMITTEE OF THE
QUEEN'S ANGLO-SANSKRIT SCHOOL,
LUCKNOW—DEFENDANTS—RESPONDENTS.
Society or institution maintained by public subscrip-

NGA YEIN v. NGA SO.

tions—Managing Committee, right of, to refuse subscriptions of individuals—'Right to subscribe'—Suit, whether lies to enforce the right—Societies Registration Act (XXI of 1860).

The managing committee of a society or institution which is maintained by public subscriptions, are under no obligation to the public to accept whatever subscription is offered to them.

No suit, therefore, lies by any member of the public to enforce the right to subscribe and to compel the committee to admit him to the privileges of membership in virtue of his offer of subscription.

Appeal against the decree of the District Judge, Lucknow, dated the 3rd June 1914, upholding that of the Munsif, South Lucknow, dated the 26th May 1914.

Mr. M. N. Chak, Babu J. K. Banerji and Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—This is a second appeal brought by Mr. A. P. Bose, who is a Pleader of this Court. Mr. Bose instituted a suit in the Court of the Munsif of Lucknow to enforce what was called "right to subscribe." The defendants in the case were the members of the managing committee of an institution known as the Queen's Anglo-Sanskrit School and the committee was sued through its President Babu Basdeo Lal, who is also an Advocate of this Court. It appears that the School is the property of a body which has been registered under the Societies Act (XXI of 1860). The Society has a managing committee which conducts the affairs of the School and it seems that the committee is elected for a period of three years. In the month of May 1914, when the period of office of the members of the committee existing at that time was about to expire, Mr. Bose and a number of his friends offered a subscription of annas 8 each for the purpose of being enrolled as subscribers. It may be mentioned here that the income of the Society is derived partly from subscribers, the Society being entitled to ask for subscriptions and to apply them to the purposes for which the Society was constituted. The Committee through its President refused to accept Mr. Bose and his friends as subscribers. The money was first of all accepted but was afterwards returned, the President informing them that as at present advised he was unable to accept the subscriptions. Mr. Bose then filed this suit and asked the

Court to issue an injunction to the Society to admit him to the privilege of membership in virtue of his offer of the subscription just mentioned, and to defer holding the meeting for the election of a new committee until he and his friends had been so admitted. Both the Courts below dismissed the case, holding that Mr. Bose had no cause of action. In my opinion this decision is perfectly correct. I know of no authority for the proposition which Mr. Bose puts forward here, that as a member of the public he is entitled to compel this Society to accept his offer of a subscription and to admit him to whatever privileges attach to membership of the Society. It is quite clear to me that, although the Committee is entitled to collect subscriptions for the purpose of maintaining the School, they are under no obligation whatever to the general public to accept any subscriptions which may be offered to them. I hold, therefore, that Mr. Bose had no cause of action for this case and I dismiss his appeal with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 529 OF 1914.

February 26, 1916.

Present:—Mr. Saunders, A. J. C.

NGA YEIN AND ANOTHER—DEFENDANTS—
APPELLANTS
versus

NGA SO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 100, 115, O. IX, r. 13—Revision petition converted into second appeal—Appeal barred at time of alteration—Insertion of wrong section of law, effect of—Ex parte fraudulent decree, suit to set aside, whether lies.

An application for revision to the High Court was, by order of Court, altered into a second appeal under section 100, Civil Procedure Code. The respondent took the objection that, when the alteration was made, the appeal was barred:

Held, that as the application presented to Court was within time and complied with all the requirements of law for a second appeal, the appeal might be taken to have been filed as on the date of the application and the insertion of the wrong section of law did not deprive the appellants of their right to appeal. [p. 265, col. 1.]

Abdulla Kaka v. Ya Sein, C. R. No. 28 of 1914, followed.

NGA YEIN v. NGA SO.

A suit will lie to set aside an *ex parte* fraudulent decree, though it was not preceded by an application under Order IX, rule 13, Civil Procedure Code. [p. 265, col. 2.]

Abdul Mazumdar v. Mahomed Gazi Chowdhry, 21 C. 605, relied on.

Pran Nath Roy v. Mohesh Chandra Moitra, 24 C. 546; *Azizan v. Matuk Lal Sahu*, 21 C. 437; and *Haji Abdul Rahiman v. Khoja Khaki Aruth*, 11 B. 6, referred to.

Mr. D. Dutt, for the Appellants.

Mr. Banerjee, for the Respondent.

JUDGMENT.—In Civil Regular Suit No. 89 of 1913 of the Township Court, Kanbalu, the present appellants sued the respondent to recover Rs. 135 and obtained a decree for that amount *ex parte* on the 28th June 1913. The decree was sent to the Township Court, Kawlin, for execution, and on the 12th January 1914 notice was issued to the judgment-debtor who paid the full amount into Court on the 18th March 1914. The amount paid in was Rs. 157-4-0, which was drawn out by the present appellants. In Suit No. 124 of 1914 of the Township Court, Kanbalu, the respondent instituted proceedings against the present appellants on the 5th May 1914 to set aside the former decree on the ground of fraud and to recover the sum of Rs. 157-4-0 paid by him. The respondent obtained a decree which was confirmed in appeal and the defendants now come to this Court.

The application first made in the form of an application for revision, which was subsequently altered by the direction of the Court into a second appeal under section 100 of the Code of Civil Procedure.

The respondent takes a preliminary objection on the ground that when the alteration was made the time for appeal was barred. There appears to be no force in this objection. When the application was filed, it was within time and all the requirements of the law for a second appeal were complied with. I am of opinion that the fact that a particular section of the Code of Civil Procedure had been inserted in the application did not deprive the appellants of their right to appeal. This view was taken in the case of *Abdulla Kaka v. Ya Sein* (1) and the objection is overruled.

(1) C. R. No. 28 of 1914.

The appeal proceeds upon two grounds, first, that the decree which the plaintiff-respondent sought to set aside having been passed *ex parte*, the plaintiff's remedy was to apply under Order IX, rule 13, to the Township Court, Kanbalu, to set the decree aside, and that ■ he failed to take this course he cannot now file a separate suit. But this view does not appear to be sustainable. In *Abdul Mazumdar v. Mahomed Gazi Chowdhry* (2) it was held that ■ suit will lie to set aside an *ex parte* fraudulent decree although no endeavour has been made to get the decree set aside and the suit revived under Order IX, rule 13, while in *Pran Nath Roy v. Mohesh Chandra Moitra* (3) it was held that ■ suit will also lie after an application made under Order IX, rule 13, has been dismissed. *Azizan v. Matuk Lal Sahu* (4) relied upon by the appellants is not an authority to the contrary, nor is the case of *Haji Abdul Rahiman v. Khoja Khaki Aruth* (5).

Plaintiff's case here was not that he had satisfied the decree and that the satisfaction had not been certified, but that before the decree had been obtained, he had satisfied the plaintiffs' claim on the understanding that the plaintiffs would not proceed with the suit, and that in spite of this the plaintiffs in the former suit had proceeded and obtained a judgment against them.

It is argued that the decision in the previous suit operated as *res judicata* and that the decree could not be set aside on mere proof that the previous decree was obtained by perjured evidence, *Moruful Huq v. Surendra Nath Roy* (6). The question of when and in what circumstances a Court may set aside a judgment on the ground of fraud was examined at some length in *Logadapatti Chinnayya v. Kotla Ramanna* (7). It ■■■ there: said "The test to be applied is, is the fraud complained of not something that was included in what has been already

(2) 21 C. 605.

(3) 24 C. 546.

(4) 21 C. 437.

(5) 11 B. 6.

(6) 15 Ind. Cas. 893; 16 C. W. N. 1002.

(7) 19 Ind. Cas. 579; 35 M. 203; (1913) M. W. N. 387; 13 M. L. T. 421; 25 M. L. J. 228.

SHEO PRASAD v. BISHESHAH NATH.

adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation that would amount to fraud." Again on page 209, the following acts are referred to as constituting a fraud which would vacate a judgment: misrepresentation or tricks practised upon defendant keeping him away from the trial, acting contrary to an agreement between the parties that the case should not be continued or that the action should be dismissed as the result of compromise or settlement. This is exactly the plaintiff-respondent's case in the present proceedings. He did not deny that he owed the money upon which the appellants sued in the Township Court, Kanbalu, but he said that he paid this money before that suit came to trial, and that in consideration of such payment the appellants agreed not to obtain a decree. Both the Courts below have found that this allegation has been clearly proved and these findings have not been questioned.

There can be no doubt that the respondent was entitled upon these findings to a decree setting aside the decree of the Township Court, Kanbalu, and directing a refund to him of the amount paid in execution of those proceedings.

The present appeal must, therefore, be dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 372 OF 1914.

December 17, 1915.

Present:—Mr. Lindsay, J. C.

SHEO PRASAD—PLAINTIFF—APPELLANT
versus

BISHESHAH NATH AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Sale of property subject to mortgage—Consideration reserved with mortgagee for payment to prior mortgagee, return of, to mortgagor, after sale of property—Redemption, suit for, by vendee—Accounts—Vendee, whether entitled to credit of amount returned by mortgagee to mortgagor—Notice of purchase to mortgagee, whether necessary.

The law does not require the purchaser of property which is subject to a mortgage to give notice of his purchase to the mortgagee. [p. 67, col. 2.]

One T mortgaged certain property to J and he effected a second mortgage in favour of B. Rupees 50 out of the mortgage consideration was left with B for redemption of the prior mortgage. T then sold his equity of redemption to S for Rs. 200. Out of this amount Rs. 54 was left with S to pay off B's mortgage and Rs. 30 to redeem J's mortgage. After this sale B offered to pay the Rs. 50 to J and on the latter refusing to receive it, B returned the amount to the mortgagor T. S conformably to the conditions of his sale redeemed J's mortgage and instituted the present suit to redeem B's mortgage. On a question arising as to the amount due to B:

Held, (1) that the plaintiff was entitled to a deduction of Rs. 50, which was left with B to discharge J's mortgage and which he returned to the mortgagor contrary to his agreement: [p. 267, col. 2.]

(2) that the plaintiff only represented T, the former mortgagor, to the extent of the rights which the latter had under the mortgage at the date of the sale to the plaintiff and no subsequent dealings between T and B could affect the rights which the plaintiff acquired by his purchase; [p. 267, col. 2.]

(3) that it was not necessary for plaintiff to give notice of his purchase to the mortgagees. [p. 267, col. 2.]

Appeal against the decree of the District Judge, Lucknow, dated the 11th May 1914, upholding that of the Probationary Munsif, Lucknow, dated the 27th January 1914.

Babu Ram Bhargose Lal, for the Appellant.
Mr. H. K. Ghosh, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for redemption brought by the plaintiff-appellant Sheo Prasad against the first defendant Bisheshar Nath. The second defendant in the case one Tilak was impleaded as the former mortgagor. The facts of the case may be stated as follows. In the year 1906 Tilak mortgaged the property in suit together with certain live-stock to one Jai Kishan. On the 7th April 1908, Tilak mortgaged the property now in suit to the first defendant Bisheshar Nath for a sum of Rs. 99; Rs. 49 in cash was paid to the mortgagor and the balance of Rs. 50 was left with Bisheshar Nath to pay off the prior mortgagee Jai Kishan. On the 22nd of July 1908, Tilak sold his remaining interest in the mortgaged property to the plaintiff Sheo Prasad for a sum of Rs. 200. Out of this purchase-money Rs. 54 was left with Sheo Prasad to pay off the mortgage of Bisheshar Nath and Rs. 30 was left with him to pay off Jai Kishan the first mortgagee. The balance was paid to Tilak. Four days after the sale to Sheo Prasad the latter redeemed the

SHEO PRASAD v. BISHESHAR NATH.

first mortgage of Jai Kishan and got back the mortgage-deed. Sheo Prasad has now sued Bisheshar Nath for redemption of the mortgage of the 7th April 1908, and the matter in dispute is what sum the plaintiff is liable to pay to Bisheshar Nath in order to obtain redemption of the mortgage. The plaintiff's case was that Bisheshar Nath could not claim from him the Rs. 50 which was left with the latter to redeem Jai Kishan and which he did not pay. The plaintiff relies on the fact that he himself redeemed Jai Kishan's mortgage and got back the deed. Bisheshar Nath's answer to this plea was that he had offered the Rs. 50 which was left with him to Jai Kishan but he refused to receive the money. After the money had been refused Bisheshar Nath says he paid the Rs. 50 to the mortgagor Tilak. According to Bisheshar Nath's evidence he first offered to pay off Jai Kishan, the first mortgagee, on the 3rd of August 1908, that is to say, after Tilak had sold the equity of redemption to the plaintiff and after the plaintiff had redeemed Jai Kishan's mortgage. The payment of Rs. 50 to Tilak was made on the 15th of August 1908. It has been found by the Courts below that this payment was actually made to Tilak and it has also been found that Bisheshar Nath at the time when he paid over Rs. 50 to the mortgagor was not aware that the equity of redemption had been sold to the plaintiff Sheo Prasad. Both Courts have held that the plaintiff Sheo Prasad is liable to pay to Bisheshar Nath the full amount of the latter's mortgage, *first*, because Bisheshar Nath had no notice of the fact that Sheo Prasad had become the purchaser of the equity of redemption, and *secondly*, because Bisheshar Nath was justified in paying over the Rs. 50 to the mortgagor Tilak after the first mortgagee Jai Kishan had refused to receive the money.

In second appeal it is contended here that the intermediate mortgagee Bisheshar Nath had no right to pay over this sum of Rs. 50 to the mortgagor and that he, therefore, cannot claim it from the plaintiff who had taken the transfer of the mortgagor's interest in the property before the payment was made. In my opinion this plea must prevail. The contract between the mortgagor Tilak and the mortgagee Bisheshar Nath was

that the latter was to redeem the earlier mortgage and have the bond returned. There was no stipulation between the parties that Bisheshar Nath was to make over the Rs. 50 to the mortgagor Tilak in case the prior mortgagee refused to receive it. Further, it is clear on all the authorities that if Bisheshar Nath retained this Rs. 50 instead of paying off the prior mortgagee, the mortgagor Tilak could not have sued Bisheshar Nath for the money. The fact that Bisheshar had retained the money would of course have been taken into consideration at the time a suit for redemption was brought by Tilak against him. As the case now stands, it must be held that the plaintiff Sheo Prasad only represents Tilak the former mortgagor to the extent of the rights which the latter had under the mortgage at the date of the sale to the plaintiff, and no subsequent dealings between Tilak and the mortgagee Bisheshar Nath can, in my opinion, affect the rights which he acquired by his purchase. With regard to what is said in the judgment of the Court below regarding notice, the law does not require the purchaser of a property which has been mortgaged to give notice of his purchase to the mortgagee. The case is not one of the transfer of an actionable claim in which the giving of such notice is required. Further, I am unable to agree with the view of the law taken by the Courts below to the effect that Bisheshar Nath was justified in handing over this sum of Rs. 50 to Tilak. As I have said already, Bisheshar Nath undertook to pay this money to the first mortgagee and there was no contract by which he was bound to hand this sum over to the mortgagor. The provisions of the Contract Act require that the promise should be performed in the manner prescribed and it is impossible, therefore, for Bisheshar Nath to take up the position that he was justified in making this payment of Rs. 50 to Tilak, who at the time he received it had transferred all interest in the mortgaged property to the plaintiff. I must allow the appeal therefore. The plaintiff will be given a decree for redemption after excluding this sum of Rs. 50, for which credit has been allowed to the first defendant by the Courts below. The office will make out the account on this footing and six months

UMAR ABDUL RAHIMAN V. GUSTADI MUNCHERJI COOPER.

will be allowed to the plaintiff-appellant to redeem. The appellant is entitled to his costs in all three Courts.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 22, 1915.

Present:—Viscount Haldane, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

Haji UMAR ABDUL RAHIMAN—

PLAINTIFF—APPELLANT

versus

GUSTADI MUNCHERJI COOPER—

DEFENDANT—RESPONDENT.

Pleading and proof—Variance, how far material as affecting plaintiff's case.

The plaintiff brought a suit against the defendant for a sum of money due to him as per his account on a pro-note dated 7th November 1907, alleging that the payment was made on that date. The defendant pleaded that he discharged the amount due by a cash payment on the 5th November 1907 and that the note and the entry in the account were forgeries. It was found that the note was genuine and was executed for the balance of amount entered in the plaintiff's accounts as having been received in cash only on the 5th November.

Held, (1) that the variance between the pleading and the proof was not one fatal to the plaintiff's suit, the cardinal points to be decided being whether the debt had been paid in cash and whether the note was a forgery; [p. 271, col. 2.]

(2) that the principle "that it would introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded and by joining the issue in the case has undertaken to prove," had been applied by the High Court in an abstract and unsatisfactory way which had misled them in estimating the merits in the controversy before them, and that in applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised, the question being, in ultimate analysis, one of circumstances and not of law. [p. 271, col. 2.]

Appeal against the decree and judgment of the Bombay High Court, reversing those of the Subordinate Judge of Poona.

FACTS appear clearly from the judgment of their Lordships of the Privy Council.

The first Court decreed the plaintiff's suit and owing to variance between proof and pleading deprived the plaintiff of his costs. On appeal the High Court

reversed the judgment on the ground that there was a variance between the pleading and the proof. The judgment of the High Court on this matter ran as follows:—

"This view is not a mere matter of technicality; it affects the merits of the case, because where, as here, a document is impugned as forgery, the time, place, and circumstances of its execution become more or less material for the purpose of deciding the question of its genuineness. It is an elementary principle of law that a Court should not allow variance between pleading and proof. As is put in *Gorakh Babaji v. Vithal Narayan Joshi* (1), citing *The 'Alice' and the 'Rosita'* (2), 'the first rule of adjudication is that a Judge shall decide *secundum allegata et probata*.' There is no doubt cases where the Courts allow a plaintiff, who has wrongly dated his cause of action in his plaint, to amend it, but that is only where he has misconceived his case and the misconception can be remedied by amendment without injustice to the defendant and contradiction between the injury averred by the plaintiff and that assumed by the Court as the ground of its judgment. See per Melvill and West, J.J., in *Small Cause Court Reference No. 28 of 1877* (3). That cannot be said here, where the plaintiff never suggested any misconception on his part but deliberately stuck to the 7th of November as the date of his cause of action and attempted to support it by forgery and perjury. 'It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.' *Eshenchunder Singh v. Shamachurn Bhutto* (4).

"When we test the finding of the Subordinate Judge, that the promissory note must have been passed on the 5th or 6th of November, by the light of the evidence in the case, it is impossible to uphold his conclusion."

(1) 11 B. 435 at p. 433.

(2) (1868) 2 P. C. 214; 5 Moore P. C. (N. S.) 300; 38 L. J. Adm. 20; 19 L. T. 753; 16 E. R. 528.

(3) (1877) P. J. 133.

(4) 11 M. L. A. 7 at p. 23; 6 W. R. 57 (P. C.); 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3.

UMAR ABDUL RAHIMAN V. GUSTADJI MUNCHERJI COOPER.
Messrs. De Gruyther, K. C., and Raikes,
for the Appellant.

Sir Erle Richards, K. C., and Sir Wil'iam
Garth, for the Respondent.

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal on questions of fact from a judgment of the High Court of Bombay, reversing the judgment of the First Subordinate Judge of Poona, who tried the case. The principal issue is whether a promissory note for Rs. 15,000, on which the appellant brought an action against the respondent, was a forgery. A good deal of the oral evidence was taken, not by the Trial Judge, but before another Judge who acted for him. The case is, therefore, not one in which a Court of Appeal has the full assistance of the impressions of a Judge who in trying the case has seen all the witnesses in the box. The High Court and this Board have had to weigh the evidence as recorded for themselves, with the aid of the views of the Trial Judge on those occasions on which the witnesses were examined and cross-examined before him.

The appellant was a furniture-dealer and money-lender at Poona. The respondent was a bookmaker on the turf, who also owned a fibre factory. The latter had frequent occasions to borrow money, and he borrowed from time to time from the appellant among others. Between the *Diwali* day in November 1906, with which the native financial year commenced, and the 5th November 1907, which ended that year, the respondent had borrowed from the appellant on promissory notes sums amounting to Rs. 19,000. Of this debt he had repaid Rs. 5,000 in August and Rs. 14,000 for principal remained unpaid on the *Diwali* day in 1907, the 5th November, together with Rs. 332 for interest. As to the security for this indebtedness there has been dispute. A good deal of the money had been advanced for the purposes of building a bungalow on some land at Poona belonging to the respondent, and the evidence of the appellant was that the title-deed to this land had been deposited with him as security for the advances, with a promise of a formal mortgage when his building was complete. However, on the 9th March 1907, the respondent got the deed

back for the purpose, as he stated in a letter of that date, of showing it to his Pleader, and on a promise to return it. He either did not return it or if he did so, he managed to get possession of it again, and he used it to enable himself to mortgage the property in August for Rs. 15,000 to Dr. Modi. The appellant was not informed of this and after discovering it he brought the action in which this appeal arises to recover the amounts due for principal and interest, and for a declaration that these amounts were charged on the property. The contention of the respondent was that he had never agreed to give the appellant a mortgage, but had only negotiated about it. It is, however, difficult to reconcile this version of the transaction with the terms of the letter of 9th March, in which he appears to treat the appellant as entitled to have the deed.

It is clear that the respondent had been borrowing on a large scale prior to November 1907 from other people as well as from the appellant. Indeed his case is that he so borrowed in order to pay off the latter. But he appears to have been in circumstances of some difficulty. He had sometime previously been declared a defaulter by the local Turf Club, a circumstance which could not but cause him difficulty in borrowing. However, his case is that he succeeded in raising enough money to pay the appellant in cash two sums of Rs. 14,000 and Rs. 1,000 on the 5th of November, in small notes of Rs. 100 and less. An important question which has to be determined is whether he did this, or whether the appellant merely closed the account for the year by taking a fresh promissory note from him for the balance carried into the new account.

Their Lordships have had before them a translation of the account kept in the books of the appellant, relating to his transactions with the respondent. From the translation it appears that the Rs. 14,000 were credited as "in cash in full settlement of the account up to this day," i. e., the 5th November 1907. At first sight this would seem to mean that the money was actually paid. But an examination of the accounts made out in the previous years shows that the expression "in cash" is far

UMAR ABLUL RAHMAN v. GUSTADJI MUNCHERJI COOPER.

from conclusive, inasmuch as it was the regular practice to enter as sums of cash received and credited the amounts of new promissory notes given by the respondent to the appellant in liquidation of earlier notes, just as though actual cash had been received. Their Lordships think that it must be taken that the practice was to close each yearly account entirely by treating any debit balance as paid off when there was credited, as liquidating the cash balance due, a new promissory note which then became a debit item in the account for the ensuing year. They are confirmed in this view by what was said by the Trial Judge, to the effect that he had had a long experience in which he had been familiar with the existence of this practice.

The appellant and his witnesses swear that this was the course adopted when the account was closed on the *Diwali* day of 1907 and a new account opened for the ensuing year. The respondent swears that he paid the Rs. 14,000 in cash, consisting of small notes which he got, not from his Bank, but from his house where the money had been kept ready for three months. Their Lordships think that the probabilities are against the truth of this statement. The respondent had been borrowing money during this period, including a large sum of Rs. 15,000 as late as August from a Dr. Modi, and he had had an execution issued against him for a judgment-debt of Rs. 8,000 in October. This debt he had paid, but he says in his evidence that in order to do so he had borrowed Rs. 5,000. Besides this he had incurred other debts. For instance he had borrowed Rs. 1,000 from the appellant on 3rd September. This state of his affairs does not render it probable that he was in a position to keep Rs. 14,000 or any other considerable sum in his house during the three months antecedent to the alleged payment of cash to the appellant. Again, the body of the promissory note on which the appellant sues is in the handwriting of the person who signed it, and the handwriting in the case both of the body of this note and its signature appear indistinguishable from the admitted handwriting of the respondent. Indeed the Trial Judge came to the conclusion, on a comparison of documents and

after taking evidence, that the signature was genuine. Further, subject to one important discrepancy, which their Lordships will presently deal with, the appellant's books bear out his assertion that the balance was liquidated by means of the promissory note. The respondent ought, in the ordinary course, to have in his turn produced his books to show the entries made by him at the time and so bear out the case of cash payment which he made. In addition to his business as a book-maker he had, as already stated, a factory. His excuse for not producing the appropriate books was that they had been destroyed in a fire which took place at the factory on the 10th and 11th November, just after the transaction in question. He said that two books only had escaped destruction, but it appears that the entries in neither of these related to the transactions in question. As against this testimony the appellant called one Cawasji, who was agent for the Insurance Company from which the respondent recovered the amount of the damage caused by the fire. Cawasji said that he had produced to him by the respondent books other than the two referred to, including a cash book. The evidence taken renders it very doubtful whether the room in which the books were was destroyed at all by the fire. Their Lordships cannot accept the story told by the respondent about the destruction of his books.

But on the other side the case made by the appellant was in its turn unsatisfactory, the promissory note on which he sued was for Rs. 15,000 being made out for the balance of Rs. 14,000, and Rs. 332 for interest due, the remainder being stated to have been paid in cash. But the note was dated, not on the *Diwali* day, the 5th, but on the 7th November. The appellant and the witnesses whom he called insisted throughout that the date of the transaction was the 7th, and that the note was signed then. They produced books which supported this statement. These books showed the Rs. 14,000 as paid in cash on the 5th November and the debit for Rs. 15,000 on the promissory note as made under date the 7th. But the respondent succeeded beyond question in completely disproving the allegation that he had signed the note on the latter

UMAR ABDUL RAHIMAN v. GUSTADJI MUNCHERJI COOPER.

date. He established conclusively that he was in Bombay and not in Poona on that day. It was not until this evidence had been given that the appellant's Solicitor suggested in his reply that the date of the disputed note and the date assigned by the appellant for the transaction might have been a mistake, and that the note was post dated and really signed on either the 5th or the 6th.

The Trial Judge took the view that the appellant and his witnesses had perjured themselves about the date and that his books had been so fabricated as to support this story. But he held that the note was in fact signed by the respondent, and that the transaction had in reality taken place in the form alleged by the appellant, but on the 5th and not on the 7th. He considered that both parties had committed perjury and to mark his sense of what had occurred, while deciding in favour of the appellant, he deprived him of his costs.

The learned Judges of the High Court took a different view. They were of opinion that the Trial Judge's finding that the disputed note was signed on a different date from that alleged by the appellant in his plaint, and the evidence given, constituted a fatal variance from the case pleaded and made. They thought that the receipt in the appellant's account on which the respondent relied, and by which the appellant purported to acknowledge receipt of cash in payment of the previous debt, was sufficient evidence of payment in cash as alleged by the respondent. They considered that the destruction of the respondent's books in the fire had been proved, and that there had been no suppression by him of facts. They thought that there was evidence that the respondent was in a position to have made the cash payment set up. As to the finding of the Trial Judge that the note was signed by the respondent, they thought that the handwriting was similar to the handwriting of the respondent in other promissory notes produced for comparison and admitted by him, but that this circumstance was not sufficient to rebut what they regarded as the inference irresistibly arising from the other proved facts in the case, that the handwriting was the work of a clever forger. They laid great stress on the

principle that it would "introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove."

Their Lordships are of opinion that the High Court has applied this principle in an abstract and unsatisfactory way, which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is, in ultimate analysis, one of circumstances and not of law. In the case which the Board has on the present occasion to consider the fundamental questions are whether the sum due was paid in cash, and whether the note was a forgery. No doubt the appellant was quite wrong in saying that the note was signed on the day on which it was dated, the 7th November 1907. On that date it is proved that the respondent was not in Poona, but he may have post dated the note accidentally, or for some purpose, and have signed it on the 5th or 6th. It is going too far, in their Lordships' opinion, to infer, what the Trial Judge inferred, that the books must have been fabricated, and that deliberate perjury was committed. It is quite possible that all that happened was that the appellant and his witnesses, whose testimony was given a year and a half after the event, had not made out the accounts until some interval had elapsed, and were then misled by the documents into making a serious but not conclusive slip. The accounts in the appellant's books may quite naturally have been erroneously, but in good faith, based on the date of the note. The natural inference from the documents and the evidence appear to their Lordships to be that the signature was genuine and that the transaction, like the previous transactions, was not a closing of this account by the payment of cash, but was a liquidation by means of a fresh note. In the view that they take of the evidence, what they have stated appears to them to be the proper inference from what is established by the evidence. They are

HARDWARI LAL v. MUHAMMAD SALAMAT ULLAH KHAN.

unable to agree with the High Court either in their view of the evidence or in thinking that the general principle on which the learned Judges relied can be decisive of a case in which the cardinal issues are in reality those stated. Their Lordships are not called on to interfere with the discretion exercised by the Trial Judge ■ to costs, but they think that at all events on the main question he was right, and the High Court wrong.

They will, therefore, humbly advise His Majesty that the judgment of the Court of first instance should be restored, and that respondent should pay the costs of this appeal and of the proceedings in the High Court.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Latteys and Hart*.

Solicitors for the Respondent: Messrs. *Downer and Johnson*.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 275
OF 1915.

March 14, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

HARDWARI LAL—DECREE-HOLDER—
APPELLANT

versus

MUHAMMAD SALAMAT ULLAH KHAN
AND ANOTHER—JUDGMENT-DEBTORS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Person 'whose interests are affected by the sale', meaning of—Declaratory suit by person alleging exclusive ownership in himself—Application in execution to set aside sale during pendency of suit, whether lies.

After the passing of a decree absolute, but before the actual sale of the mortgaged property in pursuance of that decree, the plaintiff, who was neither the decree-holder nor the judgment-debtor, filed a suit asking for a declaration that he was the real owner of the property covered by the mortgage and ordered to be sold by the Court. The property, however, was sold. Then, he applied to have the sale set aside under the provisions of Order XXI, rule 90, while his declaratory suit was yet pending:

Held, that the plaintiff could not apply under Order XXI, rule 90, Civil Procedure Code, before the declaratory suit was decided, as any decision come to on the said application would amount to prejudging the suit. [p. 272, col. 2.]

Execution first appeal from a decree of the Subordinate Judge, Shahjahanpur, dated the 24th of July 1915.

Dr. *Sundar Lal*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.

WALSH, J.—This is an appeal against an order setting aside a sale under the provisions of Order XXI, rule 90, of the Code of Civil Procedure. The first point taken is that the application under that rule ■ made by one Salamat Ullah Khan, who was neither the decree-holder nor the judgment-debtor, nor ■ person otherwise entitled to make any such application. We think this contention must prevail. The decree was one passed against Amanatullah Khan a son of Salamat Ullah Khan aforesaid. It was ■ mortgage-decree. A decree absolute was obtained on the 17th of January 1913 and the sale actually took place on the 20th of March 1915. In the meantime Salamat Ullah Khan had filed ■ suit, on the 9th of March 1915, asking for a declaration that he was himself the real owner of the property covered by the mortgage and ordered to be sold in execution of the same. This suit is still pending. The question is, whether under these circumstances, Salamat Ullah is a person whose interests are affected by the sale, within the meaning of Order XXI, rule 90, aforesaid. It is of little use to refer to reported cases which turn on the wording of section 311 of the former Code of Civil Procedure (Act XIV of 1882). There has been a substantial and intentional alteration in the law effected by the passing of the present Code. Nor is it of much use to refer to cases such as that of *Abdul Aziz v. Tufaj-addin* (1), in which the learned Judge has remarked that the expression "whose interests are affected by the sale" has ■ wider import and ■ wider scope than the corresponding expression used in section 311 of Act XIV of 1882. For certain purposes the phrase used in the present Code may be a wider one, but we have to apply the words to the facts immediately before us. It seems to us that it would be ■ dangerous proposition to lay down that the interests of Salamat Ullah Khan are affected by the sale held on the 20th of March 1915, while his declaratory suit was actually pending. To say that his interests are affected by that sale might

(1) 23 Ind. Cas. 837; 19 C. W. N. 326.

BRITISH SOUTH AFRICA COMPANY v. LENNON, LIM.

be to pronounce an opinion as to the possibility of the success of his declaratory suit. If his property has been sold in execution of a decree obtained against his son, and he is not estopped by the provisions of section 41 of the Transfer of Property Act (IV of 1882) from setting up his true title, then the sale is nullity as against him and cannot affect his interests. If, on the other hand, he has no real interest in the property in suit, he should obviously not be permitted to maintain the application under Order XXI, rule 90. We, therefore, accept this appeal, set aside the order of the Court below allowing the application of Salamat Ullah Khan and direct the record to be returned to that Court in order that it may proceed to pass all necessary orders confirming the sale and to dispose of the matter in accordance with law. The appellant will get his costs of this appeal, including fees on the higher scale.

Appeal allowed.

FRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF
SOUTH AFRICA.

July 20, 1915.

Present:—Viscount Haldane, Lord Dunedin
and Lord Sumner.

BRITISH SOUTH AFRICA COMPANY

PLAINTIFFS—APPELLANTS

versus

LENNON, LIM.—DEFENDANTS—

RESPONDENTS.

Negligence—Sale of goods—Specification of wrong quantity in label—Warranty—Damages, action for—Business reputation of vendor—Purchaser's omission to make enquiry, whether contributory negligence—Appellate Court—Appreciation of evidence.

The plaintiffs placed an order with the defendants, a firm of good business reputation, for a certain quantity of arsenite of soda, for making 'dip' for cattle. The defendants delivered 56 lbs., but the drums containing the soda were wrongly labelled as containing 8½ lbs. only. The label contained instructions as to the quantity of water to be used for mixing up with the soda. The plaintiffs' servant acted up to the instructions, with the result that a strong 'dip' was prepared and the cattle were injured. In an action to recover damages, the defendants pleaded *inter alia* that plaintiffs were guilty of contributory negligence in not making enquiries and detecting the mistake.

Held, that plaintiffs were justified in relying on

the specification as to quantity on the label and that no duty was cast on them to make enquiries to ascertain the exact quantity delivered, and hence, there was no contributory negligence on their part. [p. 275, col. 1.]

There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an Appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. [p. 274, cols. 1 & 2.]

Appeal by special leave from judgment of the Supreme Court of South Africa (Innes, J., and Solomon, J.; Lord de Villiers, C. J., dissenting).

Sir Robert Finlay, K. C., Mr. C. H. Tredgold, K. C. (of the South African Bar), and Mr. Horace Douglas (for Sir H. Greenwood, serving with His Majesty's Forces), for the Appellants.

Messrs. Leslie Scott, K. C., and D. M. Hogg, for the Respondents.

JUDGMENT.

LORD SUMNER.—The single question in this case is whether *culpa* was imputable to the plaintiffs either in causing the damage sued for jointly with the defendants' *culpa* or in failing to avert the consequences of the defendants' *culpa* by the exercise of reasonable care. It has throughout been spoken of as contributory negligence to be tested by the English decisions. Whatever difference there may be in general between the English doctrine of contributory negligence and the Roman-Dutch doctrine of *culpa*, no confusion arises here from speaking of the one in terms of the other.

By a majority the Supreme Court of South Africa held that Harrington ought to have understood from the telegrams that he had received all the drums sent, and that they contained 5½ cwt. of arsenite of soda; that he was accordingly negligent in acting on the assumption that they only contained 93½ lbs. of arsenite of soda, the labels notwithstanding; and that his statement, that he thought 5½ cwt. had only been sent off, and had not yet been delivered to him, was an afterthought and an untruth. Mr. Justice Solomon adds as an alternative view that even if Harrington's explanation were true his conduct was nevertheless careless, and that he ought not to have mixed and used the dip till he had obtained explanation from Messrs. Lennon, since 'a telegram

BRITISH SOUTH AFRICA COMPANY v. LENNON, LIM.

to Lennons would have cleared up the matter in a day." A further and apparently a fresh argument was advanced at their Lordships' Bar in the form of a dilemma—*first*, that Harrington was careless, as above stated; and *secondly*, if he was not, it was said that the appellants' "farms" office at Salisbury was, because the officials there ought to have understood from Harrington's telegram what had occurred, and by applying to Messrs. Lennon at once could have cleared up the matter in time.

As to Harrington's negligence, it is to be observed that the question was one exceedingly personal to himself. The reasonableness of his conduct, under the circumstances, was very much dependent upon what he knew, thought and believed on September 11, when he mixed the dip, and on September 12th, when he had it used. He may have been stupid, but no case was really made that, being what he was, he ought not to have been employed. His judgment may have been honestly at fault, but that alone would be no defence. If a man of ordinary care, standing in his place, would have read the telegrams as he says that he did, have believed in the explanation in which he says that he believed, and would thereupon have acted as he acted, and if his account of his reading of the telegrams and of his belief in the explanation of them be true, then the conclusion of fact that he was not guilty of negligence was fully supported by the evidence and was right.

Harrington was examined and cross-examined at length. If he gave a flippant answer or two, the Trial Judge was best able to decide how far that impaired the general value of his evidence. In rejecting Harrington's explanation of his understanding of the telegrams, Mr. Justice Solomon observes that "nowhere does he state that at the time of the occurrence he believed that this was the true explanation." There appears to be some oversight here, far from the evidence Harrington clearly meant to say that when he mixed the dip he believed that the drums sent had not all been delivered, and so the Trial Judge took it.

Their Lordships are far from saying that this conclusion was binding upon the Court of Appeal. There are cases in which, in face of the irrefragable testimony of con-

temporary written communications or of a course of business, an Appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. The present, however, is by no means such a case. The telegrams which Harrington received state that $5\frac{1}{2}$ cwts. of arsenite of soda had been despatched in two lots. They do not say in how many drums this quantity was contained. Nicely scrutinised, they might disclose that it was contained in eleven drums, the very number which Harrington had in hand, and, therefore, that it had all been delivered to him; but this riddle was by no means plain for a stockman to read. South Africa is familiar with two tons—the ton avoirdupois and the metric ton—and under the names of the "long" hundredweight and the "short" it enjoys two standards of weight. Unfortunately, not only is each called a hundredweight and its moiety half a hundredweight, but people write 50 lbs. when they mean 56 lbs. This was done in the Salisbury office telegram of September 9, but no one has suggested that this was negligence or that it affected the cause of action. Accordingly, if Harrington was to identify the eleven drums, weighing 616 lbs., which were in his hands, with the unspecified number of drums containing the quantity of arsenite of soda mentioned in the telegram, he had to divine that in the expression "one 50 lbs. the other 5 cwts.," the hundredweights were "long" though the half-hundredweight appeared to be, and really might be, "short", and that the half-hundredweight really was "long" though it was expressed as "short." So understood, the telegram certainly told him that 616 lbs. had been sent, and 616 lbs. was the quantity which he had received. If, however, the 5 cwts. were "short" hundredweights, as the 50 lbs. appeared to be a "short" half-hundredweight, all that had been sent was 550 lbs. and then at $8\frac{1}{2}$ lbs. of arsenite of soda to the drum, which he said he believed to be the case on the faith of the label, a large quantity must have been still on the way. Probably he went through no particular mental process, but simply accepted the explanation which occurred to

BRITISH SOUTH AFRICA COMPANY v. LENNON, LIM.

him. That would be neither astonishing nor careless in itself. Certainly such telegrams are not so clear and convincing as to warrant the conclusion that Harrington could not have been truthful, and that he had deceived the Trial Judge.

The alternative suggestion that an enquiry of Messrs. Lennon would have been a quick and certain way of solving the puzzle, depends on whether Harrington or the Salisbury office made it, and on Messrs. Lennon's willingness and ability to give the correct answer when applied to. When a claim was made for the loss against Messrs. Lennon, based on an allegation of negligence in labelling the drums, twenty-three days elapsed before they admitted, and then as to one drum only, "that one of our staff inadvertently placed a label properly belonging to an 8½ lbs. tin on the 56 lbs. drum," at the same time charging Harrington with gross carelessness or incapacity. There is certainly nothing here to show much willingness on their part to admit an error on September 11, even if they then knew of it. Even down to December 16 Messrs. Lennon confined their admission of error to one drum, disputing that any error could be proved as to the other ten. Though the defendants' servants were carefully asked if any enquiry about the label had been made of them before the cattle were dipped, they were equally carefully not asked whether, if an enquiry had been made, they could and would have cleared up the mystery then. Owen, the egregious person who committed this blunder, was never asked to say that upon enquiry from outside he would have made a clean breast of what he had done. It is true that the Trial Judge says "an enquiry would almost immediately—in a few minutes if they had sent a man down to Lennon's—have elicited the fact that these drums were wrongly labelled." This, however, rests on nothing in the evidence, and is true only if it be assumed that the enquiry would have reached Owen and that Owen would have confessed what he had done. In their Lordships' opinion this point, as a ground for finding negligence against Harrington himself, has no foundation, for it was never suggested that he should have disregarded the regular routine and have telegraphed to any one but the "Farms" office; and as regards the officials there, it is

only a plausible speculation, which is not really supported by any substantial evidence.

It ought to be remembered throughout this case that, admittedly, Messrs. Lennon's reputation in their business is high, and that their clerk's blunder was as extraordinary ■ it was unpardonable. Persons in Harrington's position, or in the position of the officials at Salisbury, were warranted in putting great faith in the correctness of the labels under which Messrs. Lennon sent out their goods, and, however they might be perplexed by the discrepancy between the label and the weight of the drum, could not be reasonably expected either to hit on the true explanation of it or to hold their hands for fear that a description proceeding from so respectable a firm might yet be so grossly erroneous. If no such idea occurred to them, they cannot be stamped as negligent in consequence. Harrington was pre-occupied, and not unreasonably, by the fear that he had not arsenite of soda enough, not that the label was false or that he had far too much. His duty was to make and use a dip with the arsenite of soda ordered by the Salisbury office and sent in by Messrs. Lennon. If the dip was too weak, it might not kill all the ticks, but, at any rate, it would not kill any cattle. Why should he be expected to divine that, on the contrary, thanks to the defendants' fault, his dip was too strong and his surmises were mistaken? After careful examination of the evidence their Lordships have been unable to avoid the conclusion that the decision of the Trial Judge was not reasonably open to exception, and that there was no sufficient ground for interfering with it, and they will humbly advise His Majesty that it should be restored, and the judgment appealed against should be reversed and the present appeal should be allowed, with costs here and below.

Appeal allowed.

Solicitors for the Appellants: Messrs. Coward & Hawksley, Sons & Chance.

Solicitors for the Respondents: Messrs. Slaughter & May.

DIGBIJAI SINGH v. HIRA DEVI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 170
OF 1915.

February 28, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

Kunwar DIGBIJAI SINGH—DEFENDANT—
APPELLANT
versus

HIRA DEVI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Jurisdiction—Suit for profits in respect of rents of shops and houses, market dues and ground rents—Suit cognizable by Civil Court only.

A claim for the plaintiff's share of the rents of shops and houses, market dues and ground rents in connection with a market realized by the defendant, a *lambardar*, is not cognizable by the Revenue Court under the provisions of section 164 of the Agra Tenancy Act, inasmuch as the jurisdiction of the Revenue Court is excluded unless the profits claimed are strictly in respect of revenue-paying lands. [p. 276, col. 2; p. 277, col. 1.]

First appeal from the order of the District Judge, Moradabad, dated the 16th August 1915.

Mr. B. E. O'Connor (with him Messrs. Nihal Chand and Sital Prasad Ghose), for the Appellant.

Mr. Rama Kant Malaviya, for the Respondent.

JUDGMENT.

PIGGOTT, J.—In this case the plaintiff and the defendant are both co-sharers in a certain *mahal* and the defendant is the recorded *lambardar* of the same. The plaintiff brought the present suit in the Civil Court, alleging that the defendant had during the years in suit realized certain moneys on behalf of himself and of the plaintiff, in respect of which the latter claimed his share. The moneys in question are described as being rents of certain shops and houses, market dues and ground rents paid in connection with a market. Apart from his defence on the merits, the defendant pleaded that these realizations had been made by him in his capacity of *lambardar* of the *mahal*, and that the only form of suit which could be brought against him would be a suit under section 164 of the Agra Tenancy Act (Local Act II of 1901). He also pleaded that a suit under the provisions of the Tenancy Act had already been brought against him as *lambardar* in the

Revenue Court, and that, of the claim now put forward, a part, namely, the portion relating to the rents of shops and houses, had been included in the claim before the Revenue Court and dismissed by that Court, while the remainder of the claim had not been included in the suit brought in the Revenue Court, whereas it should have been so included. The Court in which the present suit was filed upheld the defendant's contention on the point of law and held that the whole of the present suit was barred, either by the provisions of section 11 of the Code of Civil Procedure, or by those of Order II, rule 2, of the same Code. In appeal the learned District Judge has reversed this finding and remanded the case for trial on the merits. The defendant appeals against the order of remand. We have been referred to one authority which certainly has some bearing on the question of law involved. It is the case of *Baldeo Singh v. Beni Singh* (1). The learned Munsif seems to have thought that that case was authority for his decision; but if it be attentively examined, it seems to be all the other way. The learned Chief Justice in that case came to the conclusion that the money claimed in the suit then before him was part of the income of a village derived from revenue-paying land, and that consequently the *lambardar* who had realized it was bound to include it among the divisible profits for the benefit of other co-sharers, and could be made to account for the same by means of a suit in the Revenue Court. The learned Judge who concurred in the decision, laid it down that the word "profits" should be understood to mean all income which the *lambardar* of a *mahal* realises by virtue of his position as such, save and except the income derived from lands occupied by dwelling houses and manufactories or appurtenant thereto. The income in question in the present case would seem clearly to be income derived from land occupied by dwelling houses or appurtenant thereto. So far as I can gather from the record, it is not revenue-paying land within the sense in which that ex-

(1) A. W. N. (1839) 57.

NARAINBATI KUNWARI v. RAMDHARI SINGH.

pression was used by the learned Chief Justice in the case under reference. The learned District Judge has based his decision upon a somewhat broader ground; the point seems to me to be a very arguable one if it came before us as *res integra*. I think, however, it is virtually covered by the decision to which I have referred, and that this is a matter in which it is peculiarly important that the established course of decisions should not be disturbed. At any rate I am not prepared to dissent from the conclusion arrived at by the learned District Judge that the present claim was not one which could have been maintained as a suit for profits in the Revenue Court under section 164 of the Tenancy Act. If this is so, then both the objections taken fall to the ground, as neither Order II, rule 2, of the Code of Civil Procedure, nor section 11 of the same Code could bar the present suit. I would, therefore, dismiss the appeal with costs.

WALSH, J.—I concur.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 263 OF 1913.

April 6, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

Musammam NARAINBATI KUNWARI AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMDHARI SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Alienation by widow—Debt incurred for daughter's daughter's marriage, whether chargeable on husband's estate—Daughter's daughter, residence with maternal grandmother before marriage—Moral duty—Right to maintenance from maternal grandfather's property—Construction of document—Mortgage of widow's 'right and interest', meaning of.

A daughter's daughter, in a Mitakshara Hindu family, has no legal claim for maintenance from the estate left by her maternal grandfather. [p. 279, col. 1.]

The marriage of a daughter is a religious act and a widow should charge her husband's estate with the costs of the marriage of the daughter and the daughter has also a right to be maintained by the estate. [p. 279, col. 1.]

As, after marriage, the daughter enters into the family of her husband, her daughter has no claim to have her marriage performed out of her maternal grandfather's estate. The fact that she was always living with her maternal grandfather and was an orphan at date of her marriage casts a moral duty on the grandmother to have her properly married, but will not be a legal necessity of such a nature as to bind the estate. [p. 279, col. 1.]

A mortgage by a widow of her 'right and interest' in her husband's estate does not indicate necessarily that she mortgaged only her life-interest. [p. 278, col. 2.]

Per Roe, J.—A widow's estate cannot be made liable for expenses incurred in discharging a moral obligation, though it was brought on the widow's family by reason of pressure of local Hindu opinion. When the moral obligation is brought about by the widow's voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations, and not legal obligations for which her husband's estate could be encumbered. [p. 279, cols. 1 & 2.]

Mokhada Dassee v. Nundo Lal Halder, 28 C. 278 at p. 288; 5 C. W. N. 297, referred to.

Vappuluri Tatayya v. Garinalla Ramakrishnamma, 6 Ind. Cas. 240; 34 M. 288; 8 M. L. T. 74; 20 M. L. J. 799; (1910) M. W. N. 222, explained.

Appeal against the judgment and decree passed by the Officiating Second Subordinate Judge, Monghyr, dated the 29th of April 1913.

Messrs. P. R. Das, Rai Guru Sharan Prosad and N. C. Roy, for the Appellants.

Messrs. Pugh, Jayaswal and Kulwant Sahai, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Monghyr, dated the 29th April 1913. The suit was instituted on the basis of a mortgage-bond executed by a lady named Anupbati on the 5th Bysack 1305, corresponding to the 9th June 1898. Before I refer to the facts of the case it is necessary to mention here the relationship of the parties concerned. One Maharaj Singh was the ancestor of the defendants. He was married to one Narainbati, who is the defendant No. 1 in the suit. He had two sons, namely, Jugal Prasad and Kamla Prasad. Jugal Prasad is defendant No. 2 in the suit. Kamla Prasad had two wives, namely, Sunderbati and Anupbati. This Anupbati is the mortgagor of the bond in

NARAINBATI KUNWARI V. RAMDHARI SINGH

question. By Anupbati, Kamla Prasad had a daughter, named Surajbati. This daughter Surajbati was married to one Lalji Singh, son of Tota Singh, and Adyabati was the daughter of Surajbati and Lalji. Anupbati mortgaged some shares in two or three villages to one Ramdhari Singh, who is the plaintiff in the suit. By this mortgage the plaintiff advanced to Anupbati a sum of Rs. 500 and the mortgage-bond recites that this loan was for the purpose of performing the marriage of Adyabati, her daughter's daughter. The plaintiff brought the suit for the realisation of Rs. 7,000 and odd, which includes the principal of Rs. 1,500 and interest and double interest. The defendants contested the suit on the ground that Anupbati had mortgaged only her life-interest, and she being dead, the present suit is not maintainable against the present defendants. Another contention on behalf of the defendants was that the claim was barred by reason of limitation, and that in accordance with the Hindu Law, the performance of the marriage of Adyabati cannot be treated as a charge on the estate of Kamla Prasad. The question of limitation arises in this way. The present suit has, no doubt, been instituted more than 12 years after the due date as mentioned in the bond. The due date mentioned in the bond is the month of *Bysack* 1307 *Fasli*. The present suit was instituted on the 18th May 1912, that is, more than 12 years after the date fixed for the repayment of the bond. But there is an endorsement on the back of the bond showing payment of a portion of the interest on the 5th *Asar* 1314 *Fasli*, a sum of Rs. 100 through Manohar, a cook. If the money was really paid as indicated by the endorsement, the limitation would begin to run, not from the due date as mentioned in the bond, but from the date of the endorsement. On behalf of the defendants-appellants it has been conceded that if this endorsement is a genuine one, the suit would be saved from limitation. The evidence with regard to the endorsement is, I find, in the deposition of Ramdhari Singh, plaintiff. He said, Manohar, the cook of Anupbati, paid Rs. 100 on account of the interest of the bond to her. "I endorsed it on the bond." Practically there has been no cross-examination on the question

of the payment of the Rs. 100. The cross-examination on that point consists of about two or three lines, wherein it was suggested that Manohar was in service under the plaintiff. The plaintiff has denied it; no evidence has been put forward on behalf of the defendants to shew that Manohar was never in the employ of Anupbati, and that he was in service under the plaintiff. Mr. Das, appearing for the appellants, admitted that there was no evidence to contradict the statement of the plaintiff about the payment of Rs. 100, and it is conceded that that was a positive statement, which has not been rebutted by the defence, and the Court may take the payment of Rs. 100 as a fact. I am of opinion, therefore, that the payment of Rs. 100 on the 5th *Asar* 1314 saved the claim from limitation.

The next point urged is that Anupbati mortgaged only her life-interest. Our attention has been drawn to certain expressions in the bond itself. At two places in the bond it is stated, that she mortgaged her shares in two or three of the villages. In that connection she says, "my right and interest therein." She means whatever right she had, and this does not indicate necessarily that she had mortgaged only a life-interest. But she further in the same document says, "I, the declarant, or my heirs and successors shall not, until repayment of this bond with principal and interest, etc." This really shows that what she intended to mortgage was a heritable estate and not a life estate. I think this point also fails.

Then the question as to whether in a Hindu family a daughter's daughter can have any claim for maintenance from the estate left by a maternal grandfather. A passage from Mayne was referred to in this connection, which lays down a rule of law based on the pronouncement of the Judicial Committee. That author at page 78, 3rd Edition, says, "it is admitted on all hands that if there be collaterals of the husband the widow cannot, of her own will, alienate the property, except for special purposes, a religious or charitable purpose or those which are supposed to conduce to the spiritual welfare of her husband. She has a larger power of disposition than that

NARAINBATI KUNWARI v. RANDHARI SINGH.

which she possesses for the purely worldly purposes, and to support an alienation for the last she must show necessity." Adyabati's mother was married to one Lalji, who was the son of Tota Singh. There can be no doubt that in accordance with the Hindu Law, the marriage of a daughter is a religious act, and the estate should be charged with the costs of marriage of the daughter, and the daughter has also the right to be maintained by the estate. But once she has married she enters into the family of her husband. Surajbati, therefore, after her marriage became a member of the family of Tota Singh, her father-in-law, and it was, therefore, the duty of Lalji and his father Tota Singh to see that Adyabati, the daughter of Lalji, was married. On behalf of the respondent it has been pointed out that Anupbati having only a daughter, namely, Surajbati, was anxious to keep the daughter in her own house even after her marriage, and that, therefore, Lalji, a poor cultivator's son, was selected as the husband of Surajbati, so that he may come and live in his mother-in-law's house as a *ghurjamai* and that since this marriage of Surajbati she always remained in her mother's house, and that, therefore, it was the duty of Anupbati to see that Surajbati's daughter was properly married. Tota Singh was a cultivator, and from the evidence it appears that he had about 20 *bighas* of cultivation; merely because Adyabati remained with her grandmother Anupbati is no ground, according to Hindu Law, to charge the estate of Kamla Prasad with the cost of her marriage. It may be a moral duty to see that this girl was properly married, but I am not convinced that this can at all be considered as legal necessity of a nature that would bind the estate. That being my opinion, the appeal is decreed and the suit is dismissed with costs.

ROE, J. I agree that the appeal should be decreed and the suit dismissed with costs. All that I wish to add to the judgment of my learned brother, is that throughout Mr. Pugh's argument an attempt has been made to make a widow's estate liable for expenses incurred in discharging a moral obligation brought upon the widow's family by reason of pressure of local Hindu opinion. This argument is based upon the decision in the case of *Vappuluri Tatayya v. Garinalla Rama-*

krishnamma (1). There is no doubt, as my learned brother has pointed out, that legally there was no obligation to maintain the child Adyabati. This is perfectly clear from the case of *Mokhada Dissee v. Nundo Lal Haldar* (2). The point Mr. Pugh takes is that there would have been grave dissatisfaction among the Hindu community if this child had not been married from the house of Anupbati with the ceremonial befitting the granddaughter of a *zemindar*. I hold that this moral obligation was brought upon the widow Anupbati by her own voluntary act in bringing the child Anupbati to her own house. That being a clearly voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations, and not legal obligations for which the estate of Kamla Prasad could be encumbered. It is to be noted, moreover, that this case of *Vappuluri Tatayya v. Garinalla Ramakrishnamma* (1) does not go nearly as far as Mr. Pugh contends. A widow can only alienate the deceased husband's estate for some purpose connected with his spiritual welfare. The marriage of a daughter's daughter is not a matter in which, outside Bengal, the maternal grandfather is concerned. So long as Tota Singh was alive and in a position to arrange for his son's daughter's marriage, that marriage was a matter for Tota Singh to arrange. It is in evidence that Tota Singh gave the girl away. Any assistance rendered by Anupbati was voluntary assistance. It conferred no spiritual benefit on her deceased husband. The alienation was a voluntary alienation, not an alienation for legal necessity.

Appeal allowed.

(1) 6 Ind. Cas. 240; 34 M. 288; 8 M. L. T. 74; 20 M. L. J. 793; (1910) M. W. N. 222.

(2) 5 C. W. N. 297; 25 C. 278 at p. 288.

SRI RAM V. MOHAN LAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 46 OF 1915.

January 6, 1916.

Present:—Mr. Stuart, A. J. C.

SRI RAM—JUDGMENT-DEBTOR—
APPELLANT

versus

MOHAN LAL—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 22
—Irregular or defective application, notice under—
Limitation.

The issue of a notice under Order XXI, rule 22,
Civil Procedure Code, gives a new start for limitation,
even though the preceding application upon which
the notice was issued was defective or irregular.

Mohammad Abdul Karim Khan v. Nawaz Singh, 8
Ind. Cas. 377; 13 O. C. 303, followed.

Ram Dayal v. Narsingh Bahadur Singh, 4 Oudh and
Agra Law Reporter 569, explained.

Appeal against the order of the District
Judge, Lucknow, dated the 27th August
1915, upholding that of the Additional
Munsif, Lucknow, dated the 13th July 1915.

Babu Bisheshar Nath, for the Respondent.

JUDGMENT.—The decision of the Bench in
Mohammad Abdul Karim Khan v. Nawaz Singh
(1) lays down distinctly that the issue of a
notice under section 248 of Act XIV of
1882 corresponding to Order XXI, rule 22,
of the present Code gives a new start for
limitation even though the preceding appli-
cation upon which the notice was issued was
defective or irregular. This decision follows
the decisions of the High Court of Allahabad
in *Behari Lal v. Salik Ram* (2) and *Dhonkal*
Singh v. Phakkar Singh (3) and differs from
the view taken by the Bombay High Court
in *Bhagwan Jethiram v. Dhondi* (4). The
appellant, who has argued the case in person
with considerable ability, has pointed out to
me that I have decided in *Ram Dayal v.*
Narsingh Bahadur Singh (5) that where an
application for execution of a decree does not
contain a description of the property sufficient
to identify it, it cannot be considered as a
legal application and cannot have limitation.
He suggests that the view that I took in that
case is inconsistent with the view taken by
the Bench in *Mohammad Abdul Karim Khan*

(1) 8 Ind. Cas. 377; 13 O. C. 303.

(2) 1 A. 675.

(3) 15 A. 84; A. W. N. (1893) 36.

(4) 22 B. 53.

(5) 4 Oudh and Agra Law Reporter 569.

SOMWARPURI V. MATABADAL.

v. Nawaz Singh (1). Even if the view that
I took had been inconsistent with the view
taken in *Mohammad Abdul Karim Khan*
v. Nawaz Singh (1), I should be bound to
follow the latter decision, as soon as it was
brought to my notice, as it is a decision of a
Bench. But I cannot see that the view
taken by the Bench is inconsistent with the
view taken by me. All that I laid down was
that an application for execution of a decree
containing certain inherent defects was not
an application according to law. I was not
called upon to decide, and I did not decide,
whether the issue of a notice under Order
XXI, rule 22, did or did not give a new
start for limitation even though the preced-
ing application upon which the notice was
issued was defective or irregular. I, there-
fore, find the first six points against the
appellant. On the last two points I
agree with the lower Courts that such a
defect as arose by the omission to file the
mukhlarnama was a remediable defect which
was remedied in a legal manner. For the
above reasons the appeal fails and is dis-
missed. The appellant will pay his own
costs and those of the respondent.

Appeal dismissed.

ALLAHABAD HIGH COURT. FULL BENCH.

CIVIL MISCELLANEOUS No. 316 OF 1915.

March 10, 1916.

Present:—Justice Sir George Knox, Kt.,
Justice Sir P. C. Banerji, Kt., and
Mr. Justice Tudball.

Mahant SOMWARPURI—PETITIONER
versus

MATABADAL AND OTHERS —OPPOSITE PARTY.

Stamp Act (II of 1899), s. 57—Bundelkhand Aliena-
tion of Land Act (II of 1903), s. 17—Mortgage by
Collector on behalf of mortgagor, whether exempt from
stamp duty.

A mortgage-deed executed by a Collector under the
provisions of section 17 of the Bundelkhand Aliena-
tion of Land Act (II of 1903) on behalf of a mort-
gagor is not exempt from the stamp duty chargeable
under Act II of 1899. [p. 281, col. 2.]

Stamp reference under section 57 of
Act II of 1899 made by the Board of
Revenue.

Mr. A. E. Ryres, in support of the
Reference.

HORI LAL v. THAKUR BHAGWAN BAKHSH.

Mr. S. D. Sinha, for the Opposite Party.

JUDGMENT.—The proceedings before us consist of a reference by the Chief Controlling Revenue Authority under section 57 of Act No. II of 1899. The case as stated to us is that on receipt under section 17 of the Bundelkhand Alienation of Land Act (II of 1903) of a decree passed by the Munsif of Allahabad against Mata Badal and others, the Collector of Allahabad offered the decree-holder, Mahant Somwarpuri, secretary of the Akhara Niranjani, a usufructuary mortgage of the judgment-debtor's property for twenty years in full satisfaction of the decree. The decree-holder expressed his willingness to accept the offer and the Collector, therefore, executed a mortgage-deed in accordance with the powers conferred on him under the said Act II of 1903.

We have perused the particular deed and have considered its provisions. The question asked by the Chief Controlling Revenue Authority is, whether this mortgage-deed requires to be stamped and registered.

There is only one section of Act No. II of 1899 which sets out what instruments are instruments on which no duty should be chargeable. The Government has, however, power to remit duties under this Act in certain cases. As regards section 3 of Act No. II of 1899 we are of opinion that this mortgage-deed is not an instrument executed by, or on behalf of, or in favour of the Government. It is, as it purports to be, an instrument executed by the Collector of Allahabad, under the provisions of section 17 of the Alienation of Land Act, No. II of 1903. Such instrument can in no way be said to be executed in favour of, or on behalf of, Government; if any thing, it is an instrument executed in favour of the mortgagee by the Collector on behalf of the mortgagor. No remission under which this document will fall has been pointed out to us and we know of none. Our attention was directed to the remissions set out in Appendix C of the Stamp Manual. There is a Government Order, dated the 31st August 1909, which expressly remits duty upon a fresh mortgage and one executed in lieu of a previous mortgage-deed for the purpose of giving effect to the provisions of section 9, sub-section (2), of the Bundelkhand Alienation of Land Act, 1903. The document before

us can in no sense be said to have been executed under section 9 of the Bundelkhand Alienation of Land Act. The existence of this exception points, if anything, to the conclusion that it was not the intention of Government to remit the duty on a document executed under section 17. This is our answer to the reference made to us under the Stamp Act.

With reference to the question whether the mortgage-deed requires to be registered, we know of no power conferred upon the Board of Revenue to refer questions to this Court under the Registration Act.

We, therefore, do not answer this part of the question.

Reference answered.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 112 OF 1915.

January 26, 1916.

Present:—Mr. Lindsay, J. C.

HORI LAL—PLAINTIFF—APPELLANT

versus

Thakur BHAGWAN BAKHSH AND

OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 70—Registration Act (XVI of 1908), s. 60—Execution of document, proof of—Admission of execution, meaning of—Registrar's certificate, whether proof of execution.

Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, signed by the party making the transfer. [p. 282, col. 2.]

Section 70 of the Evidence Act refers only to admissions made in the course of a trial and any admission which can be availed of under section 70 is only evidence against the party himself. [p. 282, col. 2; p. 283, col. 1.]

The endorsement of a Registrar cannot be relied upon under section 60 of the Registration Act in proof of the execution of a document. [p. 283, col. 1.]

Appeal against the decree of the District Judge, Sitapur, dated the 5th February 1915, upholding that of the 1st Subordinate Judge, Sitapur, dated the 6th August 1914.

Babu Ishwari Prasad, for the Appellant.

Mr. A. P. Sen, for Respondents Nos. 1 to 3.

Mr. H. C. Dutt, for Respondent No. 6.

HORI LAL v. BHAGWAN BAKSH.

JUDGMENT.—This appeal arises out of a suit for redemption brought by the plaintiff-appellant Hori Lal. One of the principal pleas taken in defence was that the plaintiff had no title to redeem. The first Court decreed the claim. The second Court has dismissed the suit, finding in favour of the defendants that the plaintiff had no right of redemption. It is admitted that the plaintiff's title rests upon a certain deed of sale, which is said to have been executed on the 17th of August 1884 in favour of his grandfather, a man named Salik Ram. The sale-deed is said to have been executed by one Daljit Singh. The property comprised in the sale-deed consisted of an 8-pies share, which was at the time of the alleged transfer subject to a mortgage. The lower Appellate Court has found that the plaintiff failed to prove that Daljit Singh had executed this deed in favour of the plaintiff's predecessor-in-interest, Salik Ram. It is admitted that only two witnesses were produced in order to prove that this document had in fact been executed by Daljit Singh. The document, although not one which is required by law to be attested, purports to have been attested by three witnesses two of whom are proved to be dead. The third attesting witness, a man named Sitla Sahai who was a clerk to Salik Ram, gave evidence in the case but he was unable to state that this document had in fact been executed by Daljit Singh. In his evidence he admitted that the document bore his signature as a witness but he added that he had no recollection of Daljit Singh; and he stated plainly that he was unable to remember the circumstances in which the document came to be written and attested by him. There is not a word in the statement of this witness regarding the signature of Daljit Singh upon this document. The only other witness who was produced was the Sub-Registrar of Sitapur. Even if we accept entirely the statement of this man all that he says is that he registered the deed, that he knew Daljit Singh, the man who purports to have executed it, and that he does not remember whether Daljit Singh signed the deed in his presence. He further states that Daljit Singh admitted execution of the document in his presence and deposed to the signatures of the two deceased attesting witnesses. There is not a

word in the Sub-Registrar's evidence by way of identification of the signature by Daljit Singh, which appears on this document. The learned Judge of the Court below touched upon various other matters affecting this question of proof of execution, but it is sufficient for me to say that the evidence on record does not amount to proof that the deed of transfer was in fact executed by Daljit Singh. I agree, therefore, with the finding of the Court below, and the finding is one of fact which is not open to challenge in second appeal.

The learned Counsel who appeared for the appellant argued that there has been an error of law on the part of the Court below. It was contended that in coming to his decision the District Judge has not paid regard to the provisions of sections 67 to 73 of the Indian Evidence Act and further it was pleaded that the learned Judge failed to consider the bearing of section 60 of the Registration Act upon the case. With regard to the provisions of the Evidence Act which have just been mentioned, it seems to me that there is nothing in them which can help the appellant. Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, in a case like the present, signed by the party who was making the transfer. The sections above mentioned lay down various methods of proof which depend upon the question whether or not the document is required by law to be attested, but in all cases it is necessary to prove the signature of the executant. Stress has been laid on the provisions of section 70, which declares that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. In the *first* place, it does not appear that the terms of section 70 apply to the deed in suit which, as already said, was not a document of which the law required attestation. In the *second* place, the admission which is referred to in section 70 only refers to admissions made in the course of the trial [*Vide Abdul Karim v. Saliman* (1)]. No such admis-

MUTSADDI MIAN v. MAHOMED IDRIS.

sion was made in the course of the trial of the present suit, for the defendants denied the execution of the deed by Daljit Singh; and *lastly*, any admission which can be availed of under section 70 is only evidence against the party himself. It is impossible, therefore, to allow the contention put forward for the appellant that an admission of the execution by Daljit Singh to the Sub-Registrar of Sitapur was sufficient proof of execution as against the defendants-respondents.

Next with reference to the terms of section 60 of the Registration Act, here again it seems to me impossible for the appellant to rely upon this provision of the law in proof of execution of the document in dispute. Section 60, clause (2), provides that the certificate of registration is admissible for the purpose of proving "that the document has been duly registered and that the facts mentioned in the endorsement referred to under section 59 have occurred as therein mentioned." Section 59 refers back to two earlier sections, namely, sections 52 and 58. Section 52 lays down that the day, hour, place of presentation and the signature of every person presenting a document for registration shall be endorsed on every document at the time of presenting it. Section 58 also provides that the document must be endorsed at the time of registration with the signature and addition of every person who admits the execution of the document. It is clear, therefore, that section 60 read with these last two mentioned sections could not be resorted to by the plaintiff for the purpose of proving the fact that Daljit Singh executed the deed now in dispute. I must hold, therefore, that the finding of the lower Appellate Court is not liable to be set aside on any ground of law and this being so, it must be taken that the plaintiff failed to prove execution of the document in favour of his predecessor-in-title. With this finding the case of the plaintiff was bound to fail. I, therefore, maintain the decree of the Court below and dismiss this appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 29, 1915.

Present: Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

Sheikh Haji MUTSADDI MIAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAHOMED IDRIS AND OTHERS —

PLAINTIFFS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI B. C. of 1859) s. 14—Arrears incorrectly shown in Collector's books as due on separate account—Sale of whole estate—Requisition to co-sharers to purchase share as bids did not reach amount due—Re-sale on co-sharers' failure to purchase—Closing accounts of whole estate—No arrears due on date of sale for kist of period for which sale held—Irregularity—Sale inoperative—Mahalwar Register, copy of entries in, if admissible in evidence.

A revenue-paying estate was put up for sale under section 14 of the Bengal Land Revenue Sales Act for arrears due on a separated share, which was entered in a separate account in the Collector's books. The sale was ostensibly held for arrears of the March kist, but the bids not having reached the amount due, the Collector intimated to the co-sharers that they were at liberty to purchase the share within June 7, 1904, by paying the arrears due under section 14 of Act XI of 1859. The co-sharers not having purchased the share, the Collector again put up the whole estate for sale on 19th September 1904 as for the March kist. Meantime, payments were made, in consequence whereof the March kist was not in arrear though an arrear of Rs 2 and odd was due for the June kist.

Held, by the Judicial Committee affirming the judgment of the High Court,

(1) that the sale of the entire estate under section 14 of the Bengal Land Revenue Sales Act was void. [p. 286, col. 1.]

(2) that the Collector was bound to close the separate accounts on 17th June 1904, and as on that date there was no arrear in respect of the March kist, a sale as for the March kist was *ultra vires*. [p. 286, col. 1.]

Copies of entries in a *Mahalwar* Register kept under section 4 of Act VII of 1876 are admissible in evidence. The mere fact that it bears the signature of the Superintendent of Survey on a corner does not make it a document kept by that officer. [p. 284, col. 2.]

Appeal heard *ex parte* from a judgment and decree of the High Court, Calcutta, dated September 2, 1909, reversing those of the Subordinate Judge of Saran, dated June 26, 1907.

FACTS.—This was a suit for setting aside a sale for arrears of revenue. A *Mahal* called Fakhruddinpur had many proprietors, some of whom had opened accounts with the Collectorate to safeguard their shares in case of default made by other proprietors in pay-

MUTSADI MIAN V. MAHOMED IDRIS.

ment of dues from them. A proprietor having made default his share was put up for auction, but there was no bid sufficient to realise the dues to the Collectorate. It was then withdrawn from the auction. The Collector then closed all the accounts and put up the whole *mahal* for auction without giving the proprietors any notice to pay up the arrears. When the account was made up there was nothing owing for the *kist* (instalment) for which the *mahal* was being sold and only a very small sum of Rs. 2 owing for the other *kist*. The Commissioner dismissed the appeal for cancellation of the sale. The owners then instituted the present suit in the Court of the Subordinate Judge of Saran. It was proved on evidence that the appellants to the Privy Council who were upstarts had an eye upon the *mahal* and in order to purchase it anyhow had had recourse to underhand ways. The notices issued by the Collectorate were not duly served and the proprietors did not know as to what was really happening. The bidders at the auction were prevented from bidding and the property at the auction fetched a small price. The appellants had bought the property under a different name. The learned Subordinate Judge upheld the sale, although the aforesaid facts were brought to his notice. On appeal the High Court reversed the judgment of the lower Court by the following judgment:—

"This appeal arises out of a suit for the annulment of a sale for arrears of revenue which took place on the 19th of September 1904. The main grounds upon which the plaintiffs come to Court are two. *First*, that the Collector had no jurisdiction to hold the sale as no arrears were legally due, and, *second*, that the sale was brought about by the fraud of defendant No. 3, who was the accredited agent of some of the plaintiffs for the payment of revenue, and being as such bound to give information of the estate having fallen into arrears, did not do so, but, on the contrary, colluded with defendants Nos. 1 and 2 whose servant also he was, and purchased the estate for himself, his relation defendant No. 4 and defendants Nos. 1 and 2, entitling the plaintiffs to a reconveyance of their shares on payment of the proportionate value.

The learned Subordinate Judge has decided the suit against the plaintiffs on both

these points, and they have appealed mainly on the grounds indicated above.

The main facts of the case are that the estate called *Mahal Fakhruddinpur*, bearing *Tauzi* No. 1146 of the Saran Collectorate and consisting of two *mauzas*—*Pakri Fatehulla* and *Fakhruddinpur*—bore a Government revenue of Rs. 186-14-2 $\frac{1}{4}$. The *Mauzawar Register* kept by the Collector under section 4 of the Land Registration Act, Exhibit 19, p. 117, shows that the revenue assessed upon *Mauza Pakri Fatehulla* was Rs. 79-2-5 $\frac{1}{2}$, and that upon *Fakhruddinpur* Rs. 107-11-8 $\frac{3}{4}$. The learned Subordinate Judge says 'this so-called *Mahalwar Register* which bears the signature of the Superintendent of Survey is not binding on the Collector, as the *jama-sadar* of two villages cannot be apportioned except under the Butwara Law.' This seems to be a misconception of the Subordinate Judge. The keeping of these *Mauzawar Registers*, called *Mahalwar Registers* in Bihar, is enjoined by section 4 of the Land Registration Act, VII of 1876 (B.C.), and even before that enactment there were the Quinquennial Registers under Regulation XLVIII of 1793 and Estate Registers under Regulation VIII of 1800. The attested copy filed was taken from the Collectorate, and the mere fact that it bears the signature of the Superintendent of Survey on a corner does not make it a document kept by that officer. This document does not show any apportionment of revenue within a *mauza*, but states the revenue assessed on each *mauza*, so that the reference to the Butwara Law is quite irrelevant. Now, several separate accounts were opened in respect of this estate: four in respect of *Mauza Pakri Fatehulla*, comprising the whole 16 annas, and two in respect of *Fakhruddinpur*, comprising 6 annas, leaving 10 annas as the *ijmali* or residuary share bearing the original *Tauzi* No. 1146, the separate account shares being numbered as T. 1146/1, 1146/2, 1146/3, 1146/4, 1146/5, and 1146/6, the first four relating to *Pakri Fatehulla* and the rest to *Fakhruddinpur*. The first separate account (1146/1) was in respect of 9 annas 4 pies *Pakri* for a revenue of Rs. 46-3-1, which is exactly proportionate on the basis of the revenue for the 16 annas being Rs. 79-14-5 $\frac{1}{2}$. The second separate account (1146/2) was opened in 1872 in respect of a 2 annas share of *Pakri Fatehulla*, and the revenue fixed was Rs. 10-11-3. The third account (1146/3) was opened in 1882 for

MUTSADI MIAN V. MAHOMED IDRIS.

4 annas 8 pies for a revenue of Rs. 22-4-3, the 16 annas making a total of Rs. 79-2-10, ■ little more than the actual amount of Rs. 79-2-5½, small fractions being taken ■ units for the convenience of realization and payment. In 1884, account No. 4 bearing T. 1146/4 was opened out of account No. 2 for 6 pies, 13 *krants* and odd, and the revenue assessed was Rs. 2-11-11. Account No. 5 was opened in 1892 for 2 annas of Fakhruddinpur with a revenue of Rs. 13-7-6, and another of 4 annas Fakhruddinpur with a revenue of Rs. 23-15, both amounts being in exact proportion to ■ revenue of Rs. 107-11-8¾ for 16 annas. Thus 10 annas of Fakhruddinpur was left ■ the residuary share and its revenue should be Rs. 107-11-8¾ minus Rs. 40-6-6, the total of the *jamas* for Nos. 5 and 6, that is, Rs. 67-5-2¾. It would appear that when account No. 4 was opened out of account No. 2, the original revenue for the original No. 2 was not reduced but left as before, and the *jama* of the *ijmali* share was reduced by Rs. 2-11-1¾ which was assigned to account No. 4. In this way from June 1884 to March 1904, for a period of 19¾ years, the *jama* of account No. 2 was from year to year kept up on the erroneous basis of Rs. 10-11-6, i.e., Rs. 2-11-11 more than it should have been and the result was that account No. 2 was erroneously charged with Rs. 2-11-11 by 19¾ = Rs. 54-3-5 in excess. The arrear shown on the March *kist* of 1904 is Rs. 52-4-5, and if the accounts of the Collector had been correctly kept, the account No. 2 would not only have been not in arrears in March 1904, but have had an excess payment of Rs. 1-15-1 to its credit. It is contended that even the figure of Rs. 10-11-6 is not correct, and it should have been Rs. 9-14-4. Upon this amount being taken as the correct *jama* for the original No. 2, the excess payment would be much more on the 28th of March 1904, so that on either calculation there was no arrear due from account No. 2 on the 28th of March 1904; and the proceedings for the sale of account No. 2 for the March *kist* of 1904 are entirely void and consequently, the sale of the entire *mahal* under section 14 is also void. See *Balkishen Das v. Simpson* (1). The learned Subordinate Judge says

that 'If the plaintiffs' Pleader had shown by means of *chalans* that the owners of *khata* No. 2 have all along paid their share of Rs. 8 rent since the opening of *khata* No. 4 and that the arrear is due to their not paying Rs. 2 odd, then that would have shown to some extent the reason of this contention.' Here also the learned Judge is under a clear misconception. For as soon ■ we have it that since 1884 *khata* No. 2 has been charged with Rs. 10-11-6 and that on the 29th March of 1904 the arrear due on that basis was Rs. 52-4-4, the natural conclusion must be that the owners have paid the balance. There is another view of the case also in which the sale can be held to be *ultra vires*. Taking it for granted that the Collector's books were all correctly kept and that the plaintiffs were not entitled to rely upon the legally payable proportion of revenue for account No. 2, the arrear upon the 29th of March 1904 was Rs. 52-4-4 for account No. 2.

Account No. 2 was put up for sale for that amount on the 6th June 1904, and the bids not reaching the said amount of arrear, the Collector declared that the whole *mahal* would be sold if the co-sharers did not make a purchase under section 14 within 10 days, i. e., up to the 17th June 1904. Now, the June *kist* fell due on the 7th June 1904, and the owners made payments for that *kist*. When the co-sharers did not take advantage of the offer of the Collector under section 14 up to the 17th June, he had to sell the whole estate for such arrears as would be due upon the whole estate at that time. What he did, however, was that he closed the accounts up to 29th March 1904, and taking into account all excess payments made by other co-sharers up to March 29th, found an arrear of Rs. 3 odd upon the whole estate as due for the March *kist*, 1904, and sold the whole estate on the 19th September 1904 for this arrear of Rs. 3 odd as due up to the 29th March 1904. It is admitted that upon the basis of the Collector's books, this would be the arrear up to the 29th March and Rs. 2-0-6 the arrear up to the June *kist* upon the whole estate, and the respondent contends that ■ there were arrears on the March *kist*: as well as on the June *kist*, the *mahal* was liable to sale and the question

(1) 25 I. A. 151; 25 C. 532; 2 C. W. N. 513.

MUTSADI MIAN V. MAHOMED IDRIS.

of *ultra vires* goes out, and the appellants cannot succeed on the errors and irregularities pleaded, as they were not specifically pleaded in the appeal before the Commissioner. It is admitted that the Collector was bound to close all the separate accounts before he could sell the entire estate under section 14. The Collector became entitled to sell the whole estate on the 17th June 1904. On that date all the separate accounts must be considered as merged in one account for the whole estate, and if on that date all demands up to that date and all payments up to that date including the June *kist* were taken one against the other, there would be no arrear on the March *kist*, but there would be an arrear of Rs. 2-0-6 for the June *kist*. There being no arrear for the March *kist*, a sale held expressly for such an arrear would be *ultra vires*, although the sale might legitimately have been held for the June *kist*, which it was not. Therefore, on either view of the case, *i. e.*, whether we take the Collector's books as incorrect and base our calculations on the correct revenue assignable to the several accounts or whether we take the Collector's books as correct and consider how the Collector should have closed the separate accounts, there was no arrear for the March *kist* of 1904, and the sale must be held to be *ultra vires* and void. Having held that the sale was void on the first branch of the case, it is not necessary to go into the question of fraud and reconveyance. The learned Subordinate Judge was of opinion that defendant No. 3 was the servant of defendants Nos. 1 and 2, and that he was the agent of some of the plaintiffs for the payment of revenue, but that his treachery to the *maliks* of Fakhraiddinpur could not be of any avail to plaintiffs Nos. 1—9, who are *maliks* of Pakri Fatehulla with which defendant No. 3 had no concern. That is not, however, the right view to take of the case. If Wakif Hossein was the agent of some of the plaintiffs, and the servant or agent of defendants Nos. 1 and 2, and also interested as a co-sharer in the right of his father and uncle in one of the *manzas* comprising the estate, and if he brought about the sale in breach of his duty to the Pakri *maliks* whose agent he was, and if the defendants Nos. 1

and 2 took advantage of his treachery, no Court of Justice would be inclined to allow defendants Nos. 1 and 2 to retain the benefits of the sale. As we have said, however, we do not think it necessary to go into these questions, as our decision on the first branch of the case is quite sufficient to dispose of the appeal. The result, therefore, is that the appeal is decreed with costs of both the Courts. The sale is declared inoperative. The plaintiffs will recover possession of their shares with *mesne* profits, the amount of which will be ascertained in execution. The purchasers-defendants will be entitled to a refund of the purchase-money with interest at the legal rate."

The defendants then appealed to the Privy Council.

Sir W. Garth, for the Appellants, contended that the Collector was not bound under the law to apply the surplus payment on one *kist* to payment of arrears of another *kist*. Section 6 of the Bengal Land Revenue Sales Act expressly prohibited such a procedure. The respondents ought not to have been allowed to put forward a new case not made before the Commissioner. There was no sufficient evidence of the alleged mistake in the apportionment of the shares and the original plaintiffs were not prejudiced by such an error, if there was any. The estate might have been sold for the June *kist*, it ought to have been held as properly sold for the same.

The respondents did not appear.

JUDGMENT.

LORD SHAW.—Their Lordships see no occasion to interfere with the judgment of the High Court in this case. They agree with that judgment and will humbly advise His Majesty that the appeal be dismissed.

The respondents not having appeared, no question of costs arises.

Appeal dismissed.

Solicitors for the Appellants: Messrs. T. L. Wilson & Co.

NATIONAL BANK OF INDIA LTD. v. GHUZZNAVI.

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL SUIT No. 1152
OF 1914.

August 2, 1915.

Present:—Mr. Justice Chaudhuri.

NATIONAL BANK OF INDIA, LTD.—
PLAINTIFFS

versus

A. K. GHUZZNAVI—DEFENDANT.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 41,
—Application for examination of judgment-debtor,
grounds for—Ex parte order—Right of judgment-debtor
to apply to set aside.*

An application for examination of the judgment-debtor under Order XXI, rule 41, Civil Procedure Code, can be made at any stage of the execution proceedings. [p. 288, col. .]

An order for such examination may be made *ex parte* on a verified tabular statement but it is open to the Court to hear the objections of the person summoned before he is actually examined. [p. 287, col. 2.]

In re Premji Trikumdas, 17 B. 514, relied on.

The application should be encouraged where it may be necessary to prevent unduly dilatory, troublesome and expensive execution proceedings. It is not compulsory on the decree-holder to exhaust all the usual methods of execution before applying under this rule, but this procedure must be resorted to only when there is any difficulty about obtaining sufficient particulars of the judgment-debtor's property. [p. 288, col. 1.]

Mr. B. C. Mitter, for the Defendant.

Mr. A. A. Avelcom, for the Plaintiffs.

JUDGMENT.—A question has arisen in connection with this matter as to the procedure to be followed and the requisites for obtaining an order under Order XXI, rule 41, which corresponds to Order XLII, rule 32, of the English Supreme Court Rules of 1883. In England an application has to be made by summons before a Master in Chambers. If the debtor has appeared to the writ by a Solicitor, the summons must be served at the address for service, and an affidavit to that effect is necessary. Although our Order XXI, rule 41, is an amplification of section 219 of Act VIII of 1859 modified by section 267 of Act X of 1877, cases under it are rare. In fact a careful search among the records of this Court has resulted in the discovery of three cases only. It appears that those applications were made on verified tabular statements in the form directed by Order XXI, rule 11, sub-clause (2), and were *ex parte*. In the case of *In re Premji*

Trikumdas (1), the application appears to have been made *ex parte*. Our Court has framed no special rules with reference to this matter, and I must, therefore, hold that the present application, which was made *ex parte* on a verified tabular statement, is in order.

The defendant has been served with the order for his examination, and has now appeared by Counsel and urges that the order should be set aside. As our procedure allows such an order to be made *ex parte*, I am of opinion that it is open to the Court to hear the objections of the person summoned, before he is actually examined. In the Bombay case above cited, the party ordered to be examined applied on summons to have the order set aside. I think that procedure should ordinarily be followed. I have, however, treated this as an application to set aside my original order, and, as the plaintiff Bank was prepared to go on with the matter on that basis, I have not required a formal written application.

Counsel for the judgment-debtor has urged that the order should be set aside, as the decree-holders have not shown what steps they have taken to enforce the decree and the result thereof; that in fact they have taken no steps at all; that the Court should not make such an order before the usual methods of execution are exhausted. He relied upon a passage in Edwards on Execution to that effect (Edition 1888), which does not appear to be based upon any reported decision. I find no such statement in Anderson on Execution (Edition 1889). I, therefore, look upon the passage cited as an expression of the writer's opinion. The object of the rule is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money-decrees. It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and ought not to be lightly made. An order for personal examination is likely to operate still more harshly and cause unnecessary harassment and obviously ought not to be made, unless the Court is satisfied about the *bona fides* of the application and urgent

(1) 17 B. 514.

KISSENDOTAL JITSARIA V. ASKARAN CHOWTHMULL.

case (4) ■ two grounds. The first is, that the auction-purchaser in that case was a stranger to the suit. The second is, that in *Malkariun's* case (4) there was no decree upon ■ mortgage; there was a sale validly held in execution of ■ money-decree. In this attempt to distinguish there is no substance. The sole test applied in *Malkariun's* case (4) was, was the sale an irregularity or a nullity? "General assertions of the invalidity of such sales are only misleading when applied to a case in which the distinction between irregularity and nullity is the cardinal point" (page 348). "To enforce this liability was within the jurisdiction of the Court" (page 348). "It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage" (page 348).

The decrees have been held to be good decrees, and there is no cross-appeal against that decision. A decree against ■ Mitakshara father binds the son's interest in the joint estate. To enforce the liability of the mortgaged estates was within the jurisdiction of the Court even though their sons were not parties to the suit. It follows that it is necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage.

The appeals should be decreed with costs, the plaintiffs' suits dismissed with costs in all Courts.

SHARFUDDIN, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 70
OF 1915.

January 28, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

KISSENDOTAL JITSARIA AND OTHERS
DEFENDANTS—APPELLANTS

versus

ASKARAN CHOWTHMULL—

PLAINTIFF—RESPONDENT.

Vendor and purchaser—Contract Act (IX of 1872),
s. 118—Warranty of quality—Goods not in accordance

with contract, when to be rejected—Onus to prove rejection within reasonable time.

Some bales of jute, warranted to be of a certain quality, were purchased by the defendants under a contract, which stipulated that the plaintiff vendor was to receive 90 per cent. of the price when the defendants received documents from the Railway Company, and when the goods were actually delivered the balance of 10 per cent was to be paid. The documents were received by the defendants on the 28th July and the goods were actually delivered to the defendants on the 31st July and were taken to their godown, where they remained until the plaintiff sued for the price at the contract rate. The goods being of inferior quality the defendants on the 2nd August wrote to the plaintiff rejecting the same and asking him to remove them from their godown.

Held, that the defendants were liable to pay the price, as their rejection of the goods three weeks after delivery, having not been within a reasonable time, could not be operative. [p. 293, col. 1.]

That inasmuch as the goods were delivered to the defendants, the onus was upon them to prove that they had in fact rejected them within a reasonable time. [p. 294, col. 1.]

Appeal against the following judgment of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 16th August 1915:

"By a contract, dated the 23rd April 1914, the plaintiff firm sold to the defendants 125 bales of Dacca or Faridpore district jute at Rs. 13 per bazar maund. The shipment was to be in July. The defendants were to declare the mill or baler's name by the 30th June 1914. The jute was to be 3S guaranteed to yield 70 per cent. good sacking warp. It was provided that reimbursement was to be 50 per cent. demand draft against documents, and balance cash on delivery."

The plaintiffs allege that under the defendants' instructions they sent the goods to the Cossipore Road Station E. B. S. Ry., and on the 28th July 1914 sent the defendants the Railway receipt for 125 bales and their bill for Rs. 4,954 1/-, being 9 per cent. of the value thereof. The defendants, it is said, kept the Railway receipt and bill and promised payment. The goods covered by the Railway receipt were taken delivery of by the defendants from the Railway Station on the 31st July 1914. The plaintiffs allege that repeated requests were made for payment, but the defendants did not pay the price, but that on the 22nd August 1914, for the first time, alleged that the goods were of inferior quality and purported to cancel the contract.

KISSENDOTAL JITSARIA v. ASKARAN CHOWTHMULL.

In this suit the plaintiffs claim Rs. 5,523-6 being the value of the goods and Rs. 441-14 for interest.

The defendants admit the contract and the receipt of the Railway receipt and bill, but say that they agreed to pay 90 per cent. of the value if the goods on examination proved to be of contract quality. This they say was verbally arranged although the contract has a different provision, which is, therefore, unacceptable. That they took delivery from the Railway godown, is admitted, but they say that they found on examination that the goods were not of contract quality, but inferior and, therefore rejected same and informed "the plaintiffs' *zamaidar*" not named, "one Babu Jitmull" and the plaintiffs' *gomachta* and the broker, that they had rejected the goods on that ground, and they say further that although they repeatedly requested the plaintiffs to remove the goods, the plaintiffs never removed them; that the goods are still in the godown hired by them and the defendants claim to be entitled to Rs. 270 for godown rent, Rs. 171-4 for freight which they paid and Rs. 27-13-6 for cart hire, etc.

The first question I am called upon to determine is, as to whether the goods were of the guaranteed quality. The jute came from the Faridpore district and the plaintiffs' broker says that it was of contract quality. As against this, we have the evidence of Mr. Georgiadi and Mr. Gregory. Mr. Georgiadi examined the jute on the 28th May 1915 nearly a year after delivery. He says that the jute he examined, was inferior in quality and hardly likely to give more than 40 per cent. warp. "It was heavily rooted and croppy" Mr. Gregory examined the jute on the 7th June 1915. He estimates the yield to be about 55 per cent. He also says that "the jute was very croppy and heavy rooted" and contained "weak jute." As regards the weak jute he said that the jute had not deteriorated, although it may have been delivered in July 1914. He further said that if the jute had been originally packed wet or damp, and kept this long period, it would have lost colour and the fibre would have become weak and rotten and got marked. He found no such signs and concluded that the jute had been originally packed very dry. The method of examination by both these gentlemen was the same.

They opened some of the bales and looked at the jute. It appears from Mr. Gregory's evidence that no expert can distinguish between jute yielding 65 per cent. and 70 per cent. When he examined the jute he did not know which year's goods they were. He judged the weak jute in the consignment to be about 5 per cent. In judging he said the margin might vary up to 10 per cent. So his estimate about 55 per cent. would allow a margin of 10 per cent. and if his statement is correct that no expert can distinguish between 65 per cent. and 70 per cent., his evidence as regards quality does not appear to be of much value in this case.

Mr. Georgiadi said that he could distinguish between 65 per cent. and 70 per cent. He found the fibre sound, but the jute croppy and heavily rooted. The best and most reliable method of examination is to measure the fibre, cut the ends, and to weigh to find out the percentage of yield. This is the method which obtains in mills and was not resorted to in this case. Having regard to the evidence of Mr. Gregory, who seemed to me to give his evidence in a very fair manner, I cannot hold that the jute was of such an inferior quality, as alleged by the defendants, as to entitle them to reject. Mr. Gregory said that 10 per cent. of the value is usually kept in hand in these contracts to provide for allowance in case of some inferiority; that he had never heard of a case in which goods had been rejected and not taken, upon an allowance in cases of such a difference, but I am not concerned in this case with any practice relating to this matter. None has been pleaded. Mr. Georgiadi was emphatic in his opinion about the quality, but I am unable to attach the same value to his evidence as to that of Mr. Gregory. He did not at first admit that he knew what the dispute was between the parties, but when referred to his own report, he admitted that he knew it, at the time of his inspection.

It seems to me that the jute was perhaps somewhat inferior in quality, but the plaintiffs urge, as it was a falling market which is admitted, it was unreasonable for the defendants to keep the goods with them up to the 22nd of August 1914 before they purported to reject the goods as of inferior quality that they could keep the goods only;

KISSEDOYAL JITSARIA v. ASKARAN CHOWTHMULL.

for a reasonable time for inspection. But having kept the goods so long, they had no right to reject the goods on that date, according to section 118 of the Contract Act. The defendants allege that they informed the plaintiffs' people that they had rejected the goods long before that date, and assert that they did so within a day or two after the arrival of the goods. The plaintiffs' *zamadar* mentioned in the written statement, the defendants are unable to name or identify. The person named as "one Jitmull" in the written statement is now said to be one of the plaintiffs, Jodhraj. Jodhraj has been examined and denies that there was any such conversation between him and the defendants. He stated that he was not known as Jitmull. The plaintiffs' broker has been examined and states that he heard of the rejection long after the arrival of the goods and that no complaints were made to him by the defendants before the 22nd of August. He went and examined the jute and found it satisfied the guarantee.

In this case there was no inspection by the buyers in the presence of the sellers, as seems to be the practice, and no notice of inspection was given to the plaintiffs.

Bhoramall was the plaintiffs' *gomashta* at the time; he is dead. Champalal is also one of the plaintiffs' *gomashtas* and he has been examined. The plaintiffs have called all their available men. There being direct contradiction in the statements of the witnesses, the oral evidence is unsafe to rely upon. The correspondence about the rejection of the goods begins from the 22nd August. The letter of that date does not indicate that the goods had been rejected before that date. One other noticeable circumstance in connection with this matter is that the original bill for 90 per cent. was throughout kept by the defendants. If they had rejected the goods immediately after their arrival, there was no reason why this bill was not returned to the plaintiffs. This rather indicates that the plaintiffs' version that the defendants had kept the bill and put off payment from time to time is true.

I hold there is no satisfactory evidence that the defendants rejected the goods to the knowledge of the plaintiffs before the

22nd August. The market had gone down owing to the war to about Rs. 5 per maund by the 20th August. It is very likely that the defendants waited to see how the market turned out. I think it was an unreasonable time to have kept the jute before rejection, and under the circumstances, I hold in the plaintiffs' favour and decree the suit with costs on scale No. 2."

Messrs. Gregory and S. C. Bose, for the Appellants.

Messrs. A. N. Chowdhury and N. Sirkar for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of Mr. Justice Chaudhuri in which he gave judgment for the plaintiff.

The action was brought to recover the price of 125 bales of jute, and the defence was that the delivery of the jute was not in accordance with the contract, and that in consequence of the inferior quality of the jute the defendants rejected the jute.

Now, the contract was made on the 23rd of April 1914 for 125 bales of jute. It was guaranteed to yield after cutting 70 per cent. good sacking warp, and the payment was to be made as follows: reimbursement 90 per cent demand draft against documents and balance cash on delivery. That meant, and as I understand it was agreed to by both learned Counsel who argued this case, that when the buyers received the documents from the Railway Company, the plaintiff was entitled to receive 90 per cent. of the price, and when the goods were actually delivered then the balance namely, the 10 per cent., was to be paid.

Now, the documents were received by the defendants from the Railway Company on the 28th of July, and these documents, as I understand, included a bill made out by the plaintiff for 90 per cent. of the price. The goods were actually delivered to the defendants on the 31st of July, and were taken to the defendant's godown where they remained until the time the action was brought.

The learned Judge has found first of all that the goods were somewhat inferior in

KISSENDOTAL JITSARIA v. ASKARAN CHOWTHMULL.

quality. Speaking for myself, having read the evidence and carefully considered it, I think he was fully justified in coming to that conclusion, and I am not sure that if I had been trying the case I should not have omitted the qualifying word *somewhat* and held that the goods were inferior in quality. I need not go through the evidence in detail, because I agree with the learned Judge upon that point. There clearly was evidence upon which he could come to that conclusion, and, in my opinion, he was right in arriving at that decision. Of course, that does not end the matter. The goods not being in accordance with the contract, the defendants, if they chose, could have rejected the goods, and the law in this respect is made by the terms of the section to which we have been referred, *viz.*, section 118 of the Indian Contract Act. That section provides, "where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered."—(That does not apply to this case, because the defendant did not refuse to accept the goods when tendered.) "Or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them." On the 22nd of August, a letter was written by the defendants to the plaintiff in which they do say definitely that they rejected the goods on account of their inferior quality. But it is admitted by Mr. Gregory, Counsel for the appellant, that if the defendants had done nothing before the 22nd of August or rather that if they had not rejected the goods before the 22nd of August, they would not have rejected them *within a reasonable time*; and, if I may say so, he was perfectly right in making that admission, because nobody could suggest that business people with regard to a contract of this kind could sit still for three weeks after the goods were delivered taking no action with regard to them and then come forward after three weeks and say 'we reject the goods.' Therefore, the whole matter on this part of the case is reduced to this: Did the defendants reject

the goods at sometime before the 22nd of August, and if they had rejected the goods, did they reject them within "a reasonable time"? The learned Judge has found that the defendants did not reject the goods before the 22nd of August. As I read his judgment, he said the verbal evidence upon that point was contradictory and he was not able upon the oral evidence to make up his mind either one way or the other, and, therefore, he said that reliance must be placed upon the documentary evidence.

Now, the only documentary evidence with regard to the rejection is the letter of the 22nd of August to which I propose to refer. That letter says this,—it was written by the defendants themselves to the plaintiff—"We beg to state that your 125 bales of Jobsa Jute under the above contract (*i.e.*, contract No. 432 of G. L. Dudhuria 125 bales) had already reached our godown, but we regret to inform you that the quality of the same is much inferior to that guaranteed by the contract. We cannot accept the same as a fair tender against the contract and must reject the lot, which please remove from our godown at once. In the meantime the bales are lying at your entire risk and responsibility. Furthermore you are liable for the godown rent. The matter was brought to your notice on several occasions verbally." The first thing I wish to say about this letter is that it is in answer to a letter of the 20th August written by the plaintiff pressing for payment of Rs. 4,950-10-0, which represented the 90 per cent. of the contract price. It is also to be observed that the last sentence "The matter was brought to your notice on several occasions verbally," upon which so much reliance was placed by the appellants' learned Counsel, is to my mind ambiguous. The defendants in that letter are referring to two things. They are referring to the fact that the goods were inferior to the quality guaranteed by the contract; they are also referring to the fact that they rejected the same. When they say that 'that matter was brought to your notice on several occasions verbally,' it may mean that 'on a previous occasion we told you that we rejected them,' or it may mean that 'we drew your attention to the fact that the goods were not in

RAMA ROW v. KUTTIYA GOUNDEN.

accordance with the contract quality.' Therefore, to my mind the letter is not conclusive either one way or the other.

Now, what is the position? The defendants accepted the goods in this sense that they allowed them to be placed in their godown on the 31st of July. They say that they examined them either the next day or a day or two afterwards. What would one expect business people to do if the buyers found that the goods were not of the contract quality, and if they intended to reject them? I should have expected business people to put on record at once by writing to the sellers and saying that the goods were not in accordance with the contract quality, and that they rejected them. We cannot find the slightest trace of that in this case; the only letter which does in so many words say that they rejected these goods was written as late as the 22nd of August and then that was written in answer to a letter pressing them for payment. I must also say that inasmuch as the goods were delivered to the defendants it is obvious that the onus of proving that they in fact rejected, lies upon them, and the learned Judge in effect says that the defendants have not satisfied him that they did in fact reject the goods. Of course, if the learned Judge took that point of view, he was perfectly right in saying that the defendants had not rejected the goods. Speaking for myself, I have read the evidence very carefully, and I am not satisfied upon the evidence which has been put before me that the learned Judge was wrong; and, that would be quite sufficient for me. I need not say any more, because there was evidence both ways; the learned Judge was there to give his decision upon this question of fact, which is a pure question of fact and no matter of law is appertaining to it, and it is quite sufficient for me to say that I am not satisfied that the learned Judge was wrong. I may go further and say that I think it is quite possible that what happened was that there were conversations between the parties with regard to the quality of the goods, discussions as to what had been done and so on, but I am quite satisfied that the defendants have not given sufficient evidence to discharge the onus that they definitely

rejected the goods before the 22nd of August.

For these reasons I think that the appeal should be dismissed with costs.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2386 OF 1913.

February 1, 1916.

Present: Mr. Justice Conlts Trotter and
Mr. Justice Seshagiri Aiyar.

RAMA ROW AND AN OTHER—PLAINTIFFS—
APPELLANTS

versus

KUTTIYA GOUNDEN AND OTHERS—
DEFENDANTS RESPONDENTS.

Hindu Law - Mitakshara - Inheritance - Reversioner - Burden of proof - 'Samanodakas', meaning of - Relationship, how far extends - Gotraja and Bandhu, contest between - Rule of preference - Appeal, second - Burden of proof, wrong view of - Remand.

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward as well as to satisfy the Court that to the best of his knowledge there are no nearer heirs. But he cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship. [p. 295, col. 2.]

Gridhari Lall Roy v. Bengal Government, 12 M. L. A. 448, 10 W. R. 31 (P. C.); 1 B. L. R. 44 (P. C.), 2 Suth P. C. J. 154; 2 Sar P. C. J. 382; 20 E. R. 408 distinguished.

The relationship of *samanodakas* extends only to the fourteenth degree and on authority as well as for reasons of expediency it is not desirable to extend the meaning of the term to persons beyond the fourteenth degree of relationship to the deceased. [p. 297, col. 1.]

A *gotraja* will not be preferred to a *bandhu* unless he is able to trace his descent from a common ancestor. [p. 297, col. 1.]

The decision of an appeal on a wrong view as to the burden of proof will entail a remand in second appeal. [p. 297, col. 1.]

Second appeal against the decree of the Temporary Subordinate Court of Trichinopoly, in Appeal Suits Nos. 265, 325 and 385 of 1912, preferred against that of the District Munsif, Karur, in Original Suit No. 625 of 1910.

Messrs. C. V. Anantakrishna Aiyar and K. R. Rangaswami Aiyangar, for the Appellants.

RAMA ROW v. KUTTIYA GOUNDEN.

Mr. T. R. Ramacandra Aiyar, Advocate-General, and Messrs. T. H. Venkatrama Sastriar, K. S. Ganesa Aiyar and N. Rajagopalachariar, for the Respondents.

JUDGMENT. - The suit is by the plaintiffs ■■ reversioners to recover possession. The last male owner was Venkataramana Aiyar who died some forty years ago. His widow Tulasi Ammal died in September 1906. The plaintiffs claim to be the sister's sons of Venkataramana Aiyar.

The defendants are alienees from Tulasi Ammal. They denied the plaintiffs' relationship to the last male owner and pleaded that one Ranga Aiyar was the nearer heir, being a *dayadi*. They also claimed that some of the properties were Tulasi Ammal's self-acquisition and that as regards the others their alienation was for justifiable purposes.

The District Munsif held that there were no nearer heirs than the plaintiffs whom he found to be the sister's sons of the deceased male owner, and that most of the alienations were not binding on them. He gave a decree for the major portion of the properties in this suit.

On appeal, the Subordinate Judge, without determining whether the plaintiffs were heirs, was of opinion that the plaintiffs should prove affirmatively that there were none nearer than themselves. He discussed the oral evidence given for the plaintiffs and the defendants and stated: "On the above evidence of defendants' witnesses Nos. 1 to 3 and the admissions of plaintiffs' witnesses Nos. 2, 3, 6, 8, 10, 13 and 14, I hold that it is made out that Ranga Aiyar and others are *dayadies* of the deceased Venkataramana Aiyar." It should be mentioned that this Ranga Aiyar has not gone into the witness-box to prove his relationship. The conclusion of the Subordinate Judge is: "As I find that the plaintiffs have not proved that there are no *dayadies* of Venkataramana Aiyar now alive, whereas it is proved on defendants' side that Ranga Aiyar and others of Pallapalayam are Venkataramana Aiyar's *dayadies* and are alive, the first point should be found in the negative and against the plaintiffs."

In the result, the decree of the District Munsif was reversed. Hence this second appeal.

In the first place, we are unable to agree with the Subordinate Judge in his view of the burden of proof. It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiffs to prove that relationship. The decision in *Gridhari Lall Roy v. Bengal Government* (1), which is relied on as compelling plaintiffs in similar circumstances to prove by positive evidence that by process of elimination they are the only possible claimants, has been very much misunderstood. When the facts of that case are fully understood, no such proposition is deducible from it. We agree with the view taken by one of us on this question in a recent case, *Secretary of State for India v. Subraya Karantha* (2). We think the lower Court was wrong on this point.

It was argued by Mr. Venkatrama Sastriar that the finding of the Subordinate Judge amounts to saying that Ranga Aiyar and the others referred to exclude the plaintiffs ■■ *samanodakas*. On examining the evidence relied on by the Subordinate Judge, ■■ find that no definite relationship is deposed to and that beyond saying that bathing pollution was observed, no tangible circumstance is spoken to as establishing the relationship. Mr. Rajagopalachariar who followed ventured to argue that *samanodakaship* connoted all *gotrajas* and that as there is evidence on which the Court below is entitled to find on this point, we should not interfere with the finding. As this argument raised ■■ issue of considerable importance, ■■ allowed the learned Pleaders on both sides a further opportunity to examine the Hindu Law texts bearing on the question.

(1) 12 M. I. A. 448; 10 W. R. 31 (P. C.); 1 B. L. R. 44 (P. C.); 2 Suth. P. C. J. 159; 12 Sar. P. C. J. 382; 20 E. R. 408.

(2) 31 Ind. Cas. 590; (1915) M. W. N. 962; 2 L. W. 1175; 18 M. L. T. 504.

RAMA ROW V. KUTTIYA GOUNDEN.

We are indebted to Mr. Ramachandra Aiyar for the succinct summary he has given us of the authorities on the second occasion. There can be no question that Manu includes in the term '*samanodaka*' all persons belonging to the same *gotra*. "The *sapinda*-relationship is extinguished in the seventh generation; *samanodaka*-relationship lasts for all eternity, being extinguished only when the name and *gotra* are not known." Yajnavalkya, in *sloka* 135, says that the *gotrajas* come before the *bandhus*. "The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student."

Vijñaneswara in his commentary (*Mitakshara*, Chapter II, section 5, placitum 6) says: "If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach to seven degrees beyond *sapindas*, or else as far as the limits of knowledge as to birth and name extend. Accordingly what Manu says: 'The relationship of the *sapindas* ceases with the seventh person; and that of *samanodakas* extends to the fourteenth degree; or, as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra*." It is clear from the above passage that neither Vijñaneswara nor Brihat Mann gave his own sanction to extending the meaning of the term *samanodaka* to descendants beyond the fourteenth degree. The strong inclination towards unlimited heirship which characterised the writings of Manu and the *Rishis* did not find equal favour with the commentators. These latter, who understood the sentiments of the people, attached considerable importance to the customs that had grown up since the ancient *Rishis* gave the law. It is no wonder, therefore, that Vijñaneswara makes a halting allusion to what others say on the definition of the term *samanodaka*. He knew that persons belonging to the same *gotra* would not necessarily trace their descent from a common ancestor. It is common knowledge that persons of the same *gotra* belong to different *sakhas*. Some may be *Yajur Vedis*, some *Rig* or *Sama Vedis*. Further Vijñaneswara must have felt that people were more inclined to favour nearer blood relationship than descent in the same agnatic line, however remote. We are, therefore, of opinion that

the *Mitakshara* does not enunciate the theory that *samanodaka*-relationship extends beyond the fourteenth degree; and ■ that authority is paramount on questions of inheritance in Southern India, we must hold that this relationship ceases with the fourteenth. Vaidyanatha Dikshitar, an author of great repute and authority in Southern India, in the *Asouchakanda*, restricts the term *samanodaka* to persons who come within fourteen degrees from the common ancestor. This author lived within 500 years and is held in great veneration all over the Presidency; and he apparently gives expression to the traditions of the people among whom he lived.

There is another point on which our conclusion against the view of the Subordinate Judge may be sustained. Even accepting the interpretation which Brihat Manu ascribes to 'others', it is clear that unless a person is able to point to a common ancestor in the line of *gotrajas*, he is not entitled to come before *bandhus*. Both Manu and Yajnavalkya speak of *janma* and *namna* i. e., the *gotra* and the name. In the Telugu countries of Madras, the name is indicated by the house name or the *intiperu*. This is not in vogue in the southern districts. Even there people speak of the *vamsam* to which they belong. This would lead to tracing descent to a common ancestor. It would be something specific to go by. In this case no attempt has been made to show that Venkataramana Aiyar and Ranga Aiyar and the others who gave evidence had either the same house name or belonged to the same *vamsam*.

As regards the decided cases, *Bai Devkore v. Amritram Jamiatram* (3) is the only one which in any way supports the respondents' contention. In that case, the common ancestor was traced. This view of the Bombay Judges apparently did not find acceptance in Madras, as we have ascertained that Subramania Aiyar and Boddam, J.J., did not follow it in Appeals Nos. 120 and 121 of 1902. The observations of the Judicial Committee in *Bhyah Ram Singh v. Bhyah Ugar Singh* (4) are very general.

(3) 10 B. 372.

(4) 13 M. L. A. 373 at pp. 390, 393; 14 W. R. 1 (P. C.); 5 B. L. R. 293 (P. C.); 2 Sath. P. C. J. 330; 2 Sar. P. C. J. 566; 20 E. R. 591.

EBRAHIM AHMED v. SAMUEL BALTHAZAR.

Their Lordships had not to consider the meaning of the term *samanodaka* in that case. *Kutti Ammal v. Radakristna Aiyar* (5) and *Gridhari Lall Roy v. The Bengal Government* (1) only lay down that before the property escheats to the Crown all possible relations should be exhausted. The exact point at which *samanodaka*-relationship ceases was not in question in these cases. *Ram Baran Rai v. Kamla Prashad* (6) is only authority for the way in which the fourteen degrees are to be computed. On the other hand in the case from which *Kalka Prasad v. Mathura Prasad* (7) was the appeal heard by the Judicial Committee, the view taken was that *Bai Deckore v. Amritram Jamiatram* (3) had gone too far. *Naraini Kuar v. Chandi Din* (8) upholds the restricted construction of the term *samanodaka*.

Among the text writers, the general tendency is to confine the relationship to the fourteenth degree, although some would have it that so long as there is a possibility of a common ancestor being traced, the *gotraja* would exclude the *bandhus*. It has to be remembered that this indefinite extension of the meaning of the term is calculated to induce parties to place before the Court evidence of a very dubious and unreliable character.

On the whole we are of opinion that on authority and for reasons of expediency, it is not desirable to extend the meaning of the term *samanodaka* to persons beyond the fourteenth degree of relationship to the deceased; and that under no circumstances should a *gotraja* be preferred to a *bandhu* when the former is unable to trace his descent from a common ancestor.

As the Subordinate Judge has disposed of this case on a wrong view of the burden of proof, his decree must be reversed and the appeal will be remanded to the permanent Subordinate Judge of Trichinopoly for disposal on the merits with reference to the foregoing observations. Costs to abide the result.

Appeal allowed; Case remanded.

V. R. P.

(5) 8 M. H. C. R. 85.

(6) 6 Ind. Cas. 638; 32 A. 594; 7 A. L. J. 802.

(7) 30 A. 510; 5 A. L. J. 701; 18 M. L. J. 424; 8 C. L. J. 447; 10 Bom. L. R. 1088; 13 C. W. N. 1; 35 I. A. 166; 11 O. C. 362; 4 M. L. T. 380.

(8) 9 A. 467; A. W. N. (1887) 118.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 24 OF 1915.

February 15, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Twomey.

EBRAHIM AHMED MEHTER—

DEFENDANT—APPELLANT

versus

SAMUEL BALTHAZAR—PLAINTIFF—

RESPONDENT.

Contract Act (IX of 1872), s. 160—Bailment—Conversion of goods—Damages, measure of—Executor of deceased bailee, liability of, on refusal to deliver on demand—Wrongful use by executor, liability for, when bailor delays action.

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of damages. [p. 298, col. 1.]

When goods are let out on hire, the executor of a deceased bailee is bound to return them on the expiry of the term of the hire. He will be guilty of conversion of the goods to his own use from the time when he fails to return them in response to a demand by the hirer and, for this conversion, he is personally liable. [p. 298, col. 1.]

A bailor is not entitled to any damages for wrongful use, beyond getting the value of the goods, when, after issuing notice of demand, he causes a long delay to ensue before filing the suit. [p. 298, col. 2.]

Mr. Das, for the Appellant.

Mr. Doctor, for the Respondent.

JUDGMENT.

Fox, C. J.—The partnership of which the plaintiff was appointed Receiver let two silk rolling machines to Ahmed Hashim Ariff for two years from the 30th July 1906 for Rs. 100 per mensem. Ahmed Hashim Ariff let the defendant, his son, use the machines. After Ahmed Hashim Ariff's death on the 2nd June 1907 the defendant continued to use them and had possession of them until they were practically destroyed by fire in 1910. The defendant obtained Probate of his father's Will in 1907. On the 1st March 1909 a letter was written to him as executor of his father's estate demanding payment of the agreed hire for the machines from the 1st August 1906 to the end of February 1909, calling upon him to deliver up the machines by the end of the then current month and warning him that if he did not do so he personally would be charged hire at the rate of Rs. 200 per mensem. The defendant did not reply to the letter and kept the machines which he had removed to mill of his own.

IMAMI v. KALLU.

The plaintiff sued him on the 31st January 1911 for Rs. 7,000, the original cost of the machines, and for Rs. 4,200, hire of them at the rate of Rs. 200 for 21 months from the 1st April 1909 to the 31st December 1910. A decree has been passed against him for Rs. 5,000 as being the value of the machines when they were destroyed and for Rs. 1,480 as damages for his wrongful use of them from the 31st March 1909 to the 23rd June 1910, the date on which they were destroyed.

The defendant appeals on the ground that he was not personally liable in respect of the non return and loss of the machines and that he was not liable to pay damages for wrongful use of them. If Ahmed Hashim Ariff had been alive in July 1908 he would have been bound, under section 160 of the Contract Act, to return the machines to the partnership on the expiry of the time for which they had been bailed. He having died the duty of doing this devolved on the defendant as his executor.

The letter of the 1st March 1909 rightly treats the executor as responsible for hire accrued up to that date, but it gave him notice that if he did not return the machines before the end of the month he would be held personally liable for hire at an enhanced rate. Unless he agreed to pay the enhanced rate he could not be held liable for it, but as he neither returned the machines nor agreed to pay the hire demanded, he was guilty of conversion of the machines to his own use as from the time when he should have returned them in response to the demand made for them, and for this conversion he must be held personally liable—see Addison on Torts, 8th Edition, page 575.

In actions for the conversion of chattels the full value of the chattels at the time of the conversion is the measure of damages—*ibid* at page 597. The original cost of the machines was Rs. 7,000. The plaintiff's Advocate did not press for that amount to be awarded, and the learned Judge deducted Rs. 2,000 practically for depreciation. If more should have been allowed for depreciation the defendant should have called evidence to prove this: the machines were in his possession, and he himself or his employees could have spoken to the state

in which they were in 1909. Not having done so, there is no ground for reducing the amount allowed by the learned Judge as the value of the machines.

It was not a case, however, in which the plaintiff should have been awarded damages for wrongful use as well as the full value of the machines. A suit might have been brought in April 1909, and the partners must have been awarded the machines or their value. The partnership estate is not entitled to benefit by the delay of the partners in bringing a suit. If the defendant had chosen to pay the value instead of returning the machines, there would have been no ground for a claim for the use of the machines against him.

I would alter the decree to one for Rs. 5,000 only and the costs of the suit.

I would allow the defendant his costs of this appeal on Rs. 1,480 only.

TWOMEY, J.—I concur.

Decree varied.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 30 OF 1915.

May 2, 1916.

Present:—Justice Sir P. C. Banerjee, Kt., and
Mr. Justice Piggott.

IMAMI—PLAINTIFF—APPELLANT

versus

Musammât KALLU, MINOR, THROUGH
MATA GHULAM—DEFENDANT—

RESPONDENT.

Contract—Specific performance, suit for—Discretion of Court—Suit against minor—Court, duty of—Certificated guardian—Benefit of minor.

In a suit for specific performance it is in the discretion of the Court to decree specific performance or not, and in no case would the Court be justified

IMAMI V. KALLU.

n enforcing specific performance against a minor when such enforcement would be to his detriment. [p. 300, col. 2.]

The certificated guardian of a minor applied to the District Judge for permission to sell a house of the minor for the payment of debts due by the minor. The Judge ordered the property to be sold by auction to the highest bidder. The property was knocked down to the plaintiff who offered to pay Rs. 1,300, but he did not accept the draft deed. Later on he accepted it but nothing was done. Meanwhile another person offered Rs. 2,000 and the Judge ordered the guardian to sell the property to him. The plaintiff sued for specific performance. The certificated guardian did not agree to be guardian *ad litem* in the suit and another person was appointed:

Held, that the plaintiff was not entitled to the decree asked for inasmuch as he had not acquired any interest in the property. [p. 301, col. 2.]

Chhitar Mal v. Jagan Nath Prasad, 29 A. 213; A. W. N. (1907) 25. 4 A. L. J. 24, followed.

First appeal from the decision of the Subordinate Judge of Allahabad, dated the 19th August 1914.

FACTS appear from the judgment.

The Hon'ble Dr. Tej Bahadur Sapru, for the Appellant.—The contract for the sale of the house was between the guardian and the appellant. The District Judge accepted it and thereafter he had no power to order the house to be sold to another party. The guardian had given all the papers to the plaintiff-appellant and the sale had been completed.

Dr. S. N. Sen.—The point is concluded by *Chitar Mal v. Jagan Nath Prasad* (1).

Dr. Tej Bahadur Sapru.—The case of *Chhitar Mal v. Jagan Nath Prasad* (1) is quite different and it has no application to the facts of the case here.

[PIGGOTT, J.—You want a sale-deed from Mata Ghulam.]

Dr. Tej Bahadur Sapru.—The suit was brought against the certificated guardian and not against Mata Ghulam but on the certificated guardian refusing to be the guardian *ad litem*, Mata Ghulam was made guardian *ad litem*.

A minor can buy property and take bonds and if the question of specific performance comes, he can be sued. He referred to *Meghan Dube v. Pran Singh* (2), *Mahomed Musa v. Aghore Kumar* (3).

(1) 29 A. 213; A. W. N. (1907) 25; 4 A. L. J. 24.

(2) 30 A. 68; 5 A. L. J. 14; A. W. N. (1908) 10.

(3) 28 Ind. Cas. 930; 42 C. 801 at pp. 816; 817, 818; 17 Bom. L. R. 420; 21 C. L. J. 23; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258 (P. C.); (1915) M. W. N. 621 42 I. A. 1.

[BANERJI, J., referred to *Balwant Singh v. Rev Rockwell Olancy* (4), *Mir Sarwarjan v. Fakhruddin Mahomed* (5).]

You cannot bind a minor by a contract entered into by his guardian for want of mutuality.]

Dr. Tej Bahadur Sapru.—A contract entered into by a guardian is different from a contract entered into by a guardian with the permission of Court. The case in *Mir Sarwarjan v. Fakhruddin Mahomed* (5) is materially different from the present case. He referred to Guardians and Wards Act, sections 29, 30 and 31.

Dr. Surendra Nath Sen, for the Respondent.—This is a suit for declaration. The plaintiff is not entitled to a decree as of right. It is in the discretion of the Court to give a decree or not. The Court has to see to the nature of the relief and the conduct of the plaintiff. According to the evidence there was no completed contract. The sale was to be to the highest bidder and the highest bidder had to accept the draft of the document. The appellant did not accept the terms. Thus there ceased to be a completed contract.

A contract for the sale of property by a guardian may be specifically enforced where the contract is for the benefit of the minor. If it is detrimental to his interest it cannot be enforced. The cases relied on by the other side do not apply here.

In *Chhitar Mal v. Jagan Nath Prasad* (1) it has been held that unless it is proved by cogent evidence that the contract is for the benefit of the minor, it cannot be specifically enforced. This question did not arise in *Mir Sarwarjan's* case (5) in the exact form.

An act of a trustee is looked upon with suspicion. He referred to Guardians and Wards Act, sections 8 and 29.

Dr. Tej Bahadur Sapru, in reply.—I have nothing to say on the matter of law, I leave the matter there.

JUDGMENT.—This appeal arises out of a suit for specific performance of an alleged (4) 14 Ind. Cas. 629; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 14 Bom. L. R. 422; 23 M. L. J. 18; 39 I. A. 109; 34 A. 296.

(5) 13 Ind. Cas. 331; 39 C. 232 at p. 236; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156 (P. C.).

IMAMI v. KALLU.

contract of sale in respect of a house. The plaintiff also asks for a declaration that he has become the absolute owner of the house. The facts are these. The house in question belongs to the minor defendant *Musammatt Kallu*. One Shahzada was appointed guardian of the minor under the orders of the District Judge of Allahabad. The guardian Shahzada applied to the District Judge for permission to sell the house in question for the payment of debts due by the minor. The District Judge ordered the property to be sold by auction to the highest bidder. The highest bid made was by the present plaintiff Imami, who offered to pay Rs. 1,300 for the property. On the 8th of July 1912, the District Judge made an order to the effect that Shahzada, the guardian of the minor, was permitted to execute a sale-deed in favour of Imami, the draft being put up before the Court for approval prior to the execution of the sale-deed. A draft was submitted and the District Judge made certain alterations in it. Imami, however, refused to purchase the property on the ground that the alterations in the draft, which he believed had been made by or on behalf of the guardian, did not meet with his approval. This is clear from the notice which he issued to the brother of the guardian in February 1912, in which his Pleader distinctly stated that he had refused to purchase the property. Subsequently it seems he consented to accept the purchase, but nothing was done for a long time. Meanwhile other persons had offered to purchase the property for a larger value and on the 25th of November 1913 the learned District Judge granted permission to the guardian to sell the property for Rs. 2,000 to another party. Thereupon the present suit was brought by the plaintiff on the 3rd of February 1914. He stated in the plaint that he had, by reason of the sanction given by the District Judge to sell the property to him, acquired the ownership of the property and that he was entitled to obtain a sale-deed of it from the guardian. As we have stated above, Shahzada was the guardian appointed by the District Judge, but Shahzada is no party to the present suit. When the suit was instituted he was named as the guardian of the minor, but he refused to act as guardian and thereupon another person, namely, Mata Ghulam was appointed guardian *ad litem*.

Shahzada was not impleaded in his own person as a defendant. It would, therefore, be difficult, if the claim were allowed, to order Shahzada, who is no party to the suit, but who is the certificated guardian of the minor, to execute a sale-deed in the plaintiff's favour. The Court below has dismissed the claim on the ground that the sale to the plaintiff would be detrimental to the interest of the minor. There can be no doubt that in a suit for specific performance it is in the discretion of the Court to decree specific performance or not, and in no case would the Court be justified in enforcing specific performance against a minor "when such enforcement would be to his detriment." This was held by this Court in *Chhitar Mal v. Jagannath Prasad* (1). In the present case it is clear that there being a purchaser who has offered more than Rs. 2,000 for the property and for a sale to whom the learned District Judge has granted permission to the guardian, the sale to the plaintiff would surely not be to the benefit of the minor. On this ground alone the Court would be justified in refusing to grant a decree to the plaintiff. Furthermore there are in this case circumstances which would make it unreasonable to grant the plaintiff's prayer. The original permission for the sale of the property was given so far back as July 1912. In September of that year the Court said that if the draft approved by the Court was accepted, a sale-deed might be executed in the plaintiff's favour. Apparently the plaintiff did not accept the draft, and as his own notice to which we have referred above shows, he refused to purchase the property. It was not until other purchasers offered larger sums of money for the property that the plaintiff expressed his willingness to accept the terms offered. Under these circumstances we think the plaintiff is not entitled to the decree asked for. It is clear that he has not acquired any interest in the ownership of the property, as he asserted in his plaint. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

SASHI BHUSAN HAZRAH v. DENO MOYEE DASI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 24 OF 1914.

May 18, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

SASHI BHUSAN HAZRAH—PLAINTIFF—
APPELLANT

versus

Srimati DENO MOYEE DASI—

DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 153—
Interlocutory orders—Appeal.*

The term "order" as used in section 153 of the Bengal Tenancy Act is not limited to final orders but includes interlocutory orders such as orders of remand [p. 302, col. 1.]

Therefore, in a suit for rent valued at less than Rs. 100 the order of the first Appellate Court remanding the suit for retrial without deciding any of the special questions mentioned in section 153 is not appealable. [p. 302, col. 1.]

Gagan Chand Sardar v. A. Casperz, 4 C. W. N. 41, followed.

Appeal against the decree of the Hon'ble Mr. Justice Teunon; dated the 6th February 1914 reported as 23 Ind. Cas. 615, in Appeal from Appellate Decree No. 28 of 1912.

FACTS of the case appear from the judgment.

Babu Satya Charan Singh (with him Babu Sarat Chandra Rai Choudhury), for the Appellant.—The entry of rent in the Record of Rights is not merely presumed to be correct, but it is the result of a decision of the Settlement Officer and as such conclusive.

[MOOKERJEE, J.—What is the amount claimed in the rent suit?]

Less than Rs. 100.

[MOOKERJEE, J.—Does an appeal lie in this case?]

Yes. Because the amount of rent payable was in controversy between the parties and the first Court decreed the full rent claimed, and against that decree the appeal was preferred to the District Judge.

[MOOKERJEE, J.—That is not the test. Has the Appellate Court decided the question of the amount of the rent?]

No. It has remanded the whole case for a re-hearing, thereby implying that the decision of the Munsif as to the amount of rent was not correct. The Appellate Court has in a manner decided the question of the amount of rent, as it held that the full rent decreed

by the Munsif was not correct.

[MOOKERJEE, J.—The Appellate Court did not decide anything finally. It left open all questions for a decision on re-trial.

You may appeal from the decision of the Appellate Court after it has decided the question in appeal after the remand. But you cannot do so now.]

Babu Nagendra Nath Ghosh, for the Respondent.—The Code of Civil Procedure might stand in the way. Unless an appeal has been preferred against the remand, there might be no right of appeal at all against the decision of the first Appellate Court.

[MOOKERJEE, J.—Section 153 of the Bengal Tenancy Act applies to interlocutory orders, vide *Gagan Chand Sardar v. A. Casperz* (1), so there can't be any appeal in this case. This objection was not taken before Mr. Justice Teunon; but as he dismissed the appeal, the result of our holding that no appeal lay to him would not make any difference.]

JUDGMENT.

MOOKERJEE, J.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Teunon.

The plaintiff-appellant instituted a suit for arrears of rent. The defendant pleaded that rent was not payable at the rate claimed. The Court of first instance decreed the claim in full. Upon appeal the Subordinate Judge set aside the decree of the primary Court and remanded the case for a fresh trial, with full liberty to the parties to adduce whatever evidence they might like to bring forward in support of their respective allegations. The plaintiff preferred an appeal to this Court against the order of remand. The appeal was heard by Mr. Justice Teunon and was dismissed. The present appeal is directed against the decision of Mr. Justice Teunon.

The suit was valued at less than one hundred rupees. Consequently under section 153 of the Bengal Tenancy Act, no appeal lay against the order of the Subordinate Judge, unless it was established that the Subordinate Judge had by his order determined one or more of the special questions mentioned in that section. The decision of

SIVAKOLUNDU PILLAI v. GANAPATHI IYYAR.

this Court in the case of *Gagan Chand Sardar v. A. Casperz* (1) shows that the term *order* as used in section 153 is not limited to final orders but includes interlocutory orders, such as orders of remand. Consequently it was obligatory upon the appellant before Mr. Justice Teunon to show that the order of the Subordinate Judge had decided one or more of the special questions. But on a perusal of the order of the Subordinate Judge it is clear that he has not only not decided any of the questions mentioned in section 153, but has left open all the questions in controversy between the parties and remanded the case for re-trial, as, in his opinion, material evidence had been erroneously excluded by the Trial Court. Consequently, the appeal to this Court was incompetent, and should have been dismissed on that ground by Mr. Justice Teunon.

The result is that this appeal is dismissed with costs and the order of Mr. Justice Teunon is affirmed on the ground that the appeal heard by him was incompetent under the law.

SANDERSON, C. J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 277 OF 1915.

March 3, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

SIVAKOLUNDU PILLAI—DEFENDANT
No. 1—RESPONDENT No. 1—APPELLANT

versus

GANAPATHI IYYAR—DECREE-HOLDER—
PETITIONER—RESPONDENT.

Civil Procedure Code (Act I of 1909), s. 46—Attachment by precept—Objection to execution based on omission to transfer decree, if can be taken at hearing of appeal—Simultaneous execution in two Courts against same property, if permissible—Extension of time, petition for, presented before expiry of two months—Order passed after expiry of that period—Attachment, if ceases to be effective.

An objection to the jurisdiction of an executing Court to order the sale of certain immoveable property attached by it under the precept of another Court based on the want of transfer of the decree to that Court for execution, will not be allowed to be taken up for the first time

during the hearing of an appeal against the order for sale. [p. 402, col. 2.]

There is nothing in law to prevent a decree being simultaneously executed in more places than one against the property of the judgment-debtor. [p. 403, col. 1.]

Saroda Prosad Mullick v. Luchmeput Sing Dongur, 14 M. I. A. 529; 7 W. R. 269; O. B. L. R. 4; 2 Suth. P. C. J. 56C; 3 Sar. P. C. J. 77; 20 E. R. 843, considered.

Brij Nath Goenka v. F. H. Holloway, 1 C. L. J. 215, referred to.

Under section 46, Civil Procedure Code, an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months, during which the attachment will remain in force, is passed after the expiry of the said period, provided that the application for extension of time is put in before the expiry of that period. In such a case the order relates back to the date of the petition and has a retrospective effect. [p. 403, col. 1.]

Rhedoy Krishna Ghose v. Koylash Chunder Bose, 13 W. R. 3; 4 B. L. R. 84 (F. B.), followed.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, in Execution Petition No. 3-3 of 1915, in Original Suit No. 23 of 1901 on the file of the Court of the Subordinate Judge of Kumbakonam.

Mr. K. R. Rangaswami Aiyangar, for the Appellant.

Messrs. T. Narasimha Aiyangar and R. S. Jayarama Aiyar, for the Respondent.

JUDGMENT.—A contention is raised by the learned Vakil for the appellant that the decree was not transferred for execution to the Trichinopoly Sub-Judge and hence he had no jurisdiction to pass an order for the sale of the property which he had attached on the strength of a precept from the Court which passed the decree, namely, the Kumbakonam Sub-Court. This contention was not raised in the lower Court or in the memorandum of appeal to this Court, and we must presume that all necessary steps had been taken to invest the Trichinopoly Sub-Court with jurisdiction to sell the property, especially as we find a reference in the execution petition to an application of January 1915 made to the Kumbakonam Subordinate Court to transmit records to the Trichinopoly Subordinate Court.

It is further contended that simultaneous execution of the same decree cannot take place in two Courts and that the decision of the Privy Council in *Saroda Prosad Mullick v.*

PEAREY LAL v. HANIFUNNISSA BIBI.

Lachmeeput Sing Dongur (1) allowed only attachment of property in more than one Court in execution of the same decree and that further execution proceedings consequential on attachment can take place only in one Court at one and the same time. There is nothing in the decision of the Privy Council to prevent such further proceedings taking place in more than one Court simultaneously, though, of course (as Woodroffe and Ameer Ali pointed out in page 222 of their Commentary on the Code of Civil Procedure), such simultaneous further executions in more than one Court would take place only very rarely. See also the judgment of Mookerjee, J., in *Bijnath Goenka v. F. H. Holloway* (2).

It is next contended that the order for sale is illegal ■ the attachment by precept had come to an end at the expiry of two months from when it was made in December 1913 (see proviso to section 46 of the Code of Civil Procedure) and that, though a petition for extension was filed before the expiry of the two months and an order was passed extending the period of attachment for six months (which period was again extended before the expiry of that period of six months by another six months), that order is illegal and cannot have the effect of continuing the attachment which had come to an end. We think that there is nothing in this contention. The delay of the Court in passing orders on the petition for extension cannot be allowed to prejudice the petitioner and the order granting extension must be given retrospective effect as if passed on the date of the petition. [See *Rhedoy Krishna Ghose v. Koylash Chunder Bose* (3).]

We, therefore, dismiss the appeal with costs

Appeal dismissed.

V. R. P.

(1) 11 M. L. A. 529; 17 W. R. 289; 0 B. L. R. 214; 2 Suth. P. C. J. 560; 3 Sar. P. C. J. 77; 20 E. R. 883.

(2) 1 C. L. J. 315.

(3) 13 W. R. 3 (F. B.); 4 B. L. R. 82.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No 12 OF 1914.

February 11, 1916.

Present:—Mr. Justice Rafique and
Mr. Justice Piggott.

PEAREY LAL—PETITIONER—APPELLANT
versus

HANIFUNNISSA BIBI AND ANOTHER—

OPPOSITE PARTY RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s 144—
Auction-sale—Bona fide purchaser for value, whether
restitution can be obtained against.*

Restitution cannot be obtained under section 144 of the Code of Civil Procedure against a bona fide purchaser for value at an auction sale held by a Court which has jurisdiction to hold the same [p. 304, col. .]

Rewa Mahton v. Ram Kishen Singh, 14 C. 18; 13 I. A. 106; 0 Ind. Jur. 428; 4 Sar. P. C. J. 46 and *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan*, 10 A. 166; 5 I. A. 12; 5 Sar. P. C. J. 19, referred to.

Nazhat-ul-daulia Abbas Husain Khan v. Dilband Begum; 21 Ind. Cas. 570; 1 O. C. 225, followed.

Execution first appeal from the decision of the Additional Subordinate Judge, Aligarh.

Mr. B. E. O'Connor, for the Appellant.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.

PIGGOTT, J.—The finding on the issues remitted by us in our order of the 29th of May 1915 is in favour of the appellant. We must now take the facts to be substantially these. Certain property was put up for sale in the execution of a decree by one Bansidhar, who was a transferee of that decree. As regards the particular property in question in this appeal, it was purchased at auction by the appellant Lala Pearey Lal. On the findings now returned, which have not been seriously assailed in argument before us and which we must accept upon the evidence, we hold that Lala Pearey Lal was a bona fide auction-purchaser for value. The decree under execution at the instance of Bansidhar has been reversed on appeal, and the question before us is whether the judgment-debtors can obtain restitution, not merely ■ against Bansidhar himself (this they have already obtained) but against Lala Pearey Lal. We have been referred to a large number of authorities on this point but it really seems unnecessary to go beyond two decisions of their Lordships of the Privy Council, *Rewa Mahton v. Ram Kishen Singh* (1) and

(1) 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746.

BANDI BAKHSI V. INDAR PAL.

Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan (2). The precise question now in issue was argued out before a Bench of the Judicial Commissioner's Court at Lucknow, of which one of us was at the time a member. The case is that of *Nazhat-ul-daula Abbas Husain Khan v. Dilband Begam* (3). Numerous authorities are there referred to, and the conclusion arrived at is that restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bona fide* purchaser for value at an auction-sale held by a Court which had jurisdiction to hold the same. This appeal must, therefore, succeed. We set aside the order of the Court below and direct that the appellant be restored to possession of the property which has been made over to the respondents under the order appealed from. The appellant will get his costs in both Courts.

Appeal allowed.

(2) 10 A. 166; 15 I. A. 18; 5 Sar. P. C. J. 129.

(3) 21 Ind. Cas. 570; 16 O. C. 225.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 215 OF 1915.

March 16, 1916.

Present:—Mr. Stuart, A. J. C.

BANDI BAKHSI AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

INDAR PAL AND OTHERS—DEFENDANTS—

RESPONDENTS.

Declaration, suit for, that defendant not under-proprietor—Revenue Court's decision that defendant superior to ordinary tenant—Cause of action—Jurisdiction.

The decision of a Revenue Court to the effect that a person sought to be ejected has a status superior to that of an ordinary tenant, affords a sufficient cause of action to the landlord to go to the Civil Court for a declaration that that person does not possess under-proprietary rights. In order to maintain such a suit in the Civil Court it is not necessary that the Revenue Court should definitely hold such person to possess under-proprietary rights.

Amrit Lal v. Jang Bahadur Singh, 11 Ind. Cas. 920; 14 O. C. 196 and *Ram Jiyawan v. Raja Mohammad Abdul Hussain Khan*, 23 Ind. Cas. 231, referred to.

Appeal from the decree of the Additional Judge, Lucknow, dated the 15th April 1915, reversing that of the Subordinate Judge, Unao, dated the 4th January 1915.

Baba Basdeo Lal, for the Appellants.

Mr. Mohammad Wasim, for the Respondents.

JUDGMENT.—The plaintiffs-appellants are owners of a certain *mahal*. Bharath Singh, the father of defendants Nos. 1 to 3, occupied certain land in that *mahal*. In 1886 a notice of ejectment was served on behalf of the proprietor on Bharath Singh. He contested that notice in the Rent Court, asserting under-proprietary rights. The Rent Court held in 1886 that, though he could not prove under-proprietary rights, he nevertheless had a status superior to that of an ordinary tenant. The objection was allowed and the notice of ejectment was set aside. Subsequently defendants Nos. 1 to 3 sold their rights in the land to defendant No. 4. The plaintiffs then issued a notice of ejectment again. This notice was contested. The final decision was that of the Board of Revenue, which held that defendants Nos. 1 to 3 had under-proprietary rights.

This suit was then brought by the plaintiffs for proprietary and actual possession of the plot. It was decreed by the Court of first instance but dismissed by the Additional Judge of Lucknow on appeal. The present appeal is preferred. I agree with the learned Additional Judge that the decision in *Amrit Lal v. Jang Bahadur Singh* (1) governs this case. The decision of the Revenue Court in 1886 afforded a cause of action to the landholder to go to the Civil Court for a declaration that the person whom he sought to eject did not possess under-proprietary rights. In order to maintain such a suit in the Civil Court it was not necessary that the Revenue Court should definitely hold such person to possess under-proprietary rights. The decision in *Ram Jiyawan v. Mohammad Abdul Hussain Khan* (2) in no way detracts from the authority of the decision in *Amrit Lal v. Jang Bahadur Singh* (1). Accepting this view of the law I dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

(1) 11 Ind. Cas. 920; 14 O. C. 196.

(2) 23 Ind. Cas. 231.

In re MOGAMBARA PATTAN.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 601 AND 602
OF 1912.

November 27, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

In re MOGAMBARA PATTAN AND OTHERS

—ACCUSED—PETITIONERS.

Madras Towns Nuisances Act (Mad. III of 1889), ss. 6, 7—Gambling in common gaming house, conviction for—Appeal—Appellate Court, finding of—Not common gaming house—Re-trial, propriety of order for—Criminal Procedure Code (Act V of 1898), s. 423 (1).

The accused were convicted of the offence of gambling in a common gaming house under sections 6 and 7 of the Madras Towns Nuisances Act. On appeal, however, the Sub-Divisional Magistrate found that there was no evidence that the house where the gaming was carried on was a common gaming house, but ordered a re-trial in the interests of justice. On revision by the High Court:

Held, that in the absence of evidence on record or of an assurance by the prosecution, that evidence would be forthcoming that the house was a common gaming house, the Appellate Court acted irregularly in ordering a new trial.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1893, praying the High Court to revise the judgment of the 1st Class Sub-Divisional Magistrate, Cuddalore, in Criminal Appeals Nos. 24 and 25 of 1912, preferred against the judgment of the 2nd Class Magistrate, Panruti, in Calendar Cases Nos. 784 to 793 and 794 of 1912, respectively.

Messrs. E. R. Osborne and P. R. Narayanaswami Iyer, for the Petitioners.

The Public Prosecutor, on behalf of Government.

ORDER.—(1). Unless the appellate Magistrate found some material already on record tending to indicate that the house was a common gaming house or unless the Magistrate was given by the prosecution assurance of sufficient weight indicating that there would be produced practically unimpeachable evidence that the gaming took place in a common gaming house if a re-trial was ordered, he ought not to have sent back the case for re-trial and ought to have acquitted the accused in the absence of evidence to show that the house where they were found gaming was a common gaming house, that is, a house kept by the owner of it for profit and to be used by the public indiscriminately (or practically indiscriminately) for gaming purposes.

ALEXANDER v. CONNORS.

(2). So much of the order of the lower Court as directs a re-trial is quashed. A similar order is made in the connected petition.

(Orders modified.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 124 OF 1916.

February 18, 1916.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

V. R. ALEXANDER—COMPLAINANT—
PETITIONER

versus

R. W. CONNOR AND OTHERS—ACCUSED—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1893), ss. 253, 259—Procedure—Accused, when can be discharged in complainant's absence.

The discharge of an accused person in the absence of the complainant can only be made under section 259, Criminal Procedure Code, and that only in the case of a compoundable offence. It cannot be made under section 253.

Rule against the order of the Chief Presidency Magistrate of Calcutta.

Babus Jyotish Chandra Hajra, Debendra Nath Kumar, Mrityunjoy Chatterji, Apurva Chandra Mukerjee and Heramba Chandra Guha, for the Petitioner.

JUDGMENT.—In this case, the procedure of the learned Magistrate in discharging the accused under section 253, Criminal Procedure Code, in consequence of the absence of the complainant was not in accordance with law. Section 253 only provides for the discharge of an accused where the Magistrate finds that no case has been made out or he considers the charge to be groundless. The discharge in the absence of the complainant can only be made under section 259, Criminal Procedure Code, and then only in a case where the offence may be lawfully compounded. We must accordingly set aside the order of discharge and direct a further enquiry into the case. As on 8th December 1915 the learned Magistrate expressed a strong opinion with regard to the case, we direct that the Chief Presidency Magistrate do transfer the case to some other Magistrate for trial.

Case transferred.

EMPEROR v. NAWAB.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 703 OF 1915.

February 25, 1916.

Present:—Mr. Justice Rattigan and
Mr. Justice Shah Din.

EMPEROR—APPELLANT

versus

NAWAB—RESPONDENT.

Opium Act (1 of 1878), s. 9 (c), (e)—Illicit possession of opium, proof of—Servant's possession, whether on behalf of master when master and servant in each other's company—Presumption—Burden of proof—Possession with intention of exporting opium, whether amounts to offence of exporting—Appeal against acquittal—Grounds for Chief Court's interference.

An unlawful possession of opium with the intention of eventually exporting it does not amount to the offence of 'exporting' opium within the meaning of section 9 (c) of the Opium Act. [p. 306, col. 2.]

Unlawful possession of opium by a servant will not amount to possession by his master even when they are found in each other's company at the time, so as to render the master liable for conviction under section 9 (c) of the Act. [p. 307, col. 1.]

It is for the prosecution to prove affirmatively and clearly that the possession of the servant was on his master's behalf and with his master's authority. [p. 306, col. 2; p. 307, col. 1.]

Nature of the evidence required in proof of a case under section 9 (c) discussed.

The Chief Court will not set aside a judgment of acquittal unless it is clearly and palpably wrong on the evidence. [p. 307, col. 2.]

Emperor v. Chatter Singh, 7 P. R. 1904 Cr., 97 P. L. R. 1904; 1 Cr. L. J. 781, referred to.

Appeal from the order of the Sessions Judge, Ferozepore, dated the 12th March 1915, reversing that of the Magistrate, First Class, Ferozepore, dated the 4th February 1915, and acquitting the respondent.

Mr. Broadway, (Additional Government Advocate), for the Appellant.

JUDGMENT.—This is an appeal by the Local Government, under section 417, Criminal Procedure Code, from the order of the Sessions Judge, Ferozepore, acquitting the respondent, Nawab, who had been convicted by the Magistrate, first class, of offences under section 9, clauses (c) and (e) of the Opium Act, 1878, and sentenced on each count to one year's rigorous imprisonment and a fine of Rs. 1,000.

The facts are stated in detail in the judgment of the Magistrate, but it is unnecessary for the purposes of this appeal to recapitulate them. It is sufficient to say that the Police had received information from one Sher Ali, a dismissed servant of Nawab, that the latter and his present servant, Abbas, had

been to Abohar for the purpose of buying large quantities of opium which they intended to export to Burma. On the 23rd March 1914 Nawab entered the train for Delhi at Abohar and was promptly arrested and searched, but only a very small, and quite legitimate, amount of opium was found upon him. His servant, Abbas, was not with him, but the Police had been led to suspect that Abbas would enter the train at the next station, Pakki, and had accordingly made arrangements for his arrest there. Their suspicions were well founded, and Abbas was duly arrested and searched, with the result that 10 seers 6 *chittaks* of opium were found concealed in his bedding. Abbas admitted at the trial that the opium was found in his bedding, but endeavoured to exculpate himself by saying that he was in possession of it under the directions and on behalf of his master, Nawab. Nawab, on the other hand, asserted that he knew nothing about the matter and that Abbas' possession was on his own account.

Upon these facts the Magistrate convicted Nawab not only of the offence of being in possession of opium unlawfully, but also of exporting the same unlawfully, and sentenced him in respect of each offence to the maximum penalty.

Obviously, the conviction under clause (e) of section 9 of the Act was erroneous, ■ there had then been no *export* of the opium; (see the definition of the term "export" in section 3 of the Act). Assuming for the sake of the present argument, that Nawab was in possession of the opium through his servant Abbas, and that he *intended* eventually to export it, we cannot hold that he was guilty of the offence of exporting it. Mr. Broadway conceded that in any event the conviction under clause (e) had been rightly set aside as erroneous and we entirely agree.

As regards the conviction under clause (c), the learned Sessions Judge held, upon the authority of *Utam Chand v. Emperor* (1), that as the opium was found in the possession of Abbas, it was for the prosecution to prove affirmatively and clearly that the possession of Abbas was merely that of a servant acting under the authority of his master, Nawab. The

(1) 15 Ind. Cas. 1007; 16 C. W. N. 551; 13 Cr. L. J. 591; 15 C. L. J. 491; 39 C. 344.

In re MADDELA RAMANIYAMMA.

learned Judge further held that the prosecution had failed to prove that, as regards the particular opium found in Abbas' possession, the latter was in possession thereof on his master's behalf and with his master's authority, the facts that Abbas and Nawab were in each other's company at Abohar and that Abbas was the servant of Nawab being quite compatible with the suggestion that Abbas was "doing some private smuggling on his own behalf." He accordingly acquitted Nawab for want of proof of his complicity and after hearing Mr. Broadway, we are of opinion that the view taken by the learned Judge was perfectly reasonable. We were told that Nawab is a well-known professional dealer in illicit smuggling of opium; that his visits to Abohar synchronised always with a large increase of sales of opium by the licensed vendor, Midda Mal, (who was also convicted at this trial); that correspondence between him and his father showed that Nawab was engaged in this unlawful and lucrative business, and that his former servant, the informer Sher Ali, had deposed to the *modus operandi* and had sworn to previous transactions in which he had carried the opium for his then master. Accepting all these facts as duly established, we still fail to see how it can be held that, as regards the particular transaction with which we are concerned, anything more than a case of suspicion can be said to have been established against Nawab. It is not proved that he purchased these 10 seers 6 *chittaks* of opium and it is only mere surmise that Abbas was in possession thereof on his behalf. No doubt, Abbas is a poor man who possibly could not himself afford to purchase such a large quantity of opium, though here again we are in the region of conjecture, but even so, it does not follow that Abbas was not acting on behalf of his employers other than Nawab. Sher Ali, as a dismissed servant with an obvious desire to get his late master into trouble, is hardly a witness of credibility, and the increase of sales at Midda Mal's shops also synchronised, it is to be remembered, with the visits of Sher Ali to Abohar. But be this as it may, the fact that Nawab is suspected of being concerned in illicit smuggling of opium does not establish his guilt as regards the transaction with which alone we are concerned, and we cannot agree that

the Sessions Judge took an unreasonable view when he held that ■■ regards this transaction, it was quite possible that Abbas, upon whom the opium was actually found, was in possession of it on his own behalf. It is impossible to hold that this finding is so clearly and palpably wrong on the evidence as to justify us in setting aside his judgment of acquittal [see *Emperor v. Chatter Singh* (2)]. We accordingly reject this appeal.

Appeal rejected.

(2) 7 P. R. 1904 Cr.; 97 P. L. R. 1904; 1 Cr. L. J. 781.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 157 OF 1915.

CRIMINAL REVISION PETITION NO. 612

OF 1915.

March 28, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Napier.

In re MADDELA RAMANIYAMMA—

ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 164, 364—Inculpatory statements by persons not treated as accused persons—Perjury, prosecution for—Evidence—Admissibility of statements—Penal Code (Act XLV of 1860), s. 193—Evidence Act (I of 1872), s. 25.

Section 164 of the Criminal Procedure Code distinguishes sharply between statements of witnesses and confessions of accused persons. If the statement made by a person is recorded as a 'confession,' the procedure prescribed by section 364 must be followed. Whether a statement is to be called a confession or not depends, not merely on the nature of the statement itself, but on the use that is sought to be made of it. [p. 303, col. 2.]

Muthukumaraswami Pillai v. Emperor, 14 Ind. Cas. 896; 13 Cr. L. J. 352; (1912) M. W. N. 549; 12 M. L. T. 1; 35 M. 397 at p. 490, referred to.

Whether a statement is taken as a statement or as a confession, the record can be used only for the purpose for which it was taken. A 'confession' cannot be made the basis of a prosecution for perjury. A 'statement' cannot be used as a 'confession,' that is, as an admission of the truth of the facts set out in it in a criminal prosecution based on those facts, either against the person making it or against others with whom he may be jointly tried. [p. 303, col. 1.]

Inculpatory statements made, under section 164, Criminal Procedure Code, by a person who was not treated as an accused, nor subsequently tried for any offence based on such statements, are admissible in a prosecution against him for perjury. Such statements are not 'confessions' and the Magistrate's failure to record them in the manner laid

In re MADDELA RAMANIYAMMA.

down in section 364 does not preclude their being used in evidence. [p. 309, col. 1]

In the course of the investigation of an offence under section 372 of the Indian Penal Code against an accused person for purchasing a minor girl for purposes of prostitution, a Magistrate recorded, under section 164 of the Code of Criminal Procedure, a statement made to him by the mother of the minor girl (which, in effect, implicated her also). She was, however, all along treated as a complainant and a witness and never as an accused person:

Held, in a prosecution for perjury against her, that the statement was not treated as 'confession' and that it was unnecessary to follow the procedure prescribed by section 364 of the Code of Criminal Procedure while recording it, and the statement was admissible in evidence against the accused. [p. 309, cols. 1 & 2.]

Queen-Empress v. Varan, 9 M. 224; 2 Weir 125; *Emperor v. Nilakanta*, 14 Ind. Cas. 849; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp.; 35 M. 247, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Guntur, in Criminal Appeal No. 32 of 1915, preferred against the judgment of the Court of the Joint Magistrate of Ongole, in Calendar Case No. 44 of 1915.

Mr. T. Prakasam, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.

AYLING, J.--Petitioner has been convicted on an alternative charge of perjury in connection with two contradictory statements made on affirmation, Exhibits A and D. The conviction was confirmed in appeal and the sole ground argued before us on petitioner's behalf is, that Exhibit A recorded by the Sub-Magistrate of Ongole under section 164 of the Criminal Procedure Code is inadmissible in evidence.

It is urged that this statement is of a confessional nature, that it was not recorded in the manner provided in section 364 of the Criminal Procedure Code; and that, for this reason, it is inadmissible in evidence [*vide Queen-Empress v. Varan* (1)].

It appears that Exhibit A was recorded in the course of an investigation by the Police of a charge under section 373 of the Indian Penal Code against one M. Subba Rao. This man was said to have practically purchased a certain minor girl, Venkamma, for purposes of prostitution and to have had her *kannarika* ceremony performed, thereby dedicating her to that profession.

Petitioner is the mother of Venkamma and in Exhibit A she undoubtedly makes statements which strongly suggest the inference that she was herself guilty of an offence under section 372 of the Indian Penal Code. If she were on her trial for such an offence, Exhibit A would have to be regarded as a statement of a confessional nature; and, not having been recorded in manner prescribed by section 364 of the Criminal Procedure Code, it would be inadmissible in evidence.

The question is, whether it is admissible in the present proceedings (a prosecution for perjury against the person making it) for the purpose of proving that she did make the statement therein recorded; or to put the difficulty somewhat differently, whether the Magistrate who recorded it was entitled to administer an affirmation before recording it. Both questions turn on the same considerations and both must, in my opinion, be answered in the affirmative.

Section 164 of the Criminal Procedure Code distinguishes sharply between statements of witnesses and confessions of accused persons. The former may be made on affirmation and recorded in such of the manners prescribed for recording evidence as to the Magistrate seems best fitted. The latter has to be recorded as prescribed by section 364 of the Criminal Procedure Code, and before recording it, the Magistrate must follow the procedure laid down in clause (3) of the section, but, of course, administer no affirmation or oath.

Now, it seems to me that the same utterances made by any individual to a Magistrate might be regarded as a "statement" from one point of view and as a "confession" from another point of view, using both terms in the sense contemplated by the section. It all depends on the connection in which, and the purpose for which, it is sought to be used. As succinctly expressed by Abdur Rahim, J., in the Tinnevely case of *Muthukumaraswami Pillai v. Emperor* (2), "Whether a statement is to be called a confession or not, depends not merely upon the nature of the statement itself, but also on the use that is sought to be made of it."

(1) 9 M. 224; 2 Weir 125.

(2) 14 Ind. Cas. 836; 13 Cr. L. J. 352; (1912) M. W. N. 549; 12 M. L. T. 1; 35 M. 397 at p. 400.

PARDIP SINGH v. EMPEROR.

A Magistrate sitting out to record under section 194 of the Criminal Procedure Code what any person has to say to him may adopt one of two alternatives: he may record it as ■ "statement" or ■ ■ ■ "confession," using the appropriate procedure in each case. In either case the record may be used, as allowed by law, for the purpose for which it was taken, but its use for a different purpose may be open to divers objections. For example, ■ "confession" could not be used as the basis of ■ prosecution for perjury. A "statement" could not be used as ■ "confession"—that is, as an admission of the truth of the facts set out in it in a criminal prosecution based on those facts, either against the person making it or against the persons with whom he may be jointly tried.

Now in the present case, as far as I can see, until the argument we are now considering was advanced in this Court, the idea of Exhibit A being a "confession" never occurred to anyone. No prosecution for an offence under section 372 has ever been instituted against petitioner, nor, so far as appears, has ever been contemplated. When the case against M. Subba Rao broke down in consequence of petitioner and others resiling in Court from their earlier statements, the Police took steps to prosecute petitioner—not for an offence under section 372—but for one under section 193 of the Indian Penal Code. Before taking her to the Magistrate on 7th September 1913, the Police actually treated her as a *complainant*, and recorded a statement from her (Exhibit J) as provided in section 154 of the Criminal Procedure Code. Exhibit A itself was undeniably recorded as a "statement," and was used by the prosecution in the case against Subba Rao for purposes of contradiction when he was allowed to cross-examine her. Throughout those proceedings, she was treated as a witness and Exhibit A as the statement of a witness.

I can see no reason why its admissibility in the same sense in the present case should be affected by the fact that, if it had been differently recorded, it might have been used as a confession in a prosecution for a totally different offence.

Our attention has been drawn to the judgments both of the Special Bench and of the Full Bench in the Tinnevely case reported

as *Emperor v. Nilakanta* (3), and reliance is placed on the fact that the majority of the Full Bench held that section 25 of the Indian Evidence Act precluded the admission ■ evidence in that case of the statements of the approvers to the Police Inspector. The circumstances there were entirely different and the statements were sought to be used for an entirely different purpose, *i. e.*, to corroborate subsequent statements of the approvers in Court as to the same facts and thereby to establish the said facts. Here no attempt is made to do anything of the kind: the prosecution do not try to prove that the averments in Exhibit A are true, but only that petitioner made those averments.

I may also be permitted to remark that although the majority of the Full Bench held that section 25 of the Indian Evidence Act applied, yet of the eight Judges of this Court, who had to consider the point, four took the contrary view (the Chief Justice, Miller, J., Abdur Rahim, J., and myself). I am not sure, therefore, that if the point had to be considered it should even now be treated as finally settled.

In my opinion Exhibit A was properly admitted in evidence.

I would, therefore, dismiss the petition.

NAPIER, J.—I agree.

Petition dismissed.

(3) 14 Ind. Cas. 849; 35 M. 247; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITIONS NOS. 794, 797 TO 816 OF 1915.

July 26, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Chapman.

PARDIP SINGH AND OTHERS—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), ss. 17, 19—Appointment of special constables, when legal—Parties to dispute, inexpediency of appointment as special constables of—Appointment pending disposal of security cases—*Criminal Procedure Code* (Act V of 1898), s. 107.

Special constables should be appointed under section 19 of the *Police Act* only when it is really intended to use them as Police Officers and to strengthen the ordinary Police force, and not otherwise. [p. 310, col. 2.]

PARDIP SINGH v. EMPEROR.

It is objectionable to appoint as special constables parties to a dispute against whom complaints have been lodged or against whom proceedings are pending under section 107 of the Criminal Procedure Code so as to handicap them in their defence. [p. 311, col. 1.]

Criminal Revisions against the order of the District Magistrate, Mozafferpur, dated May 26th, 1915.

Mr. W. Gregory (with him Babu Birbhusan Dutt), for the Petitioners.

Mr. S. Ahmed (Deputy Legal Remembrancer, for Bihar), for the Respondent.

JUDGMENT—These twenty-one Rules have been heard together. They were issued to show cause why the orders directing the prosecution of the petitioners upon the charge of refusing to serve as special constables should not be set aside.

The petitioners live in four villages adjoining two ferries named Dih Ghat and Itwa Ghat, lease of which is held by a certain Rambirich and his son under the District Magistrate and District Board of Mozafferpur. These ferry farmers complained that in January and March last there had been riotous disturbances over their use of the ferry, and in consequence proceedings were instituted against thirteen of the present petitioners under section 107 of the Code of Criminal Procedure for the purpose of binding them down to keep the peace. During the pendency of these proceedings, the ferry farmers, on the 14th April, again complained that the villagers did not allow them to ply the ferry and prayed that certain persons named by them should be made special constables. The names given include all the present petitioners. The District Magistrate directed the District Superintendent of Police to depute an Inspector to enquire into the matter, intimating at the same time his willingness to appoint special constables. The Inspector reported that the disturbances had been due to the enhancement of the ferry tolls. He recommended that the persons named by the ferry farmers be appointed special constables, and that in the meantime a head constable and four constables be deputed from the Reserve. A head constable and four constables were accordingly deputed, and eventually, on the 10th May, the District Magistrate recorded an order appointing twenty-seven persons to

serve as special constables within a certain area in the neighbourhood of the ferries. These twenty-seven persons were the persons originally named in the complaint of the ferry farmers and included the petitioners against some of whom, as we have said, proceedings under section 107 had then been pending for a considerable time. The petitioners heard of this order, and before it was formally communicated to them came into the town of Mozafferpur. On the 11th May they presented a petition to the District Magistrate impugning the right of the ferry farmers to the ferries and praying that they (the petitioners) should not be appointed special constables. While they were in Mozafferpur awaiting the result of their petition to the District Magistrate, six of the petitioners were met by certain Police Officers who asked them to take their belts and other equipment. They refused. This was reported to the District Magistrate on the 25th May. On the same date the District Magistrate recorded an order summarily rejecting the petition which the petitioners had made to him on the 11th. On the 26th he directed the prosecution of the six petitioners above referred to under section 9 of the Police Act for refusing to serve as special constables. It does not appear whether the District Magistrate's order rejecting their petition of the 9th was communicated to the petitioners. On the 28th May they were all present in the precincts of the court-house at Mozafferpur in connection with the section 107 proceedings, in which they were accused and which were that day under trial. The remainder of the petitioners were then offered appointment, certificates and belts. They refused to take them, and upon a peon being sent to call them before the Joint Magistrate, they refused to comply. An order was then issued directing the prosecution of the remainder of the petitioners.

The only legitimate object of appointing special constables is to strengthen the ordinary Police force by the addition of suitable persons. It has been more than once held by this Court that when such appointments are not made with the object above stated, proceedings under section 19 of the Police Act will not be permitted.

It does not appear that any instructions

EMPEROR v. DHARMA SHAH.

for the performance of any kind of police duty were even issued to the petitioners, and the circumstances above set forth compel us to come to the conclusion that it was never really intended to employ the petitioners as Police Officers.

We may note also that the proceedings under section 107 are now approaching termination. The matters in issue will be decided, and any further action to prevent breach of the peace will, we hope, then be unnecessary.

In the circumstances, we direct that the proceedings against the petitioners be quashed.

The Code of Criminal Procedure, as it stands at present, does not provide any obvious remedy for the prevention of disturbances during the pendency of proceedings under section 107. It was the difficulty, no doubt, which led the District Magistrate to have recourse to appointing the persons reported likely to create disturbance, special constables. We cannot, however, believe that he intended to actually utilize their services on police duties, for this would have been objectionable and would have handicapped them in their defence in the section 107 case. We may point out that in the present instance an order under section 144 would probably have sufficed. We think also that the petitioners might well have been given a hearing. Ferry farmers are often exacting.

We welcomed the assurance of the Deputy Legal Remembrancer that, if we expressed the opinion that the prosecutions were illadvised, they would be dropped.

Rule made absolute.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 1570 OF 1915.
January 14, 1916.

Present:—Mr. Justice Rattigan.

EMPEROR—PROSECUTOR

versus

DHARMA SHAH ACCUSED.

Punjab Municipal Act (III of 1911), ss. 219, 228, Explanation—Notice by Committee requiring performance of certain things. Authority given to Darogha Safai by office to prosecute in case of non-compliance—Complaint filed by holder of office, whether legal.

Where a Municipal Committee directed a notice to be issued to the accused requiring him to do certain specified things and ordered that in case of non-compliance proceedings under section 219 of the Municipal Act should be instituted against him "by the *Darogha Safai*" in accordance with which the Conservancy *Darogha* filed on non-compliance a complaint against the accused and obtained a conviction:

Held, that as the complaint was not made by a person duly authorized in accordance with the terms of section 228 of the Municipal Act, all the proceedings were without jurisdiction and bad for want of a proper complaint. [p. 312, col. 1.]

Case reported by the Sessions Judge, Rawalpindi, with his No. 1179 of the 17th September 1915.

ORDER.—The Municipal Committee of Rawalpindi directed a notice to be issued to Dharma Shah requiring him to do certain things specified in the notice, and recorded an order to the effect that if the notice was not duly complied with, proceedings under section 219 of the Punjab Municipal Act should be instituted against the said Dharma Shah "by the *Darogha Safai*." It is alleged that Dharma Shah did not comply with the notice and accordingly Lala Bagwan Das, Conservancy *Darogha*, filed a complaint in the Court of Lala Ram Chand, Honorary Magistrate, first class, praying that Dharma Shah might be punished under section 219 of the said Act. The Magistrate has convicted Dharma Shah and sentenced him to pay a fine of Rs. 10 and a further fine of Re. 1 *per diem* for such time as he fails to comply with the orders of the Committee.

The Sessions Judge of Rawalpindi has referred the case to this Court for revision on the grounds (a) that the authority to prosecute given by the Municipal Committee did not comply with the provisions of section 228 of the Act, and (b) that the order which imposed the continuing fine was illegal, [*Emperor v. Gurditta* (1)].

Section 228 of the Act enacts that "unless otherwise expressly provided, no Court shall take cognizance of any offence punishable under this Act or any rule or any bye-law thereunder except on the complaint of, or upon information received from, the Committee or some person authorised by the Committee in this behalf." An 'explanation' is added to the effect that the Committee may authorise persons to make complaints

(1) 13 P. R. 1903 Cr.; 171 P. L. R. 1903.

BISHESSUR CHUCKERBUTTY v. EMPEROR.

or give information, and that the person authorised may be authorised by office, if he is President, Vice-President, or Secretary of the Committee, or Officer in charge of a Police station. In other cases, the authority must be personal. In the present case the authority to make the complaint was conferred upon the *Darogha Safai*, whereas it should have been conferred upon *Lala Bagwan Das* who happened to fill that office. The provisions of section 228 are imperative and as the complaint was not made by a person duly authorised in accordance with the terms of that section, I must hold that all the proceedings of the Magistrate were without jurisdiction and bad for want of a proper complaint. The conviction and sentence must, therefore, be set aside and the fine, if levied, be refunded.

I need hardly add that my present order will not stand in the way of a prosecution properly instituted by the Municipal Committee or by some person duly authorised by the Committee in this behalf upon the same facts.

Revision accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 235 OF 1916.

March 17, 1916.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

BISHESSUR CHUCKERBUTTY AND

ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144 cl. (5), 107—Enticement of time by successive orders—Illegality.

It is clearly improper for a Magistrate to extend the period of two months prescribed by clause 5 of section 144, Criminal Procedure Code, by passing successive orders under that section. [p. 312, col. 2.]

Satish Chandra Roy v. Emperor, 11 C. W. N. 79; 4 Cr. L. J. 432, referred to.

When one order under section 144 does not prove sufficient for the purpose, the right procedure to adopt is to commence proceedings under section 107, Criminal Procedure Code, [p. 312, col. 2.]

Rule against an order of the Deputy Magistrate, Faridpur, dated the 16th February 1916.

Babu Monmocha Nath Mukerjee, for the Petitioners.

Babus Dasarathi Sanyal and Hirendra Nath Ganguly, for the Opposite Party.

JUDGMENT.—In this case a Rule was issued calling on the District Magistrate to show cause why the order of the Deputy Magistrate passed under section 144, Criminal Procedure Code, should not be set aside on grounds Nos. 1 and 3 in the petition mentioned. It would have been more correct had it been based on grounds Nos. 2 and 3. In this case the dispute is with regard to rival *hats*. The petitioners at the close of last year had started a rival *hat* on grounds belonging to themselves, which the Magistrate thought was likely to lead to a breach of the peace. He accordingly passed an order under section 144, Criminal Procedure Code, on 18th December restraining them from holding a *hat* at that spot. This order would have expired on 18th February 1916. The petitioners moved this Court towards the end of January, and we rejected the petition on the ground that the order of the Magistrate was about to expire, and that there was, therefore, no reason for an interference by this Court. This was our chief, if not only, ground for declining to interfere on that occasion. Before that order expired, the Magistrate proceeded to pass orders under the same section with regard to the new *hat*—the site of which the petitioners had shifted to other lands of their own. This order was passed on 13th January 1916 and expired a few days ago. We are asked to interfere with it on the ground that the Magistrate in this case is doing what this Court has held that a Magistrate should not do, namely, by successive orders under section 144, Criminal Procedure Code, extending the period of two months which clause (5) of that section prescribes. That the Magistrate has this object in view is clear from his orders in these cases. In passing the final order making the injunction absolute in this case on 16th February 1916, he noted "put up after two months." It is obvious that the Magistrate thought that his order dated from 16th February 1916, and that two months thereafter he might be in a position to pass a third order under this section. This is clearly

EMPEROR v. PO YIN.

improper. We need only refer to the case of *Satish Chandra Roy v. Emperor* (1). The Magistrate states that he has already commenced proceedings against both the parties under section 107, Criminal Procedure Code. This is obviously the right procedure to adopt: but we are at a loss to understand why the Magistrate thinks that proceedings under that section will take such a long time before final orders can be passed. We see no reason why those proceedings should not be expedited, and orders passed immediately, so as to prevent any further difficulties in respect of these rival *hats*. We think that the present order now under consideration ought not to have been passed, and we accordingly make the Rule absolute and set it aside.

Rule made absolute.

(1) 11 C. W. N. 79; 4 Cr. L. J. 433.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 76B

OF 1916.

March 20, 1916.

Present:—Mr. Justice Twomey.

EMPEROR—PROSECUTOR

versus

PO YIN—ACCUSED.

Criminal Procedure Code (Act V of 1893), ss. 348, 349—Procedure, when previous conviction of accused brought to Magistrate's notice.

It is not illegal or irregular for a Magistrate of the 2nd or 3rd class acting under section 349, Criminal Procedure Code, to frame a charge against an accused person. [p. 314, col. 1.]

Emperor v. Hla Gyi, 2 L. B. R. 285; 10 Bur. L. R. 306; 1 Cr. L. J. 1010, referred to.

A Magistrate acting under section 348, Criminal Procedure Code, should, on the accused's previous conviction being brought to his notice, either commit the accused to the Sessions or transfer the case to the District Magistrate, unless he thinks he can pass adequate sentence. In either case, he is not entitled to submit the records to the higher Court with a finding as to the accused's guilt. Such a procedure is wrong and *ultra vires*. [p. 314, col. 2.]

Emperor v. Po Thwe, 4 L. B. R. 282; 8 Cr. L. J. 478, referred to.

Reference made by the District Magistrate, Tharrawaddy, in his order in Criminal Revision No. 21 of 1916, dated the 9th March 1916.

JUDGMENT.—The following reference has been made by the District Magistrate, Tharrawaddy:—

ORDER OF REFERENCE.

"The accused in this case has admitted two convictions of theft and under section 215 of the Penal Code respectively. The Township Magistrate has recorded a finding of guilty against him under the charge framed, namely, of an offence of criminal house trespass combined with assault. He has submitted the record to this Court under section 349 of the Code of Criminal Procedure.

"I am of opinion that the Township Magistrate could have dealt adequately with the present case. The former convictions were of offences involving dishonesty. The present case is one of trespass and assault. Except in so far as the former offences of the accused indicate that he is of criminal habits generally and does not deserve leniency, I think that they ought not to be taken into consideration to the same extent as they would be considered if the present offence were one of theft, for instance. The offence appears to have been proved against the accused.

"Following, therefore, the usual procedure in such cases I proceed to pass sentence. I direct that the accused Nga Po Yin, having been found guilty of an offence under section 452 of the Indian Penal Code, do undergo rigorous imprisonment for a term of six months.

"Being doubtful whether the procedure of the Township Magistrate of Minhla was correct I submit the record to the Chief Court for favour of a ruling.

"The case was a warrant case. The procedure in the trial of a warrant case is governed by Chapter XXI and among other sections by section 254.

"Section 254 clearly indicates that only when the Magistrate considers that he can punish the offence adequately shall he frame a charge against the accused. The Chapter does not say what shall be his procedure when he is of the contrary opinion.

"What, therefore, should be his procedure? The answer is, I submit, given by section 349. Although this section is generally interpreted in a different sense, I submit that its

NISHI KANTA LAHIRI v. EMPEROR.

intention is that the Magistrate shall follow the procedure laid down in Chapter XXI and in the circumstances described shall stay his proceedings at the point where he has heard all the evidence of the prosecution and has heard the accused 'in the ordinary course of the trial of a warrant case'. He shall not frame a charge: *vide* section 254, but shall write a report indicating his opinion and submit the record to the superior Magistrate. The latter is given discretion to call the prosecution witnesses and examine them anew or to continue the trial from the stage at which it has been suspended by the Subordinate Magistrate, namely, after the examination of the accused.

"It appears to me to be entirely wrong in principle that the Junior Magistrate shall find on the essential question of guilt and the Senior Magistrate shall merely assess the punishment. It is true that the latter is not bound to accept the finding of the Junior Magistrate; but I submit that the latter should not frame a charge nor call upon the accused for his defence.

"Section 254 practically prohibits the Junior Magistrate from framing a charge. Section 349 does not authorize him to do so. The language of the latter section does not justify the generally accepted interpretation of its intention, namely, that the junior Magistrate shall examine the witnesses of the prosecution and of the defence and, therefore, by implication shall frame a charge which section 254 has forbidden him to do.

"I submit the record with the above remarks for favour of a ruling on the point."

The question raised in the latter part of the Order of Reference has been settled, so far as Lower Burma is concerned, by the Full Bench ruling in *Emperor v. Hla Gyi* (1). It will be seen that it is not illegal or irregular for a Magistrate of the 2nd or 3rd class acting under section 349, Criminal Procedure Code, to frame a charge against the accused person.

But in the present case section 349 was not applicable. The accused Po Yin had a previous conviction 'for theft' under Chapter XVII of the Indian Penal Code, and as he was again accused of an offence under

section 452, Indian Penal Code, under Chapter XVII, punishable with imprisonment for a term of upwards of three years, the Magistrate had no option but to act in accordance with section 348, Criminal Procedure Code. See *Emperor v. Po Thwe* (2). As soon as it was brought to his notice that the accused had a previous conviction of theft, the 2nd class Magistrate was bound either to commit to the Sessions Court or transfer to the District Magistrate, unless he thought he could pass an adequate sentence. The Magistrate noted his opinion that a more severe punishment than he could impose was required and it makes no difference that the District Magistrate afterwards expressed a different opinion. In the circumstances the 2nd class Magistrate's finding of the accused guilty was wrong and *ultra vires*. The subsequent proceedings of the District Magistrate were also *ultra vires* as the provisions of section 349, Criminal Procedure Code, had no application to the case.

The conviction and sentence are set aside and it is ordered that the District Magistrate shall treat the case as transferred to him under section 348, Criminal Procedure Code, and shall proceed according to law, either trying the case himself *de novo*. The accused will be treated as an under-trial prisoner until the new trial is finished, and in case of conviction the period of imprisonment which he has already served should be taken into account in passing sentence.

Re trial ordered.

(2) 4 L. B. R. 282; 8 Cr. L. J. 478.

CALCUTTA HIGH COURT.
CRIMINAL REVISION MISCELLANEOUS
APPLICATION No. 43 OF 1916.

April 4, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

NISHI KANTA LAHIRI—ACCUSED.—
PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), ss. 19, 20—Evidence indicating offence under s. 20—Commitment to Sessions—Magistrate's duty to order,

(1) 2 L. B. R. 285; 10 Bur. L. R. 306; 1 Cr. L. J. 1010.

JAWAHIR THAKUR v. EMPEROR.

If in the trial of a case under the Indian Arms Act, the evidence recorded indicates an offence under section 20 of the Act, the Magistrate ought to commit the case to the Sessions, leaving it to the latter Court to determine whether the evidence is to be believed.

Rule against an order of the Chief Presidency Magistrate, Calcutta, dated the 20th March 1916.

Babus Monmutha Nath Mukerjee and Birendra Kumar De, for the Petitioner.

Mr. Camell and Babu Tarak Nath Sadhu, for the Crown.

JUDGMENT.—This is a Rule calling upon the Chief Presidency Magistrate to show cause why the case against the petitioner should not be committed to the Sessions, on the ground that the case falls within section 20 of the Arms Act and that the Magistrate has, therefore, no jurisdiction to try it himself. We have heard the learned Deputy Legal Remembrancer who has shown cause on behalf of the Crown; but we must say that we fail to understand the attitude taken up. He has read us the evidence which has been recorded in this case. So far as the offence under section 19F is concerned, it rests mainly on the evidence of two Police Officers who are said to have found the ammunition in the possession of the petitioner. If that evidence is believed, it is abundantly clear that an offence under the first portion of section 20 was also committed. It would be for the Court to determine whether that evidence is to be believed. But, so far as the point before us is concerned, it is clear that that evidence indicates an offence under section 20, and we think that that being so, the case ought to be committed to the Sessions. We accordingly make the Rule absolute and direct that the Magistrate, after recording any further evidence that may be adduced, do commit the case to the Sessions.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 244 of 1916.

April 18, 1916.

Present:— Mr. Justice Piggott.

JAWAHIR THAKUR—APPELLANT

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1861), ss. 474, 467, 30—
Forged document—Executant's denial—Handwriting—
Expert evidence—Corroboration—Valuable security—
Stamp Act (No. 2 of 1899), s. 12—Negotiable Instruments
Act (XXVI of 1881), s. 20*

An alleged executant of a document denied having made the signature on the document. The testimony of an expert in handwriting was to the effect that the contested signature did not agree with the admitted signature of the executant.

Held, that the expert's evidence afforded reliable corroboration of the executant's evidence. [p. 316, col. 2.]

A blank promissory note and a blank receipt contained the forged signatures of the executant but contained no specification of the person in whose favour either document purported to be executed, nor yet of the date or place of execution, nor yet of the money involved. At the top of each of these papers there was an adhesive stamp of one anna, but the signature was not across the stamp nor had the stamp been cancelled.

Held, (1) that the documents were not stamped in accordance with law. [p. 317, col. 1.]

(2) that nevertheless the documents were valuable securities within the meaning of section 30, Indian Penal Code, inasmuch as they created a legal right. [p. 317, col. 2.]

Criminal Appeal against the order of the Sessions Judge, Gorakhpur, dated the 28th February 1916, sentencing the appellant to five years' rigorous imprisonment and Rs. 200 fine or in default one year's rigorous imprisonment on a charge under section 474, Indian Penal Code.

Mr. Kanhya Lal, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant Jawahir has been convicted of an offence punishable under section 474, Indian Penal Code, in respect of a document, or more strictly speaking of two documents endorsed on separate halves of a sheet of paper, alleged to have been found in his possession. The documents in question are a blank promissory note and a blank receipt. Both purported to be signed by one Bindhayachal. At the top of each of these papers there is an adhesive stamp of one anna; but the signature is not across the stamp nor has the stamp been cancelled in accordance with the provisions of section 12 of the Indian Stamp Act, No. II of 1899. The papers

JAWAHIR TRAKUR v. EMPEROR.

in question are blank in this sense, that they are printed forms with none of the particulars filled in. There is no specification of the person in whose favour either document purports to be executed, nor yet of the date or place of execution, nor yet of the amount of money involved. One document purports on the face of it to be a receipt whereby Bindhayachal acknowledges to have received an unspecified sum of money, on an unspecified date, from some person not specified. Similarly the other document purports to be a promissory note whereby Bindhayachal binds himself to pay to or to the order of an unspecified person an unspecified sum of money, with interest and compound interest after six monthly rests, the rate of interest also remaining unspecified. What I have been asked to consider on appeal is whether all the requirements necessary to a conviction under section 474, Indian Penal Code, have been satisfied.

The first question is whether these documents are forgeries. The defence set up by Jawahir in the Court below was that these documents were genuine, that they were actually signed by Bindhayachal after a stamp had been affixed and that they were signed for good consideration, namely, in return for a loan of Rs. 900. One witness was called to prove this of the name of Nageshar Rai. He has, in my opinion, been very properly discredited by the learned Sessions Judge and I think it unnecessary to comment upon his evidence in detail. The question is whether the prosecution has affirmatively proved the signature of Bindhayachal on these papers to be a forgery. Bindhayachal went into the witness-box and denied having made either of these signatures. If he is believed, there is an end of the case so far as this point is concerned. There is very strong expert evidence, that of Mr. F. Brewster, to the effect that the two contested signatures do not agree with the admitted signatures of Bindhayachal and were not in fact written by the man who wrote the aforesaid admitted signatures. This is obviously not a case in which it is sought to base a conviction on the uncorroborated testimony of an expert in handwriting. The testimony on which the Court is asked to act is the sworn testimony of Bindhayachal. The question

is whether Mr. Brewster's evidence affords reliable corroboration of Bindhayachal's evidence. I am of opinion that it does. Further, the proved circumstances of the case generally support Bindhayachal's denial. He is a wealthier man than Jawahir, and the two men are and have long been on inimical terms. Circumstances have been proved quite sufficient to make it improbable in a very high degree that Bindhayachal should have borrowed Rs. 900 from Jawahir, or that Jawahir should have been content to lend such a sum on the security of an inchoate promissory note and receipt. The Assessors who heard the evidence were in full agreement with the learned Sessions Judge in holding that these two papers were forged documents. I feel no hesitation about endorsing that finding. It has next been contended that the possession of these documents by Jawahir is not proved. The prosecution evidence is to the effect that they were found in the joint family house inhabited by Jawahir, by his father and by his brother. The prosecution has also been able to prove that after the finding of these documents Jawahir propounded a mortgage-deed purporting to be executed by Bindhayachal in his own favour, in which a portion of the consideration purported to be a sum of Rs. 900 and interest on the same, due on a blank promissory note executed by Bindhayachal. This evidence was at least sufficient to establish a *prima facie* case against the accused, a case on which Jawahir could properly be questioned by the Court. The answers returned by Jawahir to the questions put to him both in the Magistrate's and in the Sessions Court clearly show that he had no desire to deny the possession of these documents, or to set up any joint responsibility for the same on the part of other members of his family. On the prosecution evidence, taken in connection with the accused's own admissions, I am satisfied that Jawahir's possession was proved. Something has also been said in argument before me as to the absence of fraudulent or dishonest intention on the part of the accused. There is no force in this plea. The possession of these documents coupled with the circumstantial evidence as to the relations existing between Jawahir and Bindhayachal and considered along with

NUR DIN v. EMPEROR.

the nature of the defence set up by Jawahir himself in the Court below would probably have been sufficient in any case to justify a finding against the appellant. The point is settled beyond reasonable controversy by the use admitted to have been made of this alleged promissory note in connection with the mortgage-deed subsequently propounded. There remains, however, one point to be considered before the conviction can be affirmed. The learned Sessions Judge has assumed that the documents in question, as they stand, are "valuable securities" within the meaning of the definition contained in section 30, Indian Penal Code, and falling within the scope of section 457 of the same Code. A very ingenious argument to the contrary has been pressed upon my notice on behalf of the appellant. If the signatures of the alleged executant Bindhayachal upon these documents had been across the adhesive stamps, or those stamps had been otherwise cancelled in accordance with section 12 of the Indian Stamp Act, II of 1899, there could be no possible question as to the provisions of section 20 of the Negotiable Instruments Act, XXVI of 1881, operating in respect of these documents. Even if it had to be conceded that the documents as they stood did not purport to be valuable securities, they would beyond all question purport to be documents giving authority to the holder of the same to make a valuable security. No doubt the holder of these documents had no intention of propounding them or using them in a Court of Law without first cancelling the adhesive stamps: but the documents as they stand cannot be said to be stamped in accordance with law. I am of opinion, however, that these documents must be held to be, as they stand, "valuable securities" within the meaning of section 30, Indian Penal Code. There is an old case of *High Court Proceedings* 5th August 1873 (1), in which the meaning of the words "purport to be" was considered, and it was held that a document which had not been stamped, and was, therefore, not admissible in evidence, might nevertheless be a valuable security. The same point was again decided in the case of *Queen Empress v. Ramasami* (2).

(1) 7 M. H. C. R. App. xxvi.

(2) 12 M. 148.

I am satisfied that the two papers in respect of which the appellant has been convicted do purport to be documents whereby a legal right is created within the meaning of section 30, Indian Penal Code. The appellant has, therefore, been rightly convicted.

As regards the question of sentence, I must say that I should feel it more satisfactory if I were in a position to consider this question after having before me the result of the proceedings which, I understand, have been instituted in respect of the mortgage-deed propounded by Jawahir subsequently to the discovery of these two documents in his possession. As the case now stands before me, I am not prepared to say that the sentence passed is unduly severe. I dismiss this appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 135
OF 1911.

February 3, 1912.

Present:—Mr. Justice Chevis.

NUR DIN—ACCUSED—PETITIONER
versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 344—Charge of criminal misappropriation—Declaratory suit by accused—Stay of criminal proceedings, when to be ordered.

A person against whom criminal proceedings are instituted cannot claim as a matter of course that such proceedings shall be stayed pending the result of civil proceedings, in each case discretion must be exercised and the particular circumstances of the case duly considered. [p. 318, col. 2.]

Where, therefore, the petitioner was on the 3rd October charged with criminal misappropriation in respect of a necklace and on the 4th idem filed a civil suit for a declaration that the necklace belonged to him making all other claimants defendants and on the 7th applied for postponement of the criminal proceedings:

Held, that as the civil suit had been instituted without any unnecessary delay, and as all the claimants to the property had been made defendants in the suit, the petitioner was entitled to the relief claimed and the criminal proceedings should be stayed. [p. 318, col. 2.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order

NUR DIN v. EMPEROR.

of the Magistrate 1st Class, Lahore, dated the 10th October 1911, rejecting petitioner's applications for adjournment of the criminal case pending decision of the civil suit and for transfer of the case of *Emperor v. Nur Din*, under section 526, Criminal Procedure Code.

The Hon'ble Mr. Muhammad Shafi, for the Petitioner.

Mr. Bevan Petman, for Government Advocate, and Rai Bahadur Lala Sukh Dial, for the Respondent.

JUDGMENT.— This is an application for stay of a criminal prosecution pending the disposal of a civil suit.

The main facts are that the petitioner was arrested in Bombay by the Bombay Police about the end of July last on account of certain suspicions in connection with a valuable pearl necklace, which was then in his possession. The Bombay Police communicated with the Lahore Police, and the result was that one Bura claimed the necklace as his, and the petitioner was brought to Lahore in custody towards the end of August, where he was charged with criminal misappropriation. The criminal proceedings in Court began on 30th August, and on that day or on the next the petitioner was admitted to bail. Meanwhile three other claimants (one a retired District Judge) have turned up so that in all (including petitioner) five different persons now claim to be owners of the necklace. The trial went on during September, and on 3rd October a charge was framed, on 4th October the petitioner lodged a civil suit for a declaration, and on the 7th October petitioner applied to the Criminal Court for postponement of the proceedings. This application the Magistrate refused, saying the criminal case had been dragging on for over a month, many claimants had now come forward and there would be no finality to proceedings if all the claimants were to bring civil suits.

Petitioner applies to this Court asking (1) for postponement of criminal proceedings pending decision of the civil suit, and (2) transfer.

As regards (2) the Magistrate in question has already been succeeded as City Magistrate by another Magistrate, so this matter may be disregarded.

As to postponement many rulings on each side have been quoted, but no particular rule has anywhere been laid down. It is, of course, clear that a person against whom criminal proceedings are instituted cannot claim as a matter of course that such proceedings shall be stayed pending result of civil proceedings, otherwise it would be easy for criminals to delay the disposal of prosecution by lodging civil suits. In each case discretion must be exercised and the particular circumstances of the case duly considered. Justice must not be unduly hampered but on the other hand, where there is no particular cause for hurry, the postponement of the criminal proceedings sometimes avoids a regrettable conflict of decisions between the Civil and Criminal Courts. One point which may sometimes have considerable weight is the question of priority, a man who has already instituted civil proceedings may well urge that a subsequent criminal prosecution should be delayed to see the result of the civil suit. On the other hand, where the civil suit has been instituted without any undue delay, an accused person may urge that the matter of priority should not be allowed to weigh too heavily against him. The dates I have already mentioned, coupled with the fact that the Civil Courts were closed during the month of September, that 1st and 2nd October were holidays and that petitioner had to attend the Criminal Court on 3rd October, show that there was no undue delay in lodging the civil suit.

As to the fact that several claimants have turned up, I think the Magistrate has expressed undue apprehensions. He thinks, there may be no finality to the civil proceedings if every claimant that may turn up brings a civil suit, but I note that the petitioner only asks for postponement pending the decision of his own suit. I understand, too, that all claimants who have appeared up to date have been made defendants in the civil suit.

I note also that, now that the Magistrate has been transferred, it is open to the petitioner in any case to ask for the evidence to be recorded *de novo*.

In my opinion the circumstances of the present case are such that the proceedings in the criminal case may well be stayed and

MA ■■■ v. EMPEROR.

I direct stay of those proceedings pending decision of the civil suit which has been instituted by the petitioner.

Criminal case stayed.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION PETITION No. 254
OF 1915.

January 13, 1916.

Present:—Mr. Justice Parlett.

MA SEIN—PETITIONER

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 520—
Confiscation of property subject of offence—Notice to
complainant.*

No order for the confiscation of property, the subject of an offence, can be passed under section 520, Criminal Procedure Code, without giving notice to the complainant and hearing his objections, if any. [p. 320, col. 1.]

Review of the order of the Sessions Judge, Prome, dated the 26th July 1915, passed in Criminal Appeal No. 411 of 1915.

ORDER.—The facts of this case as stated in this Court are that Rs. 1,110 was stolen from the *kyaung* of the complainant U Nyanoktaya, Pongyi of Marogon. Ba So, a former pupil, was suspected, and is alleged to have promised to restore the money. A biscuit tin full of money was subsequently found in a straw heap near Po Byo's house. There was evidence that Ba So had deposited it with Po Byo. There was also evidence that after the discovery Ma Sein appropriated the tin of money. In her possession was found Rs. 462-3 in cash. It was seized and made an exhibit in Court in ■ trial, which ended in the conviction of Ba So for theft of the Pongyi's money, of Po Byo for receiving the stolen money and of Ma Sein for criminal misappropriation of part of it and the Rs. 462-3 was ordered to be returned to the complainant. They all appealed and the Sessions Judge reversed the convictions upon a technical point of misjoinder, but his judgment did not expressly direct, as section 423 (1) (b) of the Criminal Procedure Code contemplates that it should, whether each of the appellants was acquitted, discharged or to be

re-tried. As regards Ba So and Po Byo, however, an acquittal seems to have been intended, for the Sessions Judge held certain incriminating statements attributed to Ba So to have been made under some inducement or other having reference to the charge in question from a person in authority, and that apart from those statements there was not sufficient evidence against these two accused. As regards Ma Sein I am by no means certain from the judgment what he intended. He considered the evidence against her to be sufficient, but that as the Magistrate had dealt with her under section 562, Criminal Procedure Code, he thought it unnecessary to order a re-trial. I am bound to say this reasoning does not commend itself to me. I do not know if the Sessions Judge considered section 562 was clearly appropriate to what was, in essence, an impudent theft of a large sum of money by a woman of 30, but it may well be that another Court trying her might have taken a different view. Action under section 562 is, moreover, merely a suspension of sentence dependent upon the offender's good behaviour for a future period, and in a case such as the present one, had the offender broken her bond, she should clearly have received a substantial sentence, and in any case I do not think the reason given was a sound one for acquitting, even granting that it might be for not ordering a re-trial. It was open to the Court to discharge and thereby leave it open to the complainant to institute fresh proceedings if he so wished. As, however, the Sessions Judge signed a formal order acquitting Ma Sein, her acquittal cannot be doubted, and I have merely mentioned the above points in the case in order to make the position clear in view of what has followed.

In disposing of the appeals on 17th July the Sessions Judge made no modification, under section 520, Indian Penal Code, of the Magistrate's order that the money should be returned to the complainant. On 21st July Ma Sein applied to the Magistrate for the refund of the money, which was refused as he had received no order to that effect, but the Magistrate applied to the Sessions Judge for orders on the point. On

AMBICA TEWARI v. EMPEROR.

22nd Ma Sein renewed her application to the Sessions Judge, whose order passed the same day thereon was: "The application is rejected." On the 26th July the Magistrate's letter asking for orders came before the Sessions Judge, who directed a copy of his order on Ma Sein's petition of 22nd to be sent to the Magistrate. He, however, on the same day wrote the following note: "I do not consider that the ownership of the money has been established; it should be confiscated, i. e., credited to Government."

Ma Sein now applies for that "order" to be set aside, and for the money to be either paid to her or kept in Court until some one establishes a claim to it. Notice of her application was given to the Government Advocate and to the complainant. The former does not press for the confiscation to Government. The latter asks that the Magistrate's order be restored. Assuming that the Sessions Judge had jurisdiction to make the order of 26th July, I feel no doubt whatever that he could not properly make it without first hearing the complainant to whose great prejudice it was, and on that ground alone it cannot be allowed to stand. In the view I take of the case I have no doubt whatever that the order passed by the Magistrate was under the circumstances the proper order to pass, and that Ma Sein's application was correctly dismissed on the 22nd July.

I, therefore, set aside the Sessions Judge's order of 26th July, and direct that the Magistrate's order that the money be repaid to the complainant, be restored and be carried out, a notice being sent to the complainant at once to attend and receive the money, or to depute some one to do so on his behalf.

Revision rejected; Order modified.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 3 OF 1916.

April 27, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

AMBICA TEWARI AND ANOTHER

—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (6)

(7) (c)—Sanction to prosecute—Sanction granted or refused by Small Cause Court—Appeal to District Judge—'Where no appeal lies,' meaning of, in s. 195 (7) (c).

Clause (c) of sub-section 7 of section 195 of the Criminal Procedure Code cannot be construed as if it were an independent sub-section. [p. 321, col. 1.]

The whole sub-section (7) is confined to Courts against whose decisions or some of whose decisions appeals do lie. The words 'where no appeal lies' in clause (c) of the sub-section do not refer to Courts against none of whose decisions an appeal lies, but refer to particular cases in which no appeal lies. [p. 321, col. 1.]

Ajodhia Parshad v. Ram Lal, 13 Ind. Cas. 284; 9 A. L. J. 124; 34 A. 197; 13 Cr. L. J. 44 followed.

A District Judge cannot entertain an appeal under section 195 (6) against an order granting or refusing sanction by a Small Cause Court situate within the local limits of his jurisdiction. [p. 321, col. 1.]

Mr. S. Sinha, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

CHAMIER, J.—This is an application for revision of an order of the District Judge of Saran directing the prosecution of the applicants for offences under sections 209, 210, 193 and 471 of the Indian Penal Code. The first applicant Ambica Tewari brought a suit in a Court exercising the powers of a Court of Small Causes against Badri Kandu on the basis of a hand-note said to have been signed by Badri. A decree was passed against Badri in that case *ex parte*. Badri then brought a suit to have the *ex parte* decree set aside, on the ground that it had been obtained by fraud and obtained a decree. He then applied to the Court which tried the first-mentioned case for sanction to prosecute Ambica Tewari and a witness in the case named Asarfi Tewari. The Court rejected the application. Badri appealed to the District Judge under section 195, sub-section 6, of the Code of Criminal Procedure, to revoke the order. The District Judge was of opinion

NGA PO CHEIN v. EMPEROR.

that it was not a case in which sanction should be given as Badri might hold the sanction *in terrorem* over the heads of Ambica and Asarfi and use it for the purpose of extorting money, but he passed an order under section 476 for the prosecution of both men on the charges mentioned above. The present application for revision is made on two grounds, namely, that the District Judge had no authority to entertain an appeal or application against the order sanctioning the prosecution, and, therefore, the matter did not come to his notice in the course of a judicial proceeding within the meaning of section 476 of the Code of Criminal Procedure, and *secondly*, that it is not a case in which an order should be made for the prosecution of the applicants. I am of opinion that the District Judge had no jurisdiction to entertain either an appeal or an application under section 195, sub-section (6), of the Code of Criminal Procedure. I had occasion to consider the construction of sub-sections (6) and (7) in the case of *Ajodhia Parshad v. Ram Lal* (1) and I adhere to the opinion which I expressed in that case. It seems to me that clause (c) of sub-section (7) of section 195 cannot be construed as if it were an independent sub-section. Apart from this, however, it appears to me that this is certainly not a case in which an order should be made for the prosecution of the applicants. The prosecution cannot succeed except on proof that the hand-note is a forgery. The hand-note is not signed at all but bears a thumb impression said to have been made by Badri. The District Judge has referred to the evidence of experts on the subject. They disagreed with each other and one of them said that the thumb impression was so blurred that he could not express an opinion at all. There seems to be no doubt that the prosecution, if allowed, will end in an acquittal. I would allow the application and set aside the order of the District Judge directing the prosecution of the applicants.

JWALA PRASAD, J.—I agree. In my opinion the prosecution should not be sanctioned in this case.

Petition allowed; Order set aside.

(1) 13 Ind. Cas. 284; 34 A. 197; 9 A. L. J. 124; 13 Cr. L. J. 44.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEALS NOS. 21, 22 AND 23 OF 1916.

March 23, 1916.

CRIMINAL REFERENCE NO. 9 OF 1915.

March 21, 1916.

Present:— Sir Charles Fox, Kt., Chief Judge, Mr. Justice Parlett, Mr. Justice Young and Mr. Justice Twomey.

NGA PO CHEIN AND OTHERS—APPELLANT

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19, 20, 29—Offences under ss. 19 and 20, whether distinct—Sanction under s. 29, whether necessary when act punishable under first part of s. 20—Criminal Procedure Code (Act V of 1898), s. 537—Want of sanction under s. 29, Arms Act, whether curable—Procedure.

The offences created by and punishable under the first part of section 20 of the Arms Act are distinct from offences created by and punishable under section 19 of the Act. Therefore, a District Magistrate's sanction, under section 29 of the Act, is unnecessary before instituting proceedings in respect of an act punishable under the first part of section 20 and mentioned in clause (f) of section 19. [p. 323, col. 2; p. 324, col. 1.]

The absence of sanction required under section 29 of the Arms Act is a defect fatal to any proceedings held without such sanction, inasmuch as the defect is not curable under section 537 of the Criminal Procedure Code. [p. 324, cols. 1 & 2.]

Per Parlett, J.—Proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without previous sanction under section 29. If, however, in such a case a Magistrate finds that the intention to conceal the possession is not made out, he should discharge the accused under section 20. Proceedings under section 19 (f) may then be instituted, if and when the necessary sanction thereto is given under section 29. [p. 324, col. 1.]

Appeals from the order of the Special Power Magistrate of Henzada, dated the 20th December 1915, passed in Criminal Trial No. 227 of 1915.

ORDER OF REFERENCE.

TWOMEY, J.—(February 21st, 1916.)—In this case one person has been sentenced to suffer rigorous imprisonment for seven years and two others have been sentenced to three years each, under section 20, Indian Arms Act.

The prosecution case is that the three appellants were going about with a 12 bore gun and cartridges concealed in a bundle of bedding. They were found by the Township Officer, Zalun, seated under a tree with the bundle of bedding close by. The Township

NGA TO CHEIN V. EMPEROR.

Officer caused the bundle to be searched and found the gun and cartridges in it.

When the Police investigation was completed, the case was sent to the Township Magistrate for trial and it was submitted to the District Magistrate for orders. The District Magistrate wrote on the diary: "the Special Power Magistrate will please dispose of this case," and the Special Power Magistrate did so, convicting the accused as stated above.

The District Magistrate, on being asked to report whether the proceedings were instituted with his previous sanction as required by section 29 of the Arms Act, reports: "The proceedings were instituted without my previous sanction as such is not necessary under the provisions of Judicial Department Circular No. 20, dated the 19th October 1892, page 104, Burma Arms Manual". The Circular referred to was issued under the orders of Government and it lays down that sections 29 and 30 of the Arms Act do not apply to cases falling under section 20 of the Act. The correctness of this statement seems at least doubtful and a definite ruling on the point is desirable, for if sanction is necessary the want of sanction would not be curable by section 537 of the Code of Criminal Procedure and the whole proceedings would, therefore, be invalid.

In the Calcutta case of *Ahmed Hussein v. Queen-Empress* (1) Chief Justice Maclean remarked that "sections 19 and 20 are so closely interwoven that it is difficult to see how an offence can be committed under the first paragraph of section 20 unless an offence under one of the enumerated sub-sections of section 19 has also been committed". Yet in that case the conviction under section 19 (f) was confirmed though there was no proper sanction. I do not understand how the conviction under section 19 (f) was sustained.

In two Burma cases, 5 Burma Law Reports 171 and *Shunshanisa v. Emperor* (2), the view taken in the Chief Commissioner's Circular of 1892 appears to have been accepted without question. According to Birks, J., all that is necessary to validate a prosecution instituted without sanction is to record that concealment was practised and then "to

convict under section 19 (f) read with section 20". On a question of this kind the views of the Executive Government are entitled to great respect, but I think the Court is bound to examine the question for itself and pronounce definitely ■ to the proper judicial interpretation of section 29. It is clear in my opinion that "any act mentioned in clause (f) of section 19" is "an offence punishable under section 19, clause (f)", and that, therefore, previous sanction is requisite under section 29, whether the act is done in such manner as to indicate an intention to conceal it from the authorities or not. The only difference is that if the act is done in such manner as to indicate that intention, the offender is liable to higher punishment.

In order that the question may be definitely settled it seems proper to refer it to a Bench and I accordingly refer the following question:—

Is the previous sanction of the District Magistrate necessary under section 29, Indian Arms Act, 1878, before proceedings can be instituted in respect of an act mentioned in clause (f) of section 19 punishable under the first part of section 20?

OPINION OF THE BENCH.

PARLETT, J.—The question referred is:—Is the previous sanction of the District Magistrate necessary under section 29, Indian Arms Act, 1878, before proceedings can be instituted in respect of an act mentioned in clause (f) of section 19 punishable under the first part of section 20? At the hearing of the reference the further question was added and argued whether, if such previous sanction is necessary, its absence is a defect fatal to the prosecution.

Clause (f) of section 19 provides that whoever has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15, which prescribe certain licenses permitting such possession and control, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

The parts of section 20 which are material to the present reference run: "Whoever does any act mentioned in clause (f) of section 19, in such manner as to indicate an intention that such act may

(1) 27 C. 692; 4 C. W. N. 750.

(2) 2 L. B. R. 244; 1 Cr. L. J. 742.

NGA PO CHRIN V. EMPEROR.

not be known to any public servant, ■ defined in the Indian Penal Code, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.²² Section 29 provides that where an offence punishable under section 19, clause (f), has been committed, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the District. The question is, whether this section requires the District Magistrate's previous sanction to the institution of proceedings in respect of an offence punishable not under section 19, but under section 20. The words of the section on the face of them appear to me to show that it does not, nor do I see any reason to interpret them otherwise than according to their plain meaning.

As indicated by the marginal note, section 19 renders punishable breaches of certain sections of the Arms Act and section 20 renders more heavily punishable what are called secret breaches of some of those clauses. Thus section 20 treats certain acts, which by themselves constitute offences under section 19, as offences of a graver nature when accompanied by certain attendant circumstances, in this case the intention of concealment from the public authorities. The Criminal Law furnishes numerous instances of similar provisions, e.g., sections 193 and 194; 323 and 325; 379 and 382; 392 and 394; 406 and 408; 448 and the three following sections, and many other sections of the Indian Penal Code. In such cases though the commission of the graver offence includes also the commission of one less grave, the graver offence is distinct from and is punishable more heavily than and under a different section to the minor offence. Some reference was made in the arguments to sections 397 and 398 of the Indian Penal Code, but they appear to me to bear no analogy to the sections of the Arms Act now under consideration. They merely prescribe ■ (minimum) sentence of seven years' imprisonment to be passed upon an offender convicted of an offence under one of the sections 392 to 395 inclusive, when he is armed with ■ deadly weapon or attempts to cause death or grievous hurt.

They neither create graver offences nor render existing offences liable to an enhanced punishment. The offences are punishable under, and their maximum penalties are fixed by; sections 392 to 395 and in no instance are they less than seven years' imprisonment. A first offender who commits robbery by day can be sentenced to ten years' imprisonment, although he is not armed: he can be sentenced to no more, however, if he is armed, and it appears to me that sections 379 and 398 merely ensure that if armed he shall be substantially punished. On the other hand, in my opinion, distinct offences are created by, and are punishable under section 20 of the Arms Act, and such offences cannot be said to be punishable under, section 19. Section 29 accordingly does not apply to such offences and I would answer the *first* question referred in the negative.

The *second* question should, I think, be answered in the affirmative. The want of sanction to the institution of proceedings, when such sanction is required, could only be cured, if at all, by clause (b) of section 527 of the Criminal Procedure Code, as being an omission in the proceedings before trial. If clause (a) were intended to apply to such cases, not only would clause (b) be unnecessary and redundant, but the want of sanction required by other sections of the Criminal Procedure Code, such ■ 197, would be a mere irregularity curable under section 537, unless it had in fact occasioned a failure of justice. The very enactment of clause (b) clearly shows that it is the want of sanction required by section 195 alone which is curable under section 537 and that the absence of sanction required by any other provision of law cannot be so remedied. To take the contrary view would, I consider, render almost nugatory the requirements of the law regarding sanction. The Legislature has enacted with respect to certain offences that no Court shall take cognizance of them or, in the case of section 29 of the Arms Act, that no proceedings shall be instituted against any person in respect of them, without the previous sanction of a specified authority. Without such sanction a Court is not competent to take cognizance of, or to hold any proceedings in respect of, such offences, and if it does

MAM CHAND V. EMPEROR.

so its proceedings, unless covered by clause (b) of section 537, are entirely without jurisdiction and invalid. In my opinion the absence of sanction, when required under section 29 of the Arms Act, is a defect fatal to any proceedings held without such sanction.

Taking the two questions referred together, my view is that proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without previous sanction under section 29. If, however, in such a case a Magistrate finds that the intention to conceal the possession is not made out, he should discharge the accused under section 20. Proceedings under section 19 (f) may then be instituted, if and when the necessary sanction thereto is given under section 29.

FOX, C. J.—I concur.

YOUNG, J.—I concur.

TWOMEY, J.—It was probably the intention of the Legislature to confine the operation of section 20 to cases in which no concealment is practised. Such a restriction is commended in the Government Circular of 1892 as "not only harmless but beneficial." It is easy to understand that while allowing prosecutions to be instituted freely when the accused is found to have hidden arms or ammunition, the Legislature may have intended the district authorities to proceed with more deliberation in cases where the arms, etc., are held openly and where the initial presumption of innocence is, therefore, much greater.

We have to see whether the actual provisions as enacted give effect to the above intention. I think Parlett, J., has shown that the first part of section 20 may be regarded as creating a distinct offence punishable under the section, and that the operation of section 29 may lawfully be restricted to offences punishable not under section 20, but only under section 19 (f). It is true that according to this view sanction would be necessary for a minor offence, while proceedings could be instituted without sanction for a major offence which includes such minor offence, but I do not think that this anomaly need prevent us from adopting the construction

proposed by Parlett, J. I, therefore, concur in answering in the negative the first part of the reference.

I also agree with him in thinking that if sanction were necessary under section 29 before the institution of proceedings under section 20, the absence of such sanction would be a fatal defect.

On the case going back to Twomey, J., he delivered the following

JUDGMENT.—It has now been decided by a Bench (Criminal Reference No. 9 of 1916) that proceedings can be instituted against a person accused of an offence under section 20, Indian Arms Act, without the previous sanction of the District Magistrate.

As to the merits of the case there can be no doubt. The three appellants admittedly were travelling together (though they denied this when they were first arrested). The evidence of the 4th, 5th and 6th witnesses for the prosecution fully establishes the fact that the Indian appellant, Magunia, had a roll of bedding in which a gun and cartridges were hidden. There is a strong presumption that all three accused knew what was in the roll of bedding. They said that the roll was left by a man named Po Han, but they entirely failed to prove this defence and I think it was rightly disbelieved.

The sentence passed on Nga Po Chein is the maximum under section 20 but I am not prepared to say that it is excessive in the circumstances.

The three appeals are dismissed.

Appeals dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1404
OF 1915.

January 22, 1916.

Present:—Mr. Justice Rattigan.

MAM CHAND AND OTHERS—CONVICTS—
PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Sentence—One week's rigorous imprisonment altered to fine of Rs. 50 or in default one week's rigorous imprisonment—Enhancement, illegality of.

NGA POONA v. EMPEROR.

Where petitioners were sentenced to undergo one week's rigorous imprisonment in respect of an offence under section 323, Indian Penal Code, and on appeal the District Magistrate "reduced" the sentence to one of Rs. 50 or in default one week's rigorous imprisonment, irrespective of the fact that they had already undergone several days' imprisonment:

Held, that the order of the District Magistrate amounted to one enhancing the sentence and was illegal.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Rohtak, dated the 9th August 1915, varying that of the Magistrate, Second Class, Jhajjar, District Rohtak, dated the 26th of July 1915, convicting the petitioners.

Mr. N. C. Mehra, for the Petitioners.

JUDGMENT.—Petitioners were sentenced by the Magistrate each to one week's rigorous imprisonment in respect of an offence punishable under section 323, Indian Penal Code, the order of the Magistrate being dated the 26th July 1915. On the 29th July they presented an appeal to the District Magistrate and the 9th of August was fixed as the date of hearing. On the latter date the District Magistrate "reduced" the sentence in each case to one of Rs. 50 or in default one week's rigorous imprisonment.

They have applied for revision of this order, on the ground that the course adopted by the District Magistrate amounted practically to an enhancement of sentence inasmuch as the petitioners are men of no means and quite unable to pay the fine, in default of which they would have to suffer one week's rigorous imprisonment irrespective of the fact that they had already undergone several days' imprisonment before the order was passed. The record does not show whether the petitioners were released on bail by the District Magistrate, but their learned Counsel informs me that he has reason to believe that his clients were imprisoned for four days only and were then released on bail. Be this as it may, I am of opinion that upon the facts of this particular case the order of the District Magistrate amounted to one enhancing the sentence and I accordingly set it aside. The fine, if realised, shall be refunded. The petitioners have suffered sufficient punishment and I accordingly reduce their

sentence to the amount of imprisonment already undergone by them.

Revision allowed; Sentence reduced.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 1 OF 1916.

February 9, 1916.

Present:—Mr. Justice Twomey.

NGA POONA AND OTHERS—ACCUSED—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 499, Exception (8), 500—Defamation—Complaint of grievance to person in authority—Privilege—Good faith—Imputation honestly believed though untrue in fact—Absence of unnecessary publication—Seeking redress.

A person charged with defamation under section 500, Indian Penal Code, who claims the benefit of exception (8) to section 499, must show that the accusation complained of was a *bona fide* complaint of a grievance, and not a wanton accusation maliciously made with the object of injuring another person. [p. 329, col. 1st]

If, without express malice, a person makes a defamatory charge which he *bona fide* believes to be true, against one whose conduct in the respect defamed has caused him injury, to one whose duty it is to inquire into and redress such injury, the occasion is privileged, because the person making the charge has an interest in its subject-matter and the person to whom the communication is made has, on hearing it, a duty to discharge in respect of it. [p. 329, col. 1.]

The accused, who were paddy merchants, sent a telegram to the Traffic Manager of a Railway that a Station Master unduly favoured the charcoal traders in the allotment of waggons and in allowing them to send charcoal in excess of the quantity for which freight was paid and that for this purpose he received a bribe. It was proved that the accused acted in consultation with each other and had no grudge against the Station Master. Certain account-books were tendered in evidence ranging over a long period containing entries of payment of bribes to the Station Master. The Magistrate discredited the evidence, oral and documentary, and convicted the accused, finding that the allegation of payment of bribes to the Station Master was false:

Held, that it could not be said that the accused had no reasonable ground for the telegram, even if it should afterwards appear that their information was untrue in whole or in part, and that, as they complained to the proper authority and did not further publish the imputation of bribery, they were protected by exception (8) to section 499, Indian Penal Code. [p. 328, col. 2.]

Toodgood v. Spyryng, (1834) 1 C. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 347; 149 E. R. 1044; 40 R. R. 523; *Harrison v. Bush*, (1855) 25 L. J. & Q. B. 25; 5 El. & Bl. 344; 1 Jur. (N. S.) 846; 3 W. R. 474; 119 E. R. 509; 103 R. R. 507 and *Waring v. McCaldin*, 7 Ir. R. C. L. 288, referred to.

NGA POONA v. EMPEROR.

Appeal from the order of the Western Sub-Divisional Magistrate of Rangoon, dated the 25th November 1915, passed in Criminal Regular No. 100 of 1915.

JUDGMENT.—The six appellants have been fined by the Sub-Divisional Magistrate, Rangoon, in sums aggregating Rs. 1,100, on conviction for defamation under section 500, Indian Penal Code. The appellants are all substantial rice and paddy traders at Minhla, Tharawaddy District, and they were prosecuted by the Railway Station Master at Minhla, Mg. Maung Gyi, for sending the following telegram on the 25th January 1915 to the Traffic Manager at Rangoon: "Station Master Maung Maung Gyi supplied waggons Nos. 7933, 7639, 7127 on the 24th sending by 10 down train and waggon Nos. 7826, 8086 on the 25th for charcoal bags taking Rs. 6 as bribe for each waggon. He did not supply for rice and paddy; charcoal are loaded 135 to 140 bags to each waggon, he stated less bags in Railway receipt. Ko Poona Bokwa Hawlun Manshin Bathaw."

The accusation of taking bribes for unduly favouring the charcoal traders in the allotment of waggons and for allowing the charcoal traders to send charcoal in excess of the quantity for which freight had been paid is no doubt injurious to the Station Master's reputation. A charge of corruption such as this clearly would lower his character in respect of his calling. It is, moreover, an accusation of an offence under section 161, Indian Penal Code, because all Railway servants are public servants for the purposes of Chapter IX of the Code. The imputations in the telegram were certainly *prima facie* defamatory. The Railway Authorities caused an enquiry to be held into the subject-matter of the telegram and examined some witnesses. After considering Mr. Peters' report the Railway Authorities decided that the charges against the Station Master were not substantiated and the Station Master was told that he was at liberty to take proceedings against his traducers. Mg. Maung Gyi then instituted the present criminal case against the six accused.

The six accused admitted sending the telegram in their joint names. They produced certain evidence to show that the charges

against the Station Master were well founded but that evidence has been disbelieved by the Magistrate.

It was not necessary, however, for the accused to plead that the imputations in the telegram were actually true. It was open to them to take the less difficult course of proving that their action fell under the 8th exception to section 499 of the Code, which runs as follows:—"It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation." This plea was actually advanced by the accused. The Magistrate, after considering the evidence offered by the accused as to the sources of their information, held that the plea was not established and that they had not acted in good faith in sending the telegram. Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention (section 52, Indian Penal Code). As the burden of proving that they were within the 8th exception to section 499 was on the six accused, they had to show that they acted with due care and attention or, in other words, that they had reasonable and probable grounds for making the imputations and did not act with negligence or recklessness.

The prosecution evidence shows that the distribution of waggons is left entirely to the Station Master, that the weighment of goods is under his control and that if a trader wishes to complain about the Station Master's action in these matters, the proper authority to apply to is the Traffic Manager. Traffic Inspector Peters, who held the enquiry for the Railway, described what each of the accused said to him when he called upon them to substantiate the charges in the telegram. Ko Poona, first appellant, was the prime mover. He is a rice mill owner of Minhla and appears to be the principal trader among the accused. If there was a shortage of waggons, he would probably feel it most. He relied on specific information received from his brother-in-law, Po Hmi, a charcoal trader. It is clear that the six accused consulted together about sending the telegram. It may be assumed that they discussed the

NGA POONA v. EMPEROR.

subject and learnt from one another the grounds which each of them had for bringing the charge of corruption against the Station Master.

For the defence, Po Hmi produced certain books of account. Exhibit 2 is a day-book beginning in August 1914 and going on to September 1915 and giving details from day to day of his charcoal transactions. Exhibit 3 covers the same period as Exhibit 2 and is a register of loads of charcoal sent by rail giving the waggon number, capacity of each waggon, weight per waggon, and the various amounts spent on each load and working out the total expenses of each consignment and the profit derived from it. Another charcoal trader Nyasul Huq was also examined for the defence and he also produced his accounts. There were two other witnesses, Lu Hmon and Po Son, who are clerks of Po Hmi and Ko Poona respectively. The evidence of the defence witnesses, if believed, is sufficient to show that there was a long standing system at Minhla Railway Station by which the Station Master and the Station clerks received sums of money from traders for giving them preference in the supply of waggons. Another man named Po Chit, who used to act as broker to Po Hmi but who also traded himself in charcoal, was examined for the prosecution but he gave evidence supporting the defence, stating that he paid Rs. 5 for a charcoal waggon on the 25th January. This witness, however, was rightly regarded as untrustworthy, for his evidence conflicts with his earlier statement to Mr. Peters.

It is established that there was overloading, i.e., that the charcoal traders' consignments weighed considerably more than the weights which were paid for at Minhla. Exhibits C and C1 show that four out of the five waggons mentioned in the telegram were found on arrival at Kemmendine to contain each from 220 to 290 viss in excess of the quantity paid for. The entries in the remarks column of Exhibits C and C1 show only two to seven bags in excess in each case, but these figures do not correspond with the excess weights entered in the body of the form. If the total excess in weight on these four waggons was 1,010 viss as shown in the form, then the number of bags in excess

would presumably be 1,010/14 or 72, i. e. an average of 18 bags per waggon in excess. The Sub-Divisional Magistrate's argument that it was not worth while to bribe the Railway Officials in respect of the overloading seems, therefore, to be incorrect. Moreover as the Sub-Divisional Magistrate points out, according to Po Hmi's account books, there was habitual overloading. The Sub-Divisional Magistrate could not see why the consignors should pay the Station Master bribes to allow five or six bags to be loaded in excess if the consignees had to pay for the extra bags at the other end. But it is not in evidence that the consignments are, as a matter of practice, weighed at the other end. From Peters' evidence, it seems to have come on him as a surprise to hear that these waggons were weighed on arrival. They were weighed in consequence of the appellants' telegram.

The Sub-Divisional Magistrate did not think that any reliance could be placed on Po Hmi's account-books and he came to the conclusion that the books had probably been written up for the occasion; yet the Sub-Divisional Magistrate notes certain facts which militated against the theory of faked accounts, as that they began in August 1914, five months before the telegram was sent, and that they contain 133 pages of manuscript, which is rather a large number of pages for a Burman to write up "unless he is exceptionally obliging or influenced by a considerable remuneration" and, moreover, the Sub-Divisional Magistrate regards as improbable the prosecution theory as to how Po Hmi got details of the numbers of the waggons for entry in his account-book, Exhibit 3. The multitude of details in his account is indeed hardly consistent with the theory that they were written up specially to support the charge of bribery. The Sub-Divisional Magistrate remarks, on the other hand, that there are indications that the books have not been entered up from day to day but have been copied or dictated. After examining the accounts, I cannot find any marked indications of this nature. On the contrary, Po Hmi's accounts appear to me, on the whole, to be accounts kept with fair regularity. The Sub-Divisional Magistrate

NGA POONA v. EMPEROR.

has compared several of the items here and there with the Railway records and with the oral statements of the defence witnesses and noted inconsistencies to which he attaches great weight, as indicating that the accounts are not genuine. Some of the discrepancies may well be due to mistake or inadvertence and the occasional delay in making the entries may also be due to carelessness. The Sub-Divisional Magistrate's remark as to the number of bags loaded in the waggon No. 7127 takes no account of the excess weight; the number of bags in excess would presumably be not 5 to 17. As for the entry, "For the station," in Po Hmi's books I have no difficulty in believing that a trader would, as a rule, prefer to use a veiled or ambiguous form in entering in his accounts sums paid as bribes to Railway Officials, for it is a criminal offence to give such bribes. Nor can I see anything improbable in the entry of Rs. 3 for charcoal bought by the Station Master. I am unable to derive from the discrepancies noted by the Sub-Divisional Magistrate the sinister inference that Po Hmi's accounts are faked. Nyasul Huq's accounts also show payments of money to the Station Officials. These accounts are in Urdu and have not been subjected to the same detailed examination as Po Hmi's accounts. The Sub-Divisional Magistrate, however, decided that Nyasul Huq's accounts were not genuine because he omitted to enter a certain payment alleged to have been made to the witness Po Yin. The reason can hardly be regarded as conclusive.

Assuming, however, that the genuineness of Po Hmi's and Nyasul Huq's accounts is not established and that these and the other witnesses for the defence have given false evidence as to the payments made to the Station Master, should it be inferred as a necessary consequence that Ko Poona and the other accused had no reasonable grounds for sending the telegram? It seems to me that the inference is not warranted. It would still have to be proved that the accused knew or that they had good reason to believe that the statements of Po Hmi and the other charcoal traders and the account-books showing payments of money could not be relied

upon. If the accused had the information which has been laid before the Court by the defence witnesses, it is, in my opinion, impossible to say that they had no reasonable grounds for sending the telegram, even if it should afterwards appear that that information was untrue in whole or in part. The Sub-Divisional Magistrate saw no reason to think that the accused had, in the matter of fact, been treated unfairly in the allotment of waggons. That view may be correct but there can be no doubt, I think, that the accused believed that they were treated unfairly in comparison with the charcoal traders; for otherwise they would not have telegraphed that they did. No suggestion was made in the Magistrate's Court that the accused were actuated by any other motive in telegraphing. They bore no grudge against the Station Master. They telegraphed only because at the beginning of the paddy export season they found waggons being allotted, as they thought, unfairly to the charcoal traders and were thus prevented from taking advantage as fully as they otherwise might have done of the fluctuations of the market rate at Rangoon. They complained to the proper authority with a view to having their grievance redressed and they sent their complaint by telegram as the matter was urgent. They did not publish the imputation of bribery beyond sending the telegram to the Traffic Manager. The imputation has now acquired great publicity, but this is only the consequence of the Station Master's action in prosecuting the accused.

Even if the defence witnesses have given false evidence, it is quite clear that in the matter of overloading the allegation in the telegram was well founded.

In the English case of *Toodgood v. Spyring* (1) Baron Park said: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, ... unless fairly made by a person in matters where his interests are concerned. * * If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the

(1) (1834) 1 C. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 317; 149 E. R. 1014; 40 R. R. 523.

MARUDANAYAKAM PILLAI v. MOHAMMAD ROWTHEN.

common convenience and welfare of society and the law has not restricted the right to make them within any narrow limits." Again in *Harrison v. Bush* (2) Lord Campbell, C. J., remarked: "In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it." The words of Fitzgerald, B., in *Waring v. M'Calvin* (3) may also be cited: "If, without express malice, I make a defamatory charge which I *bona fide* believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is to inquire into and redress such injury, the occasion is privileged; because I have an interest in the subject-matter of my charge, and the person to whom I make the communication has on hearing the communication a duty to discharge in respect of it." These principles of the English Law are embodied in the exceptions 8 and 9 to section 499, Indian Penal Code, and they show the necessity of distinguishing *bona fide* complaints of grievances from defamatory statements maliciously made with the object of injuring another person. In this country even more than in England it is very undesirable that the Courts should take any action which may have the effect of stifling legitimate complaints. I do not agree in the Magistrate's finding in the present case that the accused persons have not shown that they acted in good faith in sending the telegram of 25th January. I think they are entitled to the benefit of the 8th exception to section 499.

The convictions and sentences are set aside and the fines paid by the six accused will be refunded to them.

Convictions quashed.

- (2) (1855) 25 L. J. Q. B. 25; 5 El. & Bl. 344; 1 Jur. (N. S.) 846; 3 W. R. 474; 119 E. R. 509; 103 R. R. 507.
(3) 7 Ir. R. C. L. 288.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 873 OF 1915.

CRIMINAL REVISION PETITION No. 703
OF 1915.

April 7, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

MARUDANAYAKAM PILLAI—COUNTER-
PETITIONER No. 2—PETITIONER

versus

Syed MOHAMMAD ROWTHEN AND OTHERS
—PETITIONERS AND COUNTER-PETITIONERS

Nos. 1 & 3 TO 8—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145 (4)
—Magistrate's refusal to examine witnesses—Failure to record finding as to possession at date of preliminary order—Declining jurisdiction—Irregularity—High Court—Revision.

If a Magistrate refuses to examine, except on the ground of vexation or delay, the witnesses tendered by parties to proceedings under section 145, Criminal Procedure Code, or fails to record a finding as to which party was in possession at the date of his preliminary order, he fails to exercise a jurisdiction vested in him by law, and the High Court would be justified to interfere in revision. [p. 330, col. 2; p. 331, col. 2.]

Thumbalabed Hampanna v. Parisi Gangamma, 27 Ind. Cas. 911; 16 Cr. L. J. 239; *Raja of Karvetnagar v. Lodd Gorind Doss Krishna Doss*, 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91; *Palani Chetty v. Rathina Chetty*, 24 Ind. Cas. 597; 26 M. L. J. 208; (1914) M. W. N. 352; 15 Cr. L. J. 609 and *Kolha Koer v. Muneswar Tewari*, 34 C. 840; 11 Cr. L. J. 452, followed.

Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakul, 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753; *Abhayaessari Debi v. Shidhessari Debi*, 16 C. 513; *In the matter of the petition of Nathu Mal*, 24 A. 315, A. W. N. (1902) 74, distinguished.

Obiter.—The High Court has jurisdiction to interfere in cases of illegalities or manifest irregularities in procedure committed by the subordinate Courts in proceedings under section 145, Criminal Procedure Code. [p. 331, col. 1.]

Palani Chetty v. Rathina Chetty, 24 Ind. Cas. 597; 26 M. L. J. 208; (1914) M. W. N. 352; 15 Cr. L. J. 509, approved.

Petition, under section 439 of the Code of Criminal Procedure, 1898, and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the First Class Magistrate, Melur Division, in Miscellaneous Case No. 19 of 1915.

Mr. C. A. Seshagiri Sastri, for the Petitioner.

Mr. C. Madhavan Nair, for the Respondents.

Mr. M. H. Hakim, for the Government.

JUDGMENT.—In this case I cannot help saying that the attempt of the first class Magistrate to take a short cut has resulted

MARUDANAYAKAM PILLAI v. MOHAMMAD ROWTHEN.

in an unnecessary prolongation of the proceedings. The chief complaint is that the witnesses summoned by the second party, one of whom is the petitioner in this Court, have not been examined. There is no doubt that these witnesses were summoned and were present at the time the Magistrate passed his order. The Magistrate himself says that it was unnecessary to examine the witnesses, as the documents filed before him showed that the first party was in possession.

The facts are these. There was a complaint by the first party that on the 7th September 1915, while they were in peaceful possession of the property, the second party attempted to take forcible possession from them and threatened to commit a breach of the peace in furtherance of their object. Therefore, the question which the Magistrate had to decide was as to who was in possession of the disputed property on 21st September 1915, when the Magistrate passed his preliminary order. The documents to which the Magistrate refers stop with the end of *Fasli* 1324, i. e., 1st July 1915, as the last *kist* receipt produced by the first party was for *Fasli* 1324. No other document has been put in showing the payment of *kist* since July 1915, and there is no document to show as to who was in possession after July 1915. Mr. Madhavan Nair drew my attention to the fact that there was a report by the Village Magistrate immediately after the presentation of the petition, which showed that the possession was with the first party. It is enough to say with reference to this argument that the Village Magistrate has not been examined in this case and that consequently the report sent by him after the matter was taken up by the Magistrate is not evidence. Another suggestion by Mr. Madhavan Nair is that, as in the course of the inquiry, the second party who are the petitioners in this Court stated (falsely, we will take it for the purpose of this case) that they themselves paid the money to the first party for the *kist*, they were conscious that payment of *kist* implied possession. I am unable to agree that, by making this untrue statement, they admitted that the first party was in possession, if they paid *kist*. Under these circumstances, it was obviously the duty of the Magistrate to have taken evidence to ascertain as to who was in possession on 21st

September 1915. Under section 145 of the Criminal Procedure Code, it is clear that the Magistrate is bound to take the evidence tendered to him on the question of possession at the date of the preliminary order. The section is imperative and says, "The Magistrate shall hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject." Throughout the order of the Magistrate there is not a word said about possession on the 21st September 1915, the date on which he must find who was in possession. As myself and Mr. Justice Spencer said in the judgment in *Thumbalabed Humpanna v. Parisi Gangamma* (1), when the mind of the Magistrate is not applied to finding as to who was in possession on the date of the preliminary order, the proceedings must be taken to have been passed without jurisdiction. I adhere to that view. I am also bound by the considered opinion of a Bench of this Court in *Raja of Karvetnagar v. Lodd Govind Doss Krishna Doss* (2), where the learned Judges have laid down distinctly that failure to receive the evidence tendered would amount to the declining of jurisdiction by the Magistrate. Mr. Madhavan Nair, Counsel for the first party, drew my attention to the judgment of this Court in *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (3) and argued that if the Magistrate after passing the preliminary order committed any irregularities in the trial, such irregularities would not amount to mistakes in the exercise of jurisdiction. The language employed by the learned Judges is this: "Once he (the Court) is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not to jurisdiction." Speaking for myself, I am inclined to think that the *obiter* in this sentence

(1) 27 Ind. Cas. 911; 16 Cr. L. J. 239.

(2) 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91.

(3) 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753.

MARUDANAYAKAM PILLAI v. MOHAMMAD ROWTHEN.

requires some modification. However that may be, there was no question in that case of a refusal to record any evidence which was tendered, and I am not prepared to read the sentence which I have quoted as containing a pronouncement that once the Magistrate has passed his preliminary order no subsequent irregularity on his part would amount to the declining of jurisdiction where the express provision of the law is departed from. There can be no doubt that the action of the Magistrate would amount to a refusal to exercise jurisdiction, because the finding as to possession is of the essence of the proceedings under section 145, and a failure to observe the law in that behalf must have the effect of declining jurisdiction when Courts hold that a failure to pass a preliminary order amounts to failure to exercise jurisdiction. The reason of the rule is that an express provision of the law having been ignored, the conditions of jurisdiction under the section have failed. The same reasoning applies to cases where there has been a disobedience of the imperative provisions of clause (4) of section 145. The two grounds which justify proceedings under this Chapter are apprehension of a breach of the peace and a threat to disturb peaceful possession. Any violation of the law which deprives the party from placing the materials to enable the Magistrate to arrive at a conclusion on these two vital points, must be regarded as affecting jurisdiction. Subsequent to the decision in *Kamal Kuttu v. Udayavarma Raja Valia Raja of Chirakal* (3), in addition to the decision to which I was a party along with Mr. Justice Spencer, there was a decision of Mr. Justice Sadasiva Aiyar, *Palani Chetty v. Rathina Chetty* (4), in which the learned Judge seems to consider that any illegality or manifest irregularity in procedure would warrant the interference of the High Court. Speaking for myself, I am entirely at one with the learned Judge in the view that this Court has jurisdiction to consider the proceedings of the Magistrate where we are satisfied he has acted illegally, or has committed serious irregularities in the procedure. But it is not necessary to decide that point, because in this case I am satisfied

that the refusal to take the evidence is a refusal to exercise the jurisdiction which the law has conferred on the Magistrate.

As regards the decisions of the other Courts, *Abhayessari Debi v. Shidhessari Debi* (5) was much relied on. It is enough to say of this case that it is not a considered opinion upon the question I am now asked to decide, because the learned Judges say that, apart from the casual remark made about essence, they were basing their decision on other points. As regards the case *In the matter of the petition of Nathu Mal* (6), it was found in that case that the Magistrate had examined about ten witnesses and being of opinion that the party was unnecessarily prolonging the litigation by asking the Court to examine more witnesses, he refused to examine the witnesses who had been already summoned. That is a matter upon which there has been some doubt. Where the Magistrate considers that there has been a vexatious attempt on the part of a party to prolong the proceedings it cannot be said that he has declined jurisdiction by refusing to examine further witnesses. Therefore the decision in *In the matter of the petition of Nathu Mal* (6) does not affect the present question. On the other hand, the decision of the Calcutta High Court in *Kolha Koer v. Muneswar Tewari* (7) supports the view taken in Madras in *Raja of Karvetnagar v. Ladd Govind Doss Krishna Doss* (2).

For these reasons, I am of opinion that the order of the Magistrate must be set aside and the case sent back to him for re-hearing. Costs will be dealt with by the Magistrate when he passes the revised order. Mr. Madhavan Nair wants to say that his client must be permitted to adduce further evidence if the other side tenders any evidence. The Magistrate will be directed to hear the evidence of both sides, if tendered.

Petition allowed; Case sent back.

(5) 16 C. 513.

(6) 24 A. 315; A. W. N. (1902) 74.

(7) 34 C. 840; 6 Cr. L. J. 452.

(4) 24 Ind. Cas. 597; 26 M. L. J. 203; (1914) M. W. N. 352; 15 Cr. L. J. 609.

GHULAM RASUL v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 63 OF 1916.

April 23, 1916.

Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

GHULAM RASUL AND ANOTHER—CONVICTS
—APPELLANTS

versus

EMPEROR—RESPONDENT.

*Evidence Act (I of 1872), ss. 30, 114, Ill. (b), 133—
Approver, evidence of—Corroboration in material
particulars.*

Courts should not ordinarily depart from the well-recognized practice of accepting the evidence of an approver as against an accused person only when it is corroborated in material particulars by other independent evidence. It is the more necessary to follow this rule where the accused belong to a low class and it is a matter of no difficulty for the approver to include the name of any person of that class among the offenders even though he had no connection with the offence and it might be difficult for him to establish his innocence. [p. 333, cols. 1 & 2.]

In exceptional cases Courts might, for reasons stated, act upon the evidence of an approver as a whole, though uncorroborated in particular details by independent evidence. [p. 333, col. 1]

Balmokani v. Emperor, 28 Ind. Cas. 738; 11 P. W. R. 1915 Cr.; 17 P. R. 1915 Cr.; 16 Cr. L. J. 354, referred to.

Appeal from the order of the Additional Sessions Judge, Multan, dated the 6th December 1915, convicting the appellants.

Mr. Beechey and Dr. Muhammad Iqbal, for the Appellants.

The Government Advocate and Diwan Khalida Ram, for the Respondents.

JUDGMENT.—At about 9 or 10 P.M., on the 7th August 1915, a singularly bold dacoity was committed by a large gang of men at the small village, or *basti*, called Kotla Bhattian in the Shujabad Tahsil of the Multan District. The village is composed almost entirely of fairly well-to-do Hindus, the principal man being one Jathu Mal P. W. No. 1. According to the evidence, the dacoits appeared very suddenly upon the scene, fired two shots, attacked all those who opposed them tore off ornaments from women, broke into houses, and laid hands on all the valuables they could get hold of and also burnt *bahis* and documents, and eventually made off. None of the gang were previously known to any of the Kotla Bhattian residents and consequently were not recognised. Information was promptly given, not only to the local *thana* which is twelve miles from the scene, but also to the

Revenue Assistant of Multan who happened to be encamped at a place called Kureshiwala a few miles off. The Police at once took up the investigation and made careful enquiries from all persons who were likely to know anything about the movements of the gang and also called in trackers to follow up such tracks as they might find. The investigation proved a difficult one, and though the Police from time to time made important discoveries, especially in consequence of statements made by a grazier named Piran who had come across the gang a day preceding the dacoity, nothing very definite was found out until the arrest, on the 15th August, of Allah Bakhsh alias Pakki, a goldsmith of Betkech. This man, who is one of the leaders of the gang, appears to have made many disclosures and as a consequence various arrests followed in due course. On the 21st August one Imam Bakhsh was produced before the Police and was stated to have taken a principal part in the dacoity. On the 22nd August he informed the Sub-Inspector that he was prepared to give evidence as an approver if a free pardon was tendered to him. This was done and on the 29th August a lengthy statement of his was recorded by the Deputy Commissioner. Imam Bakhsh is the principal witness in the case and according to the Sessions Judge, gave his evidence clearly and without hesitation throughout.

Thirty five persons were committed to the Sessions Court for trial in connection with this dacoity and all of them have been convicted by the learned Judge and sentenced, some to transportation for life and others to varying terms of imprisonment. The Assessors (who were all three Hindus) appear to have taken a very intelligent interest in the proceedings and in their opinion, of the thirty-five persons charged twenty-five were guilty, eight were not proved guilty and in the case of two others their guilt was doubtful.

Of the persons convicted six, namely Palia accused No. 6, Ghulam Rasul Qasab accused No. 8, Allah Bakhsh Qasab accused No. 9, Dalla accused No. 20, Pathana accused No. 27 and Rasul Bakhsh accused No. 38, have not appealed. Of the others Allah Bakhsh accused No. 5, Fateh accused No. 7, Ilahi Bakhsh accused No. 10, Diwaya Khoja accused No. 15, Diwaya Mochi accused No. 16, Lukman accused No. 17, Qabul accused

GHULAM RASUL v. EMPEROR.

No. 18, Budha accused No. 21, Hussain accused No. 22, Allah Bakhsh accused No. 23, Salihon accused No. 24, Muhammad Din accused No. 34, and Kadir Bakhsh accused No. 37 have appealed through their Counsel Mr. Beechey. Massu accused No. 13, Ghulam Rasul accused No. 14, Ali accused No. 29, Allah Bakhsh Biloch accused No. 32, Dosa accused No. 33, and Muhammad Ali accused No. 36 have appealed through their Counsel Mr. Muhammad Iqbal, while Nura accused No. 1, Rustam Mohna accused No. 12, Ghulam Rasul barber accused No. 19, Ramzu Bhangar accused No. 25, Sardar Bhangar accused No. 26, Moghal accused No. 28, Karima Mochi accused No. 30, Juma Biloch accused No. 31 and Phullu Biloch accused No. 42 have appealed through the jail authorities.

The record is very lengthy, the trial having occupied the Additional Sessions Judge from the 18th October continuously till the 24th November, 105 witnesses for the prosecution and 75 witnesses for the defence having been examined and cross-examined. The case has also been argued at great length before us and we have carefully considered all the evidence on the record, checking it, where necessary and in the interest of the appellants, by reference to the Police diaries. It is not denied that the dacoity actually occurred, or that the complainant and his friends were robbed of much valuable property, or that nine residents of the village were injured more or less severely. As a matter of fact one of the latter Prabh Dyal was very dangerously wounded in the body by a shot from a gun and had a narrow escape from death.

The sole point which we have to decide is, whether all or any of the appellants participated in the crime. According to the approver they were all concerned in its commission and the Additional Sessions Judge has practically accepted the statement of the approver as in itself sufficient to convict everybody incriminated by him. In our opinion, this is not a case where we should depart from the well-recognised practice of accepting an approver's evidence as against particular persons only when it is corroborated in material particulars as regards the individuals concerned. There are exceptional cases (such for example as the Delhi conspi-

racious case*) where a Court has for reasons given by it acted upon the evidence of an approver in whole though uncorroborated in particular details by independent evidence. Such cases, however, are rare and the general rule that corroboration is necessary should be followed, especially in cases such as the present where it would be a matter of no difficulty for the approver to include the name of any person of the class to which the appellants belong even though such a person had no connection whatever with the offence and it might be very difficult for the latter to establish his innocence. For these reasons we cannot maintain the convictions which rest merely upon the uncorroborated statements of the approver, and it was obviously upon this principle that the Assessors also proceeded. We accordingly accept the appeals of Ilahi Bakhsh (accused No. 10), Nura (accused No. 11), Diwaya Khoja (accused No. 15), Sardar (accused No. 26), Ali (accused No. 29), Juma (accused No. 31), Dosa (accused No. 33) and Muhammad Ali (accused No. 36), and acquit them.

We now proceed to deal with the case of each of the remaining appellants.

[After dealing separately with the case of each of the remaining twenty-one appellants, their Lordships concluded as follows:—]

In conclusion we have only to add that this case was one of no little difficulty and that the Additional Sessions Judge has dealt with the mass of evidence upon the record with great care and thoroughness, while his clear and systematically arranged judgment has been of the greatest assistance to us. We are also much indebted to the learned Government Advocate and Messrs. Beechey and Muhammad Iqbal, for the valuable help they rendered us during the hearing of the appeals in this Court.

* * *
Appeal of some accused accepted.

* See *Balmokand v. Emperor*, 28 Ind. Cas. 738; 11 P. W. R. 1915 Cr.; 17 P. R. 1915 Cr.; 16 Cr. L. J. 354—Ed.

SIT TAW U. MAUNG YE.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 169 OF 1915.
March 2, 1916.

Present:—Mr. Justice Maung Kim.
SIT TAW—APPLICANT

versus

MAUNG YE—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Order granting or refusing sanction—Appeal—Jurisdiction of Appellate Court—Remand.

The powers of revision exercisable by an Appellate Court under section 195 clause (6), Criminal Procedure Code, are confined to revoking or granting the sanction given or refused by a subordinate Court. It has no jurisdiction to make an order of remand even when the order appealed against was passed by a Civil Court. [p. 334, col. 2; p. 335, col. 1.]

Beni Pershad v. Sarju Pershad, 9 Ind. Cas. 982; 8 A. L. J. 429; 12 Cr. L. J. 174; 33 A. 512; *Muhammad Ishaq v. Muqim-ud-din*, 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913; *Krishna Reddy v. Emperor*, 5 Ind. Cas. 881; 11 Cr. L. J. 280; 20 M. L. J. 102; 33 M. 90; 7 M. L. T. 128, relied on.

Mr. Ginwala, for the Applicant.

Mr. Ba Dun, for the Respondent.

JUDGMENT.—The applicant in his petition states:—

In Civil Miscellaneous No. 3 of 1915 of the Court of District Magistrate, Tavoy, the respondent applied for sanction under section 195 of the Code of Criminal Procedure to prosecute the petitioner under section 210 of the Indian Penal Code.

The respondent's application was dismissed on the 13th of January 1915.

In Civil Miscellaneous No. 3 of 1915 the respondent applied to the Divisional Court of Tenasserim and the said Court by its order, dated the 8th September 1915, set aside the order of the District Magistrate and directed that the application for sanction be re-heard *de novo* according to law. The appellant applies to this Court on revision against the order of the Divisional Court upon the following grounds:—

(1) The Divisional Court had no jurisdiction to order a re-hearing of the application, as under section 195, sub-clause (6), such Court had jurisdiction only either to revoke or grant sanction.

(2) Non-service of notice upon petitioner was no ground for such remand, when in fact sanction to prosecute petitioner had been refused by the District Magistrate.

The second is obviously correct.

The authorities conclusively support the first.

The case of *Beni Pershad v. Sarju Pershad* (1) of the Allahabad High Court is on all fours with the present case. Richards, J., said:—

"It must be admitted that the powers of the learned District Judge * * * * * are confined to the powers conferred on him by section 195 of the Code of Criminal Procedure. Clause (6) provides that 'any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate,' and the learned District Judge has neither revoked nor granted the sanction. His order, amongst other things, directs the Munsif to consider whether or not the latter should exercise the powers conferred on him by section 476 of the Code of Criminal Procedure, powers which the learned Judge admits that he himself has not got to exercise in the present case." The learned Judge then proceeded to hold that the powers of revision exercisable by the District Judge were confined to those conferred by section 195, Criminal Procedure Code, and that he had no jurisdiction to make the order of remand. This case has been followed by the Punjab Chief Court in *Muhammad Ishaq v. Muqimud-din* (2).

In Madras there was the case of *In re Kamma Narayanappa* (3), where the same view was held following the two previous cases of *Rama Aiyar v. Venkatachella Padayachi* (4) and *Krishna Reddy v. Emperor* (5).

The learned Counsel for the respondent has argued that the present proceedings arose out of a civil case and that the powers of the Divisional Court are as given to it under Order XLI, rule 23, which gives a Civil Appellate Court power to remand a case for trial on issues framed by it. The same contention was raised in the Allahabad case

(1) 9 Ind. Cas. 982; 33 A. 512; 8 A. L. J. 429; 12 Cr. L. J. 174.

(2) 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913.

(3) 8 Ind. Cas. 670; 11 Cr. L. J. 699; (1910) M. W. N. 100; 9 M. L. T. 97.

(4) 30 M. 311; 11 M. L. T. 84; 17 M. L. J. 123; 5 Cr. L. J. 288.

(5) 5 Ind. Cas. 881; 33 M. 90; 11 Cr. L. J. 280; 20 M. L. J. 102; 7 M. L. T. 128.

HARKARAN SINGH v. HARNAM SINGH.

cited above and the learned Judge disposed of it with the following observations:—“(Counsel) relies on the Full Bench ruling of this Court, which decides that a Court exercising the powers conferred by section 195 is a Civil Court and not a Criminal Court, and that, therefore, the provisions of the Code of Civil Procedure enabling the Appellate Court to remand cases and send down issues apply. I am of course bound by the ruling in the Full Bench case referred to but, in my opinion, even assuming the Court to be a Civil Court, its powers in cases like the present are confined to powers conferred on it by section 195.”

There is a consensus of authorities in Madras, Allahabad and Punjab.

I must, therefore, set aside the order of the Divisional Court and the same is hereby set aside.

Order set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 166 OF 1915.

September 27, 1915.

Present:—Mr. Lindsay, J. C.

HARKARAN SINGH—ACCUSED—

APPLICANT

versus

HARNAM SINGH AND ANOTHER—COM-

LAINANTS—OPPOSITE PARTY.

Revision—Courts, inferior and superior—District Magistrate—Sessions Judge.

The Court of a District Magistrate is for the purposes of revision a Court inferior to that of the Sessions Judge. [p. 336, col. 1.]

Queen-Empress v. Pirya Gopal, 9 B. 100, referred to.

Application against the order of the Sessions Judge, Lucknow, dated the 11th September 1915, reversing that of the Officiating District Magistrate, Bara Banki, dated the 16th August 1915.

Mr. Muhammad Siddique, for the Applicant.

Pandit Jagat Narain Mulla, for the Opposite Party.

JUDGMENT.—These applications are on behalf of two persons Harkaran Singh and

Ramadhar Singh, who are accused of offences under section 211 read with section 109 of the Indian Penal Code. The cases have arisen out of a certain charge of dacoity which was brought against certain officials of the Ramnagar Estate in the Bara Banki District. That case was brought on the instigation of the present applicants and another man named Duniya Singh, whose case is not now before me. The charge of dacoity was tried in the Court of the Additional Sessions Judge and the persons against whom the accusation had been made were acquitted by the Sessions Court, the Additional Judge being of opinion apparently that the charge was not a true one. In the event he sanctioned the prosecution of the present applicants and the man named Duniya Singh on the charge under which they have now been tried in the Court below. The sanction which was given by the Additional Sessions Judge in that case was upheld by this Court in revision. The three persons Ramadhar, Duniya Singh and Harkaran were then put on their trial in the Court of Babu Shambhu Nath, a first class Magistrate in the Bara Banki District. The charges being cognizable by a Court of Session, the proceedings were in the nature of an enquiry in order to ascertain whether these persons should or should not be committed to, Sessions. On the 16th of August Babu Shambhu Nath, who had by that time become for the time being District Magistrate of Bara Banki, passed an order of discharge under section 209 of the Criminal Procedure Code, being of opinion that the evidence was not strong enough on which to commit these prisoners for trial to the Sessions Court. The Sessions Judge of Lucknow by an order dated the 11th of September, which was passed under section 435 of the Code of Criminal Procedure, set aside this order of discharge and directed that the accused should be committed for trial to the Sessions Court. This order of the Sessions Judge is attacked here on several grounds. In the first place, it is argued that the Sessions Judge had no authority in law to revise the order of the District Magistrate. The argument in this connection is that the Court of the District Magistrate is not a Court inferior to that of the Sessions Judge. This point was taken before the

RAHIMAN BIBI v. MOBARAK MONDAL.

Sessions Judge, who decided that the Court of the District Magistrate was for the purposes of revision a Court inferior to that of the Sessions Judge. I agree with the opinion of the learned Sessions Judge, which is supported by the authority reported as *Queen-Empress v. Pirya Gopal* (1). I have no doubt, therefore, that the learned Judge had authority to revise this order. In the next place, it is contended that on the merits of the case the Sessions Judge should not have interfered and certain rulings have been quoted in order to show that a Court of Session should not interfere in cases of this kind, where a Committing Magistrate has passed an order of discharge on the ground that he does not believe the evidence tendered for the prosecution. No rule of general application in this matter can be laid down and in the present case I do not feel disposed to interfere with the order of the Sessions Judge on this ground. It will be better for me not to enter into the merits of the case for there is, of course, a possibility that it may come up here later on in appeal. I am content to say at the present time that I see no reason on the merits for interfering with the order of the Sessions Judge. I dismiss both these applications.

Application rejected.

(1) 9 B. 103.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 30 OF 1916.
March 17, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

RAHIMAN BIBI—COMPLAINANT

versus

MOBARAK MONDAL AND ANOTHER—
ACCUSED.

*Criminal Procedure Code (Act I of 1898), s. 234—
Penal Code (Act XLV of 1860), ss. 379, 380, offences
under, for theft of same person's property on two
successive days, if triable together, where accused more
than one—Misjoinder of charges.*

Two persons, accused of offences under sections 379 and 380, Indian Penal Code, for committing theft of the complainant's property in a building and of his paddy in a field on two successive days, cannot be charged with and tried at one trial for both the offences under section 234, Criminal Procedure Code.

Reference made by the Sessions Judge, Birbhum, on 28th February 1916, under section 438, Criminal Procedure Code.

Babu Jitendra Lal Banerjee, for the Accused.

JUDGMENT.—This is a reference in the matter of two persons Mobarak Mondal and Sabak Mondal. They were tried summarily by the Magistrate on two charges—theft in a building (under section 380, Indian Penal Code) committed on 13th November 1915, and theft of paddy in a field (under section 379, Indian Penal Code) committed on 14th November 1915,—the property in the building and the paddy belonging to one and the same complainant. The Judge points out that the trial on these two charges of the two persons was illegal within the meaning of the sections in the Criminal Procedure Code relating to joinder of charges. Technically speaking, the Judge is correct. Section 234, Criminal Procedure Code, has been held to apply only to one person and the offences are also technically not of the same kind. It is difficult to see how the accused could have been prejudiced, as it appears from the Magistrate's order that the charge of theft in the building, which was for the removal of some doors, was not seriously pressed. The trial proceeded mainly on the question of taking of the paddy from the field. However, as the accused press for a fresh trial and technically speaking, the recommendation of the learned Sessions Judge is correct, we set aside the conviction and sentence and direct that the accused be re-tried on the charge of theft of paddy from the field committed on 14th November 1915.

Re-trial ordered.

BHARAT CHANDER GALUI v. PRAMOTHA NATH ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 359
OF 1914.

April 12, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

BHARAT CHANDER GALUI, MINOR,

REPRESENTED BY HIS GUARDIAN

MADHUSUDAN GALUI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

PRAMOTHA NATH ROY AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Estoppel—Landlord and tenant—Purchase of portion
of tenant's non-transferable holding in execution sale
—Deposit by purchaser of amount of subsequent rent-
decree—Withdrawal by landlord—Acknowledgment of
purchaser's interest, whether amounts to.*

The plaintiffs, purchasers of a moiety of a non-transferable holding in execution of a mortgage-decree deposited in Court the amount of a subsequent rent-decree obtained by the landlord against the recorded tenants, to prevent its sale in execution. The deposit was withdrawn by the landlord:

Held, that in the absence of anything in the making of that deposit which would bring to the landlord's notice the fact of the plaintiffs' interest, the landlord was not estopped from disputing the plaintiffs' right. [p. 33, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Hooghly, dated the 8th January 1914, reversing that of the Munsif, 1st Court, Howrah, dated the 29th June 1912.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"This appeal arises out of a suit for confirmation of possession in immoveable properties after declaration of the plaintiffs' title thereto.

The properties in suit are the 8-annas share of a holding whereof the defendant No. 9, Dharmadas, and late Kartikdas (husband of defendant No. 10) were the recorded tenants in the *sherista* of the landlords, namely, the defendants Nos. 1 to 7.

The plaintiffs' case was that in May 1896 their father, late Sitanath Galui, purchased the 8-annas share of aforesaid Kartikdas in that holding in execution of a mortgage-decree, and that he was in possession of the same and after him they are in possession. But since then the landlords twice sued the recorded tenants for rents without making the plaintiffs or their father defendants in those suits. On both occasions the land-

lords got decrees against the recorded tenants and caused the holding to be sold. The plaintiffs' father had the first sale set aside on depositing the decretal money and the compensation under section 310A of the former Civil Procedure Code; but the second sale having taken place after Act I of 1907 amending the Bengal Tenancy Act had come in force, no such deposit could be made for setting aside that second sale. An attempt was, therefore, made by the plaintiffs to have the sale set aside under section 311 of the former Civil Procedure Code or the corresponding provision of the present Civil Procedure Code; but their attempt did not come to a successful issue. The present suit was, therefore, brought by the plaintiffs. The purchaser at the second rent execution sale, *viz.*, defendant No. 8 alone contested the suit, contending amongst other things that the plaintiffs' alleged purchase conferred no right, the holding being non-transferable. The lower Court decreed the plaintiffs' suit and the defendant No. 8 has, therefore, appealed.

The first point I propose to enquire into in this case is the question of plaintiffs' title. The fourth issue raised in the suit related to the same matter. That question hinges upon the transferability of the holding in suit. * *

I find, therefore, disagreeing with the learned Munsif, that the holding was not transferable by custom and that the plaintiffs' purchase having been made without the landlords' consent, the plaintiffs acquired no right thereby; and that even if as purchasers of a portion of a holding they had any right in the same, that was lost by the second sale in which the defendant No. 8 purchased, inasmuch as in view of the rulings reported as *Azgar Ali v. Asaboddin Kazi* (1), *Gopi Nath Chattopadhyaya v. Sajani Kanta Singh* (2) and *Haradhan Rakshit v. Girish Chandra Mukerji* (3) they were bound by the rent-decrees obtained against the recorded tenants.

The learned Munsif relied upon a ruling reported as *Ashok Bhuiyan v. Karim Bepari* (4) and found that the plaintiffs were

(1) 9 C. W. N. 134.

(2) 10 C. W. N. 240.

(3) 4 Ind. Cas. 326; 13 C. W. N. 98.

(4) 9 C. W. N. 843.

RAMASWAMY CHETTY v. MADURA MILLS CO., LTD.

not bound to get their names registered in the landlords' 'sherista'. That ruling, in my opinion, does not at all apply to the present case. In that case there was a question of heirship. The landlords in that case did not sue all the heirs of the recorded tenants for rents; and the purchasers from the excluded heirs were, therefore, allowed the remedy they asked for. The present case is quite a different one.

Then I notice that, relying upon a ruling reported as *Thomas Barclay v. Syed Hossein Ali Khan* (5), the learned Munsif held that by withdrawing the money deposited by the plaintiffs' father under section 310A of the former Procedure Code, the landlords recognised the plaintiffs' tenancy. It raises the question of estoppel. It signifies that the landlords were estopped from ignoring the plaintiffs' tenancy in the second rent suit. The ruling aforesaid related to a case in which the purchaser of a holding deposited the money under section 171 of the Bengal Tenancy Act to avoid a sale after distinctly setting forth the right under which he came. In the present case the deposit was made after the sale had taken place, and it is not shown what were the allegations made by the plaintiffs' father to be allowed to make the deposit. There is nothing to show if the landlords had any reason to speak against the deposit or the right under which the plaintiffs' father was allowed to pay the money. In my opinion, therefore, the ruling reported as *Thomas Barclay v. Syed Hossein Ali Khan* (5) cannot be made applicable in this case. For the foregoing reasons I should find the question against the plaintiffs and the suit should fail. * * *

Babu Mohini Mohan Chakrabutty for Babu Abinash Chander Chakrabutty, for the Appellants.

Babu Monmotho Nath Roy, for the Respondents.

JUDGMENT.—The only point of law arising in this appeal is whether the learned Subordinate Judge was right in holding that the landlords were not estopped from disputing the plaintiffs' interest in the holding. Plaintiffs' title is based on the purchase of a moiety of a holding from defendant No. 10. In two subsequent rent suits brought by the

landlords, defendants Nos. 1 to 7, against the recorded tenants, the property was put up for sale in execution. In the sale which took place in 1904 the plaintiffs deposited the money to save the sale and that deposit was withdrawn by the landlords. The question is, whether there was anything in the making of that deposit which would bring to the landlords' notice the fact that the plaintiffs were interested in the holding and were claiming such interest. It is now conceded by the learned Pleader for the plaintiffs-appellants that all that appeared on that occasion was the plaintiffs' names in the *challan*. There was no suggestion then made that the plaintiffs were interested in the property. The learned Pleader informs us that there was a document which would imply such an assertion, but that that was not proved in either of the Courts below. It cannot, therefore, be taken into consideration in second appeal. That being the case, the point is concluded by the finding of fact arrived at by the learned Subordinate Judge. The appeal is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 29 OF 1915.

January 5, 1916.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

RAMASWAMY CHETTY AND OTHERS,

BY THEIR AUTHORISED AGENT

AIYASWAMI PILLAI—DEFENDANTS

NOS. 12 TO 15—APPELLANTS

versus

THE MADURA MILLS CO., LTD., THROUGH

THEIR AUTHORIZED AGENT,

D. W. GILLESPIE, AND OTHERS—PLAINTIFF

AND DEFENDANTS NOS 1 TO 11 AND LEGAL

REPRESENTATIVES—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 81—Marshalling.

Per Abdur Rahim, J.—In order that a right to marshal may arise, the contending creditors must be creditors of one and the same person and must claim against the same property. Where the defendant had notice of the plaintiff's mortgage when he obtained his security, that would be

RAMASWAMY CHETTY v. MADURA MILL CO., LTD.

sufficient to bar his claim. under section 81 of the Transfer of Property Act. [p. 340, col. 1.]

Whether the Full Bench decision in *Appayya v. Rangayya*, 31 M. 419; 18 M. L. J. 229; 3 M. L. T. 287, applies also to a mortgagee from the purchaser? [p. 339, col. 2.]

Per Srinivasa Aiyangar, J.—Section 81 of the Transfer of Property Act does not avail the mortgagees of a purchaser, as their right to marshal is in the right of their assignor who is the vendee of the original mortgagor. The right to marshal is a discretion in the Court, which, however, is not a right of any particular party, to direct the sale of any particular item if that would be sufficient to pay off the mortgage-debt. It is a discretion which the Court is entitled to exercise at the time when final execution is ordered. [p. 340, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Madura, in Original Suit No. 66 of 1912.

FACTS.—The plaintiff was the assignee of a simple mortgage, dated 6th July 1906, executed by the 1st defendant in favour of one Meyyappa Chetty. The mortgage consisted of 12 items of property. On some of the items, including the 11th item, the 1st defendant created a second mortgage in favour of the 7th defendant on 1st August 1906. On 6th November 1906, the 11th item was sold by the 1st defendant to one Thoppayya Pillai, whose widow was the 2nd defendant. On the same date Thoppayya Pillai mortgaged item No. 11 and some other properties to the 3rd defendant, having paid Rs. 700 to the 7th defendant and obtained a release of item No. 11 from his mortgage. On 22nd March 1907, Thoppayya Pillai mortgaged items Nos. 11 and 28 other items to the 9th defendant. He again created a 3rd mortgage over item No. 11 alone for Rs. 1,000 in favour of the 6th defendant on 6th January 1908. Thoppayya Pillai and 8th defendant mortgaged items Nos. 1 to 28 including the 11th item belonging to Thoppayya Pillai and items Nos. 29 to 32 belonging to the 9th defendant in favour of the 8th defendant, whose representatives were defendants Nos. 12 to 15. Under that mortgage, Thoppayya Pillai and the 9th defendant were jointly and severally liable. Thoppayya Pillai created on 2nd April 1911 the fifth and the last mortgage of item No. 11 alone in favour of the 4th and the 5th defendants.

On these facts the defendants claimed the right of marshalling the 11th item as against the plaintiff. The lower Court held that they had no such right, whatever other rights

might be available to them. Defendants Nos. 12 to 15, the legal representatives of the 8th defendant, alone appealed.

Messrs. C. V. Ananthakrishna Aiyar and P. S. Narayanasawmi Aiyar, for the Appellants.

Messrs. T. Rangachariar, C. S. Venkatachariar and K. R. Narayanasawmi Aiyar, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The appeal before us is by the representatives of the 8th defendant who holds a mortgage derived from the 2nd and 9th defendants, dated the 6th January 1908. His mortgage covers item No. 11 and 31 other items of property. The learned Vakil who appears for the representatives of the 8th defendant contends, and that is the only question raised before us excepting some other point as to the form of the decree, that he is entitled, under section 81 of the Transfer of Property Act, to have the securities marshalled so that the plaintiff may be compelled to realize his debts from properties other than item No. 11. The 2nd defendant was a purchaser of the property, item No. 11, from the 1st defendant who owned all these properties, her purchase being on the 6th November 1916, that is, subsequent to the plaintiff's mortgage.

A Full Bench decision of this Court reported as *Appayya v. Rangayya* (1) has held that section 81 of the Transfer of Property Act gives no right of marshalling to a purchaser. It only applies to the case of security-holders, that is, mortgagees. That case may perhaps be distinguishable on the ground that here the 8th defendant is not claiming the right to marshal as a purchaser but as a mortgagee, though a mortgagee under the purchaser. It is not, however, necessary to come to a definite conclusion whether that distinction is or is not a sound one, because there are other facts which clearly stand in the way of the 8th defendant's claim. The 8th defendant derives his mortgage not only from the 2nd but also from the 9th defendant, that is to say, his debtors are these two persons; of whom one alone or rather the assignor of one alone is the debtor of the plaintiff and it is well established that where the debtor is not the same, no question of marshalling

(1) 31 M. 419; 18 M. L. J. 229; 3 M. L. T. 287.

RAMASWAMY CHETTY v. MADURA MILLS CO., LTD.

arises. The point has been decided by this Court so far back as in *Gopala v. Saminathayyan* (2), in which the question arose where the property was mortgaged to one creditor by the manager of a joint Hindu family consisting of himself and another co-parcener and the subsequent mortgage was effected by one of the co-parceners after division, that co-parcener being the man who was the manager of the family when it was joint. The judgment in that case refers to the English rulings and relies upon the decision of Lord Eldon, where the doctrine is clearly propounded that, in order that a right to marshal may arise, the contending creditors must be creditors of one and the same person and must claim against the same property. This is quite enough to dispose of the claim of the 8th defendant. It may, however, be also pointed out that the 8th defendant has a number of other properties to look to besides item No. 11 and that being so, it is extremely doubtful whether he can invoke the assistance of this Court to exercise what is in the nature of equitable discretion. It also appears from the facts that the 8th defendant must have had notice of the plaintiff's mortgage when he obtained his security and that again in itself would be sufficient to bar his claim under section 81 of the Transfer of Property Act. It is curious that he did not raise properly before the lower Court the question as to his right of marshalling. No issue was framed on the point and apparently the question was raised only at the last moment, when the facts bearing on the matter could not be fully investigated. That is the substantial question raised before us on behalf of the 8th defendant, and that failing, the appeal must be dismissed. The costs of the plaintiff will be included in the mortgage amount due to the plaintiff.

It is pointed out that the decree as framed does not give the 8th defendant the right to redeem the plaintiff by paying off the amount he is entitled to. In the first paragraph of the decree, the first defendant alone is given the right to redeem the plaintiff. That is not correct. The decree must be amended giving also

the 8th defendant or rather his representatives the right to redeem the plaintiff and on payment of whatever may be found due to the plaintiff, he is entitled to have the securities transferred to him. Time will be extended to 6 months from the date of the decree of this Court.

The 3rd defendant, who has neither filed an appeal nor any cross-objections, wanted to argue through his learned Vakil that he is entitled to priority over the plaintiff with respect to a sum of Rs. 700, which, he alleges, went to pay off a prior mortgage, i.e., a mortgage previous to that of the plaintiff. The 3rd defendant does not appear to have raised the question at all before the lower Court. There is no issue at all on the point and it is not treated in the judgment. No appeal has been filed nor even a cross-objection. The objection cannot be entertained at this stage.

SRINIVASA AYYANGAR, J.—I agree and wish to add only a few words. The claim of the 8th defendant's representatives as a matter of right to marshal could not be entertained under section 81 of the Transfer of Property Act, as they and the plaintiff are not creditors of the same debtor. Their right to marshal, if any, is in the rights of their assignor, who is the vendee from the original mortgagor. As far as their rights are concerned, the Full Bench decision of this Court reported as *Appayya v. Rangayya* (1) is conclusive and binding on us. As pointed out in the case of *Appayya v. Rangayya* (1) there may be a discretion in the Court, which, however, is not a right of any particular party, to direct the sale of any particular item if that would be sufficient to pay off the mortgage-debt. That is a discretion which the Court is entitled to exercise at the time when final execution is ordered.

Decree modified.

V. R. P.

PANCHKORI GHOSH v. HARI DAS JATI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 52 OF 1911.

May 9, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

PANCHKORI GHOSH—PLAINTIFF—

APPELLANT

versus

HARI DAS JATI AND ANOTHER—DEFENDANTS
—RESPONDENTS.

*Contract Act (IX of 1872), ss. 69, 70—Bengal
Tenancy Act (VIII of 1885), ss. 170, 171—Rent-decree
against tenant—Order for sale—Deposit by fictitious
mortgagee—Claim for recovery of deposited amount
from judgment-debtor, sustainability of—‘Lawfully
paid’ in s. 70 of Contract Act, meaning of.*

Defendants' holding having been advertised for sale in execution of a rent-decree against them, plaintiff deposited the decree amount into Court under section 171 of the Bengal Tenancy Act, alleging that he was mortgagee in respect of the property and was, therefore, interested in preventing the sale. The defendants objected that the alleged mortgage was a forgery and that plaintiff had no 'interest voidable on the sale' within the meaning of section 171. The Court, however, accepted the payment as the plaintiff was a mortgagee on the face of his deed of mortgage, reserving to parties the right to fight out the other questions in a separate suit. The plaintiff then sued on his mortgage and the suit was dismissed on the ground that the mortgage document was a concocted one. In the present action for recovery of the money deposited in Court:

Held, (1) that the plaintiff was not a person having an 'interest voidable under the sale' within the meaning of section 171 of the Bengal Tenancy Act and should not have been allowed to make the deposit; [p. 342, col. 2.]

(2) that the claim was not enforceable either under section 69 or section 70 of the Contract Act. [p. 343, col. 1.]

To entitle a person to claim the benefit of section 70 of the Contract Act, the payment must have been lawfully made, that is, by a person having a lawful interest in making it and not some interest from the point of view of the payer. [p. 343, col. 1.]

Raja Baikunt Nath Dey Bahadur v. Uday Chand Maiti, 2 C. L. J. 311, at p. 316 followed.

The obligation to repay by a person enjoying the benefit of a non-gratuitous act under section 70 of the Contract Act should not be determined by nice considerations of what is fair or proper according to the highest morality. The obligation must be either express or implied, and does not arise from the fact that the person who is asked to repay was benefited by the payment, especially when he entered a protest against the payment at the earliest opportunity. [p. 343, col. 2.]

Ram Tuhul Singh v. Bissewar Lal Sahoo, 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208 (P. C.) referred to.

Appeal against the decree of Mr. Justice Coxe, dated the 22nd February 1911 and

reported as 9 Ind. Cas. 615, in Second Appeal No. 998 of 1909.

FACTS material to the report will appear from the judgment of Mr. Justice Coxe which has been reported in *Hari Das Jati v. Panchkowi Ghosh* (1).

Babu Baidya Nath Dutt (with him Babu Tarakeswar Pal Chowdhuri), for the Appellant.—It has been found by the lower Courts that the money was deposited by the plaintiff bona fide and lawfully and was not intended to be paid gratuitously. The High Court in second appeal could not interfere with that finding. If that finding stands, the plaintiff is entitled to recover from the defendants. Refers to *Ajodhya Singh v. Janno Lal* (2) and section 70 of the Contract Act.

[SANDERSON, C. J.—What do you mean by 'lawfully' ?]

Not contrary to any provision of law. The word has been interpreted in *Raja Baikunt Nath Dey Bahadur v. Uday Chand Maiti* (3).

[MOOKERJEE, J.—I did not mean to define the word 'lawfully' there. If this payment were made during the pendency of the mortgage suit, it would have been lawfully made.]

A case similar to this would be found reported as *Nobin Krishna Bose v. Mon Mohun Bose* (4).

[SANDERSON, C. J.—On what ground was the mortgage suit of the plaintiff dismissed?]

On the ground that the mortgage was a fictitious one.

[MOOKERJEE, J.—What happened seems to be this. You made the deposit claiming to be a mortgagee; the judgment-debtor objected, saying you were not a mortgagee and had no right to make the deposit; the Court ordered the deposit to be made without deciding whether the mortgage was real or not. In your mortgage suit it was found that the mortgage was a fictitious one. How can you now recover the money?]

The Court allowed me to pay the money, the Court did not say I was not entitled to pay the money. As I paid the money in accordance with the order of the Court, my payment could not be unlawful. The ques-

(1) 9 Ind. Cas. 615.

(2) 6 Ind. Chs. 341; 14 C. W. N. 699.

(3) 2 C. L. J. 311 at p. 316.

(4) 7 C. 573; 9 C. L. R. 182.

PANCHKORI GHOSH V. HARI DAS JATI.

tion is whether the payment was *bona fide* at the time it was made. If at the time of making the payment I believed that I had an interest in making the payment that is sufficient.

By the light of subsequent events my previous conduct in making the payment ought not to be judged, but the conduct should be considered in reference to the circumstances under which the payment was made. The lower Appellate Court has found that the payment was lawfully made and not gratuitously and the defendant was admittedly benefited by the payment; on these findings the only possible inference is that the plaintiff is entitled to recover under section 70 of the Contract Act. The sole question is, whether subsequent events should be considered to discover the motive for the payment or the motive should be ascertained from the circumstances existing at the time of the payment.

Babu *Berin Behary Ghose* (Senior), for the Respondents, was not called upon.

JUDGMENT.

SANDERSON, C. J.—In this case there has been an appeal from the judgment of Mr. Justice Coxe by the plaintiff, and the circumstances of this case are to my mind somewhat extraordinary. It appears that on the 4th August 1904, there was alleged to have been made a mortgage by the defendants in this case in favour of the plaintiff of certain property, which need not be more specifically described. After that mortgage the *zemindars* brought an action against the defendants for rent and obtained a decree, and were proposing to sell the defendants' interest for the purpose of realizing their decree. Subsequently on the 17th of January 1907, the plaintiff made a deposit of Rs. 284 in the Court in which the decree by the *zemindars* had been obtained, and it is for the recovery of that amount that the present suit was brought. The deposit was made under somewhat peculiar circumstances. As has been pointed out by my learned brother, Mr. Justice Mookerjee, it was made in the first instance by the plaintiff *ex parte*; then the defendants appeared upon the scene, and objected to the plaintiff making that deposit on the ground, as they alleged, that the plaintiff had no interest in the property, that he was not a mortgagee and that he

ought not to have been allowed to make the deposit; and a note which was made on the record is as follows: "As the third party appears on the face of the document to be a mortgagee the amount deposited by him may go to satisfy this decree. As to whether the document is really forged or not or as to whether the third party is really entitled to deposit the money or his deposit amounts to a voluntary payment are questions which would be decided in a regular suit between the judgment-debtor and the third party and cannot be looked into in this execution case." Therefore, it is obvious to my mind that the defendants, upon this deposit being brought to their notice, put in an objection upon the ground that the plaintiffs' alleged mortgage was not a mortgage at all, but that in fact it was a forged document and that the plaintiff had not paid any money to the defendants in respect of the document.

Now, the first question that arises upon that is, whether in those circumstances the plaintiff can be said to be a person who comes within section 170, paragraph (3), of the Bengal Tenancy Act, which runs as follows: "The judgment-debtor, or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section." Now it appears that when the matter of the validity of the mortgage came to be investigated by the Court in a mortgage suit which the plaintiff brought in 1907, it turned out that the first Court held that it was not satisfied that the defendants had executed the mortgage at all and that it was quite satisfied that the plaintiff had not made any payment in respect of the alleged mortgage and the second Court, to whose decision of course we must have most regard as far as the facts are concerned, held that that document was a concocted document. Under those circumstances, and having regard to those facts, the plaintiff being simply a holder of a document which the Court has found to be a concocted document, and he being a person who had advanced no money to the defendants, is it possible for us to say that "he is a person having any interest voidable on the sale?" In my judgment it is sufficient only to state the facts to show that it is not possible for us to say that he is such a person, and; therefore, he ought not to have been allowed to make the deposit under the procedure provided by

PANCHKORI GHOSH v. HARI DAS JATI.

section 170 or section 171 of the Bengal Tenancy Act.

Then it is said that the plaintiff comes within either section 69 or section 70 or perhaps both of the Contract Act of 1872. In order to come within section 69, the plaintiff must show that he is a person who is interested in the payment of the money which another was bound to pay; or if he is to come within section 70 he must be a person who lawfully paid for the defendant not intending to do so gratuitously and that the defendant has enjoyed the benefit of such payment. In my judgment, having regard to the facts which I have stated, he does not come within either.

The test as regards the meaning of the word "lawfully" was laid down by my learned brother, Mr. Justice Mookerjee, in the case of *Raja Baikunt Nath Dey Bahadur v. Uday Chand Maiti* (3):—"The word 'lawfully' in section 70 of the Contract Act is not merely a surplusage. It must be considered in each individual case, whether the person, who made the payment, had any interest in making it; if not, the payment cannot be said to have been made lawfully." I expect my learned brother would agree with me, when I say he meant "had any lawful interest in making it", because having regard to the judgment which was delivered in the mortgage suit, it seems to me that the plaintiff in this case had a very considerable interest in making this payment; for his scheme seems to have been that he had bought adjoining land, and he hoped that if he could get the Court to hold that the forged mortgage was a valid mortgage and then when the zemindar brought a suit for rent, and the tenant was not able to pay the rent, he could step in on the basis of his mortgage and might thereby obtain possession of the adjoining land and might get that which he desired to obtain: thereby he certainly had an interest from his own point of view in making the payment. But in my judgment it must mean lawful interest: and having regard to the facts which I have stated, I do not think that the plaintiff had such an interest. This is quite sufficient for the decision with regard to section 69, at which the learned Judge has arrived. I do not think that the plaintiff was interested in the payment of money within the meaning of

section 69, nor was the payment 'lawful' within the meaning of section 70.

Stress is laid upon the fact that the defendants having had the benefit of the payment, they are liable. I am not sure how the matter stands in that respect. But assuming for the sake of argument that they have benefited by the payment, I think that is not sufficient to bring the case within the meaning of section 70, because it is pointed out by the Privy Council in the case of *Ram Tuhul Singh v. Biseswar Lal Sahoo* (5), the passage to which I wish to refer being at page 143, that—"Even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." How can it be said in this case that there was either an express or implied obligation to repay when the defendants, at the first opportunity after it was brought to their knowledge that this deposit was made by the plaintiff, went to the Court to protest against the making of the deposit on the ground that plaintiff had no interest to make the deposit, and that the mortgage was a forged mortgage? Having regard to those facts it is impossible to say that this payment was made upon the implied undertaking to repay.

On these grounds I think that Mr. Justice Coxe's judgment was correct, and this appeal ought to be dismissed with costs.

MOOKERJEE, J.—I entirely agree.

Appeal dismissed.

(5) 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208 (P. C.).

MUHAMMAD MARUF v. SULTAN AHMAD.

ALLAHABAD HIGH COURT.
EXECUTION SECOND APPEAL No. 1241
OF 1915.

March 31, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

MUHAMMAD MARUF AND OTHERS—
OPPOSITE PARTY APPELLANTS

versus

SULTAN AHMAD AND ANOTHER—OBJECTORS
—RESPONDENTS.

*Execution of decree—Withdrawal of portion of
appeal in High Court, effect of—Interpretation of
decree—Practice.*

Plaintiffs sued for a declaration of title and their right of way and for demolition of certain constructions. The Munsif granted a decree for declaration, but refused to order demolition of the constructions. On appeal by the plaintiffs, the District Judge gave them joint possession over the land and ordered the demolition of the constructions. The defendants appealed to the High Court on two grounds, viz., (i) that they had a right of way over the land and (ii) that the order as to the demolition of the constructions was wrong. The second plea was abandoned. The decree of the District Judge was set aside and that of the Munsif restored. The plaintiffs went up under the Letters Patent but their appeal was dismissed. The plaintiffs then sought to execute that portion of the decree of the District Judge which ordered the demolition of the constructions:

Held per Piggott, J., Walsh, J., dissenting, that the execution Court could not be permitted to get round the terms of a decree, which was on the face of it perfectly clear and unambiguous, and that plaintiffs, not having applied for review of judgment to the single Judge of the High Court or challenged the decree on this point under the Letters Patent, were not entitled to seek relief by asking the Court executing the decree to interpret it in the light of the pleadings and of the record generally, so as to put a meaning upon it inconsistent with its plain and unambiguous terms. [p. 345, col. 1.]

Per Walsh, J.—When the withdrawal was made in the High Court, the District Judge's decree so far as it related to the removal of the buildings became final. [p. 345, col. 2.]

Even if the decree was erroneously drawn up in the High Court, the High Court had inherent powers, and ought to amend it in the present appeal. [p. 347, col. 1.]

Shaikh Ewas v. Mokuna Bibi, 1 A. 132, followed.

A decree of a Court cannot operate upon a subject matter which was not before the Court. A decree can only operate upon the pleadings. It cannot operate upon or be construed as dealing with any matter not in the suit. [p. 346, col. 1.]

The practice of construing decrees discussed. [p. 446, cols. 1 & 2.]

Execution second appeal from the decision of the District Judge, Azamgarh, dated the 23rd April 1915.

Mr. K. N. Laghate, for the Appellants.

Mr. U. S. Bajpai, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is a decree-holder's appeal in an execution case. One of the questions raised in the litigation was in respect of certain land on which the defendants had constructed a thatched shed and cattle-troughs. The first Court—the Additional Munsif of Azamgarh—gave the plaintiffs a declaration of title in respect of their land, but refused to order the demolition of these constructions. On an appeal by the plaintiffs the District Judge of Azamgarh modified the decree of the first Court in their favour. He gave them joint possession of the plot of land on which stood the thatched shed and cattle-troughs, and ordered the demolition of these constructions. The defendants appealed to this Court, and obtained a decree setting aside the decree of the District Judge and restoring that of the Additional Munsif. The plaintiffs challenged this decree by an appeal under section 10 of the Letters Patent, but their appeal was dismissed.

Nevertheless the plaintiffs are now seeking to take out execution of that portion of the decree of the District Judge which ordered the demolition of the thatched shed and the cattle-troughs. It seems to me a complete answer to their claim that the decree of the District Judge is no longer in existence, having been set aside by the decree of this Court. The plaintiffs contend that it can be shown, by a detailed examination of the record of the proceedings in this Court, that the decree passed by the single Judge of this Court has not the effect of setting aside the decree of the District Judge in the matter of the thatched shed and the cattle-troughs. It is not denied that the defendants had appealed against the entire decree of the District Judge in so far as it modified the decree of the Additional Munsif. No ambiguity can be pointed out in the terms in which the decree of the single Judge of this Court is framed. It even appears (though I do not think it lay on the respondents to show this) that the said decree is in strict accordance with the operative portion of the judgment. In order to make out a case the appellants ask the Court to examine the pleadings on which this judgment proceeded. It appears that two

MUHAMMAD MARUF C. SUTLAN AHMAD.

pleas were taken in the memorandum of appeal to this Court; the first raised a question as to an alleged right of way and the second challenged the propriety of the District Judge's order directing the demolition of the thatched shed and cattle-troughs. This latter plea was abandoned when the case came to be argued on behalf of the defendants-appellants. From this it is contended that a portion of the appeal itself had been withdrawn and that the learned Judge of this Court must not be understood to have decreed that portion of the appeal. In my opinion an execution Court cannot be permitted to turn the record inside out in this way in order to get round the terms of a decree which is, on the face of it, perfectly clear and unambiguous. I must decline to enter into any speculation as to how or why the learned Judge of this Court, under the circumstances above stated, came to pass a decree which in express terms sets aside the decree of the District Judge and restores that of the Additional Munsif. I presume the appellant's case to be that he did so from inadvertence, not perceiving that the decree as worded purports to set aside the whole decree of the District Judge. If it be assumed, for the sake of argument, that this was so, the plaintiffs were by no means without appropriate remedy. They could have applied for review of judgment to the single Judge of this Court, or they could have called in question the form of the decree passed by him when they appealed against the same under the Letters Patent. Having done neither of these things, they are not, in my opinion, entitled to seek relief by asking the Court executing the decree to interpret it in the light of the pleadings and of the record generally, so as to put a meaning upon it inconsistent with its plain and unambiguous terms.

I ought perhaps to make it clear that I am not ruling that an application for review of judgment would not even now be entertainable by the Bench of two Judges which decided the appeal under the Letters Patent. I think such an application would be entertainable, and might or might not be successful but it is not a matter with which the present Bench has any concern.

There has been a suggestion that the de-

fendants-respondents are in some way estopped from contesting the appellants' application for execution. It seems to me that the respondents are not setting up any plea previously raised by them. What they say is that the plaintiffs-appellants, whatever their legal rights may have been, have managed this litigation so clumsily that they do not hold a decree entitling them to have these constructions removed. They could not have raised this plea before and *a fortiori* they cannot have abandoned it. I can see no principle of law which prevents them from raising it now.

I would, therefore, dismiss this appeal with costs.

WALSH, J.—In my opinion this appeal should be allowed. I agree in substance with the judgment of the Munsif. Two appeals were brought before this Court by the appellants. It is quite immaterial that they arose out of one suit. They were as distinct as it is possible for two appeals to be. They were in respect of two distinct causes of action. One appeal had relation to a decision in regard to a right of way, the other appeal had relation to a decision for the removal of certain buildings. These two decisions had been given by the District Judge in one decree. The defendants appealed against both the decisions, but in this Court with the sanction of the Court and with the approval of their opponents, the defendants, amongst whom I observe is a well-known Vakil of this High Court, expressly through their Counsel withdrew the appeal upon the second question, namely, the removal of the buildings. To my mind from the moment that withdrawal was made two legal consequences resulted. The District Judge's decree so far as it related to the removal of the buildings became final. In my opinion there is authority in this Court which binds me to that effect. It is to be found in *Shaikh Ewaz v. Mokuna Bibi* (1). It was there laid down that when the time for an appeal from a decree has expired, or an appeal, having been brought, has been dismissed, the decree became final. A withdrawal is the same thing. The second consequence was that this Court never had before it the decree of the District Judge which related to the removal of these buildings. If one might for a moment take the

(1) 1 A. 132.

MUHAMMAD MARUF V. SULTAN AHMAD.

hypothesis that, in spite of a withdrawal on the part of the appellants, this Court entertained an appeal, it would to my mind be doing something *ultra vires* and without jurisdiction. This Court has no jurisdiction to entertain an appeal which it has allowed to be withdrawn. The appellants' argument is that everything turns upon what happened in this Court upon the hearing of the appeal I am discussing. The respondent's argument is that the decree as drawn up reversed the decree of the District Judge, which ordered the removal of these buildings. But that argument overlooks what to my mind is plain law, *viz.*, that a decree of this Court cannot operate upon a subject-matter which was not before the Court. To construe the decree as the respondent would have us construe it, is to decide that this Court entertained an appeal which was not within its jurisdiction. To my mind it is impossible for this Court to put ■ construction upon one of its own decrees which leads to such an absurd result. It is said secondly on behalf of the respondent that to construe a decree according to the actual proceedings in the Court of Appeal is to go behind the decree, that is to say, you must shut your eyes to everything which took place after the appeal was filed and merely look at what the decree says in terms. To my mind the appellants are not going behind the decree. I have not read the judgment of the Court of Appeal in the particular case before us and I do not want to do so. A decree can only operate upon the pleadings. It cannot operate upon, or be construed as dealing with, any matter not in the suit. For example to determine whether a case comes within section 11, Civil Procedure Code, so as to operate as *res judicata* it is necessary to look at the issues in the suit. Just as a decree in a suit can rest only upon the issues on the pleadings, so a decree on an appeal can only operate upon the subject-matter of the appeal. I presume it could not be contended for one moment that a decree of this Court could possibly be construed so as to include an appeal not in the memorandum of appeal. To my mind a subject of appeal in the memorandum of appeal which is withdrawn by the sanction of the Court, is the same as if the subject was never in the memorandum of

appeal at all. In order to construe a decree you must look at the record, not at the judgment, and see what was before the Court, otherwise it is impossible for anybody to know what the decree operated to determine. It is hardly pretended that the result in this particular case is not repugnant to justice. The net result is that if we uphold in this case the decision of the District Judge on the execution application, and give effect to the contention of the respondent, we shall be holding that this Court decided a question which everybody concerned in the case on both sides, and ourselves, know perfectly well has not been decided at all. To my mind this method of construing blindly the precise words in a decree without reference to the subject-matter before the Court which passed the decree, is ■ species of construction which does not serve the ends of the justice but defeats them. We are asked by the respondent to shut our eyes to an admitted fact and to construe the document, without regard to that admitted fact, as meaning what everybody knows it was not intended to mean. I decline to accede to such a contention. To my mind on these grounds the appeal ought to be allowed.

But in any case even accepting the view that the decree was fallacious, it seems to me that there are abundant powers inherent in the Court to amend and do what is necessary to correct the mistake, if there has been ■ mistake, in order to do justice between the parties. It is said on the one hand that it was the appellant's own fault, and that he might have taken steps to correct the decree in time. I do not agree, because I think the decree means what I have said in the earlier part of my judgment, and that there is no reason to correct it at all. But such mistakes of practice, which arise from oversight, have always been dealt with under the inherent powers of the Court to correct common mistakes or administrative slips by substituting the real decision for the mistaken decision, and to punish the party in default, if he is in default, by an order as to costs. As has been said over and over again by the English Courts, there is no mistake of practice or procedure which is not liable to correction and punishable by costs. It is further said that

NARAYANAN CHETTYAR v. VELLAYAPPA CHETTYAR.

there may be difficulties in the way of the appellants in this particular case, because it so happens that the particular Judge who decided this appeal has been promoted to another Court. He, therefore, cannot personally correct the mistake even if it is one, and that inasmuch as an appeal was brought from this decision under the Letters Patent to a Bench of two Judges of this Court, even if he were here he could not correct the mistake himself. How an appeal under the Letters Patent on a question of the right of way can possibly affect the powers of this Court to correct a mistake, relating to an appeal regarding the removal of buildings, is a matter which I am wholly unable to understand. To my mind the fact that the learned Judge who has left this Court happened to have been the Judge deciding the case, is wholly immaterial. The powers of the Judges of this Court are of co-ordinate jurisdiction and what one Judge has done, if it is a matter which can be undone by a review or amendment, can be undone by another Judge. If the decree has been erroneously drawn up and if it bears the interpretation which the respondents seek to put on it, although it is a matter on which I have already expressed an opinion that it is not so, there are powers of the Court hearing this appeal to make the necessary amendments which ought to be made if the decree is wrong, and to my mind on that ground also this appeal ought to be allowed. The matter ought to be put in the position in which it was left as regards the removal of these buildings when the appeal was withdrawn from this Court. This is a matter which was dealt with by this Court, and it ought to be put in the form and in accordance with the decision of this Court, the appellant being subjected to payment of such costs as are proper for his negligence. On both these grounds I think this appeal ought to be allowed.

BY THE COURT.—In consequence of difference of opinion in this Court this appeal must fail and it is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT

FIRST CIVIL APPEAL No. 219 OF 1914.

January 21, 1916.

Present: Mr. Justice Abdur Rahim and
Mr. Justice Seshagiri Aiyar.

S. R. M. S. NARAYANAN CHETTYAR—
DEFENDANT—APPELLANT

versus

R. M. P. R. VELLAYAPPA CHETTYAR
PLAINTIFF—RESPONDENT.

Gift—Money left with third person as donee's money—Money payable on majority or demand of donee—Completion of gift—Privity of contract—Deposit—Loan—Presumption Limitation Act (IX of 1908), Sch. I, Art. 60.

A donor, with the intention of making a gift of some money to his granddaughter, left the money with the defendant with the direction that he would pay it to her when she attained her majority or when she might demand it, with interest at a certain rate. In defendant's book the money was shown as that of the donee:

Held, (1) that there was a completed gift by the donor to the donee and that, therefore, no question of privity of contract arose; [p. 348, col. 1; p. 349, col. 1.]

(2) that the money being a deposit with the defendant, a suit for its recovery would be governed by Article 60 of Schedule I of the Limitation Act. [p. 348, col. 2; p. 349, col. 1.]

Iswaram Pillai v. Taregan, 23 Ind. Cas. 951; 26 M. L. J. 127; 38 M. 753, distinguished.

Dorabji Jehangir Randiva v. Muncherji Bomanji Panthaki, 19 B. 352; *Ramanathan Chetty v. Subramaniam Chetty*, 28 Ind. Cas. 688; 17 M. L. T. 266; 28 M. L. J. 372, followed.

Per Seshagiri Aiyar J.—There is only a thin difference between a loan and a deposit. Where the arrangement is that the money handed over is to be paid to a third party on demand or on the happening of a specified event, the transaction should be regarded as a deposit and not a loan. [p. 349, col. 1.]

If there is any doubt as to whether a transaction amounts to a loan or a deposit, the presumption is that it is a deposit, and not a loan. [p. 349, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 34 of 1913.

Mr. T. Rangachariar, for the Appellant.

Mr. T. V. Gopalaswami Mudaliar, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—The two questions argued before us in this appeal are, that there was no privity of contract between Panchaksharam and the defendant and, therefore, the suit by the plaintiff, who is the assignee of the money sought to be recovered which was given to Panchaksharam by her grandfather, was not maintainable; and that the suit was barred by limitation.

NARAYANAN CHETTYAR v. VELLAYAPPA CHETTYAR.

The finding of the Subordinate Judge, which has not been questioned before us, is in these words: "The entries", i. e., in the defendant's accounts "show clearly and beyond doubt that the money in question was left with the defendant only for the benefit of Panchaksharam without any reference to her marriage and was treated as such money of Panchaksharam bearing interest at annas 10 per cent. per mensem compound interest from 1897 to at least 1903." The entries referred to clearly show that the money was treated by the defendant himself as belonging to Panchaksharam. It is argued by Mr. Rangachariar, the learned Vakil for the appellant, that the case is one standing on the same footing as where one person asks another as his agent to pay some money belonging to him to a third person, and that third person is not entitled in law to enforce the contract between the person who paid the money and the other person who agreed to pay it to him. That was the nature of the case relied upon by Mr. Rangachariar, *Iswaram Pillai v. Taregan* (1). But here the nature of the transaction is different. The facts as found by the Subordinate Judge show that the grandfather at the time in question intended to make a gift of Rs. 2,000 to her and did, in fact, make that gift, and that he asked the defendant who was also a relative of his to hold the money for her and give it to her when she attained her majority or when she might demand it, with interest at a certain rate. There is no oral or documentary evidence showing what exactly were the words used at the time the money was handed over to the defendant by Panchaksharam's grandfather. But that the nature of the transaction was what I have indicated, seems to be clear from the entries in the defendant's own books; that is to say, there was a completed gift by the grandfather and the defendant agreed to hold the money in deposit for the donee and to pay it with interest to her at a particular rate. There can, therefore, be no doubt that the money belonged to Panchaksharam, and no question of privity of contract arises.

The next question raised by Mr. Ranga-

chariar is one of limitation. His contention is that the transaction, supposing it was a case of gift by the grandfather to Panchaksharam, amounted to a loan of the subject-matter of gift by the grandfather acting on behalf of Panchaksharam to the defendant, and, therefore, the suit was governed by Article 57 or 59 or 62 of the Limitation Act. I do not think this contention is sound. In my opinion the transaction was clearly in the nature of a deposit of the money in the hands of the defendant. We would be merely importing a fiction, if we were to assume that Palaniappa Chetty the grandfather having parted with the money to Panchaksharam, who at that time was a child, assumed to himself the status of a guardian though, as a matter of fact, he was not the guardian, and in that character lent the money to the defendant. The other and the more natural interpretation would be to hold that the grandfather made a gift of this money to the granddaughter and left it as a deposit with the defendant his relation. There are two cases at any rate where, on facts which were very similar to those in this case, this view was taken. One was a decision of the Bombay High Court, *Dorabji Jehangir Randiva v. Muncherji Bomanji Panthaki* (2) and on appeal *Muncherji Bomanji Panthaki v. Dorabji Jehangir Randiva* (3). The other is a recent decision of this Court in *Ramanathan Chetty v. Subramaniam Chetty* (4). As pointed out in the latter case, in cases of this nature the proper presumption is that the money was deposited on the terms that it was to be payable on demand. In that view, the Article of the Limitation Act properly applicable is Article 60.

Then it is argued by Mr. Rangachariar that, even if that Article applied, there was a demand made by the plaintiff, as evidenced by Exhibit III, more than three years before the institution of the suit. That, however, was clearly a demand made by the plaintiff on the basis that the money belonged to himself not as assignee of his daughter, Panchaksharam, but as being the actual donee of the amount. This was

(2) 19 B. 352.

(3) 19 B. 775.

(4) 28 Ind. Cas. 688; 28 M. L. J. 372; 17 M. L. T. 266.

(1) 23 Ind. Cas. 951; 33 M. 753; 26 M. L. J. 127.

BISHESHAR SINGH v. BIKRAMJIT SINGH.

before the date of the assignment and that demand cannot, therefore, in any way affect the present claim of the plaintiff.

I would, therefore, dismiss the appeal with costs.

SESHAGIRI AIYAR, J.—I agree. As I read the evidence, it seems to me that the transaction was one of a completed gift from the grandfather to the granddaughter. Instead of allowing the granddaughter to make a deposit herself, the grandfather deposited the money with the defendant. Under these circumstances, having regard to the fact that subsequently the defendant regarded the money as being due to the granddaughter, Panchaksharam, I feel no doubt that no question of privity of contract arises in this case. The case of *Iswaram Pillai v. Taregan* (1) can be put on the ground that the defendant in that case was regarded as the agent of the mortgagor. It was open to the mortgagor as principal to revoke the agent's authority to pay his creditors before payment or notice of the undertaking to pay by the agent was given to them. That case does not affect the present question.

On the question of limitation, I entirely agree with my learned colleague that Article 60 is applicable to the present case. There is no doubt there is only a thin difference between a loan and a deposit. But where the arrangement is that the money is to be paid on the happening of a certain specified event or on demand, the transaction should be regarded as a deposit payable on the happening of the event or on demand, as the case may be, and not as a loan. Further, as pointed out in *Ramanathan Chetty v. Subramaniam Chetty* (4), if there is any doubt as to whether a transaction amounts to a loan or a deposit, the presumption is that it is a deposit and not a loan. The present case comes within the principle laid down by the Bombay High Court in the two cases to which my learned colleague has just referred. The money was not entered in the current account; there was no payment of interest, but the interest was added on from year to year, and fresh entries were made year after year. Under those circumstances the money was in deposit, as pointed out by the learned Judges of the Bombay

High Court. Consequently there is no bar of limitation.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

V. R. P.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 132 OF 1915.

February 22, 1916.

Present:—Mr. Lindsay, J. C.

BISHESHAR SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

BIKRAMJIT SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Decree nisi obtained under Transfer of Property Act (IV of 1882) and before enactment of Civil Procedure Code (Act V of 1908)—Order absolute not passed—Extension of time limited by decree not obtained—Mortgagor's right to deposit money—General Clauses Act (X of 1897), s. 6.

A mortgagor who obtains a decree for redemption, passed under the Transfer of Property Act and before the enactment of the Civil Procedure Code of 1908, is entitled to deposit the money due under the decree *nisi* at any time before the passing of a decree absolute, without obtaining an extension of the time limited by the decree, although the said Code is in force at the time he applies for the deposit. [p. 350, col. 2.]

Jageshar Singh v. Raja Bhagwan Bakhsh Singh, 9 Ind Cas. 337; 14 O. C. 10, referred to.

Appeal from the decree of the District Judge, Fyzabad, dated the 15th March 1915, reversing that of the Subordinate Judge, Fyzabad, dated the 28th October 1913.

Mr. Mohammad Wasim, for the Appellants.

Babu Hari Kishen Dhaon, holding brief of Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT—The sole point for decision in this appeal is one of limitation.

It appears that on the 30th May 1904 a decree for redemption was passed in favour of several plaintiffs, one of whom Ram Harakh Singh was a minor on that date. The period fixed for payment was six months.

On the 6th September 1913 Ram Harakh put in an application in the Court of the Subordinate Judge, depositing the amount made payable by the decree and praying that notice should issue to the mortgagees to withdraw the money. Notice issued accordingly and the mortgagees objected, saying that the deposit, not having been made within the time

KASTHURI AIYANGAR v. ARUNACHELAM CHETTIAR.

limited by the decree, could not be received by the Court and that in fact the right of redemption had been lost.

The Subordinate Judge overruled the objection, holding that the mortgagor could redeem at any time before an order for sale had been passed on application made by the mortgagees and pointing out that the mortgagor could have sale stayed under Order XXI, rule 69, even after an order for sale had been passed. He accepted the deposit and directed the preparation of a final decree under Order XXXIV, rule 8, sub-rule (1). This order has been reversed in appeal by the District Judge, who was of opinion that the application to deposit the money was time-barred. He treated the application as an application for the execution of a decree and on this ground distinguished the present case from that reported as *Vidya-sagar v. Ratipal* (1), where it was laid down that a mortgagor against whom a decree for foreclosure had been passed might pay in the money due under a decree *nisi* at any time before an order absolute had been passed.

It is not necessary for me, I think, to discuss the question, whether the right of the mortgagor to deposit the money is less extensive in the case in which he has sued for redemption than in the case where he is given an opportunity to redeem under the terms of a decree passed against him in a suit for foreclosure in which he has been arrayed as a defendant.

A case somewhat similar to the present one was dealt with by a Bench of this Court in *Jageshar Singh v. Raja Bhagwan Bakhsh Singh* (2). There a decree for redemption was passed on the 1st November 1904, which was affirmed on appeal on the 9th July 1906. The money was deposited by the decree-holder on the 8th July 1909, that is, within three years from the date of the final decree in appeal, the decree-holder asking for the issue of a notice to the mortgagees requiring them to withdraw the money. A further application was made on the 13th July 1909 by the decree-holder asking that he might be placed in possession of the property. There, too, as here, the mortgagor had not obtained any order for extension of the time fixed for pay-

ment, nor had the mortgagees applied for an order absolute for the sale of the property.

It was held that inasmuch as the decree for redemption had been passed under the Transfer of Property Act and before the enactment of the present Code of Civil Procedure, the right of the mortgagor to redeem at any time before the passing of an order absolute for sale of the property, without obtaining an extension of the time limited by the decree, was saved by the operation of section 6 of the General Clauses Act of 1897. This principle is applicable in the present case, although in this instance the deposit was made long after the expiry of three years from the date of the decree, for according to the ruling the right can be exercised at any time before an order absolute for sale has been passed, and admittedly no such order has been made in the present case.

I am unable, therefore, to accept the view of the lower Court that the applicant in this case has lost the right to deposit the mortgage-money in order to obtain redemption.

I allow the appeal, set aside the order of the lower Appellate Court and restore the order of the Subordinate Judge. The appellant will have his costs both here and in the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2036 OF 1914.

November 29, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KASTHURI AIYANGAR—DEFENDANT
No. 2—APPELLANT

versus

PISA ARU ARU ARUNACHELAM
CHETTIAR AND ANOTHER—PLAINTIFF AND
DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 257, 310A—Payment into Court of decretal amount by persons other than judgment-debtor, whether amounts to satisfaction of decree—Order as to rateable distribution, when justified—Sale proclamation mentioning larger amount than what is really due, effect of—Sale, whether valid.

If the whole amount due under a decree is paid into Court, the decree becomes satisfied without any formal order of the Court recording satisfaction, but the payment must be made either by the judgment-debtor himself or on his behalf by a recognised agent or by a Pleader duly authorized. [p. 351, col. 2.]

(1) 25 Ind. Cas. 752; 17 O. C. 347; 1 O. L. J. 433.

(2) 9 Ind. Cas. 337; 14 O. C. 10.

KASTHURI AIYANGAR V. ARUNACHELAM CHETTIAR.

Where, therefore, payment into Court of the decretal amount was made, not by the judgment-debtor, but by two other persons who paid not on behalf of the judgment-debtor but as persons whose immoveable property had been sold in execution of a money-decree:

Held, (1), that such payment did not have the effect of satisfying the decree in the eye of the law unless and until the decree-holder consented to receive the amount deposited in satisfaction of his decree; [p. 352, col. 1.]

(2) that as the depositors had no right to make such payment and were mere volunteers, the lower Court did not act without jurisdiction in treating it as money realised under section 295 of the old Code of Civil Procedure and in ordering its rateable distribution among the creditors. [p. 352, col. 1.]

Where a decree has not been wholly satisfied, the holding of a sale in execution of that decree mentioning in the sale proclamation an amount larger than the amount then really due under the decree, is only an irregularity and does not make the sale nullity, i.e., a sale held without jurisdiction. [p. 352, col. 2.]

When the right, title and interest of a judgment-debtor have once been sold in execution, there is nothing left for a purchaser, in a subsequent auction sale to take. [p. 353, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 92 of 1913, preferred against that of the Court of the District Munsif of Namakkal, in Original Suit No. 723 of 1911.

Mr. S. Varadachariar for Mr. C. A. Seshagiri Sastri, for the Appellant.

Messrs. T. Rangachariar and K. Satyamurthi, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The second defendant is the appellant. The plaintiff's right to the plaint house is founded on a purchase by his predecessor-in-title in a Court auction held on the 14 March 1902 in execution of a money decree obtained against one Srinivasachariar.

The first question for consideration is, whether the Court which held that sale had no jurisdiction by reason of the fact that the entire decree amount in Original Suit No. 993 of 1900 had been deposited in Court by two persons, Ramaswamy Aiyangar and Krishnaswamy Aiyangar, on the 2nd October 1902 and thus the decree had been fully satisfied.

Section 257 of the Old Civil Procedure Code of 1882 (which was the Act in force in October 1902) says that "All money payable under a decree shall be paid as follows:—(namely) (a) into the Court whose duty

it is to execute the decree; or (b) out of Court to the decree-holder; or (c) otherwise by the Court which made the decree directs."

I take it that the payment into Court can only be made by or on behalf of the person who is liable under the decree to make that payment. If the payment is made on behalf of the judgment-debtor or his representative, it must be done by a recognised agent (section 37 of the old Civil Procedure Code) or by a Pleader duly authorized.

It seems to me further clear that if the whole amount due under the decree is paid into Court, the decree becomes satisfied without any formal order of the Court recording satisfaction, just as a payment to a creditor by a debtor satisfies the debt without a formal receipt from the creditor. As regards payment out of Court to the decree-holder, the last paragraph of section 258 requires a record to be made of the certificate of satisfaction before the decree can be treated as satisfied for purposes of preventing further attempts of execution being lawful. Section 275 of the old Code also implies that satisfaction of the decree is effected without more when the amount decreed with costs, all charges and expenses in execution are paid into Court.

Assuming that a Court has no jurisdiction to execute the decree after it has been satisfied by a payment of the whole decree amount into Court by the person liable under the decree or by his legal representative, see *Janakdhari Lal v. Mohant Gossain Lal* (1), was the payment made in October 1902 in the suit, Original Suit No. 993 of 1900 made by such a person? As said above, that payment was not made by the judgment-debtor, Srinivasachariar, but by two persons Ramaswamy Aiyangar and Krishnaswamy Aiyangar. It is clear from the records that those two persons did not pay the money on behalf of the judgment-debtor. They paid the money under section 310 (A) as persons whose immoveable property had been sold in execution of a money-decree. It is again clear from the records that the plaint house did not then belong to these two persons, though one of them had obtained a sham sale-deed from the judgment-debtor.

(1) 1 Ind. Cas. 871; 37 C. 107; 13 C. W. N. 710; 11 C. L. J. 254.

KASTHURI AIYANGAR v. ARUNACHELAM CHETTIAR.

Even assuming that they had a right to make the payment of the sum required under section 310 (A) to be paid into Court before the execution sale could be set aside under that section, such a payment does not always or necessarily have the effect of satisfying the decree. [See the last paragraph of section 310 (A).] It is said that Ramaswamy Aiyangar and Krishnaswamy Aiyangar paid not only the exact sum necessary to be deposited under section 310 (A) for the setting aside of the sale, but had also deposited Re. 1-3-0 in excess which would satisfy the decree itself wholly, if the decree-holder had taken it in its entirety. They had no right to pay that Re. 1-3-0 under section 310 (A). I am, therefore of opinion that the payment into Court in October 1902, by persons who were not only strangers to the decree but persons who did not come at all under the description given in section 310 (A) (the persons entitled to have the execution sale executed set aside under that section), cannot have the effect of satisfying the decree in the eye of the law, unless and until the decree-holder consented to receive the amount deposited in satisfaction of his decree.

If Ramaswamy Aiyangar and Krishnaswamy Aiyangar had the right to make that payment under section 310 (A), then the money deposited by them for payment to the decree-holder [see clause (b) of section 310 (A)] cannot be lawfully distributed rateably under section 295 between the decree-holder in Suit No. 993 of 1900 and the holder of any other decree against the same judgment-debtor. But as the depositors had no right to make such payment and were mere volunteers, the Court did not act without jurisdiction in making (as it did make) such distribution between the decree-holder in Original Suit No. 993 of 1900 and another money decree-holder against Srinivasachariar and thus keep alive a portion of the decree in Original Suit No. 993 of 1900. Even if the Court was bound to pay what was deposited by these unauthorized persons for payment to the decree-holder in Original Suit No. 993 of 1900 solely under section 310 (A), clause (b), that decree would still have remained unsatisfied to the extent of at least the one rupee and three annas. The Court was not bound to pay that one and odd rupees to the

decree-holder and the decree-holder was not bound to accept it in satisfaction of his decree. This Bench has held in Civil Miscellaneous Appeal No. 339 of 1914, that where a decree had not been wholly satisfied, the holding of a sale in execution of that decree mentioning in the sale proclamation an amount larger than the amount then really due under the decree was only an irregularity and did not make the sale a nullity, that is, a sale held without jurisdiction. The first contention of the appellants' learned Vakil, therefore, that the plaintiff's predecessor got no title by his purchase in April 1903 in Court auction falls to the ground.

The next contention of the appellant is based on the following facts. Before the plaintiff's predecessor purchased in March 1903 the plaint house in Court auction sale, a decree had been passed in January 1902, in Original Suit No. 12 of 1901 in the District Court of Salem, against Srinivasachari charging the plaint house (and other properties) with the payment of Rs. 1,500 in favour of one Sundaram Iyengar (the present 1st defendant). That decree made Srinivasachariar liable also personally to Sundaram Iyengar for the payment of the sum of Rs. 1,500. In execution of its decree the plaint house was sold in Court auction in 1911 and purchased by the 2nd defendant. The second defendant contends that the plaintiff's purchase in 1903 in Court auction in execution of a money-decree against Srinivasachariar was subject to the charge which had already been created in January 1902 under the decree of Original Suit No. 12 of 1901 and that the title of the plaintiff was, therefore, subject to be destroyed by a sale held in execution of decree in Original Suit No. 12 of 1901 enforcing the charge in Sundaram Iyengar's favour and that consequently when the 2nd defendant purchased in 1911 in execution of the above decree in Original Suit No. 12 of 1911, the plaintiff's title was divested. Assuming (without deciding) that the decree in Original Suit No. 12 of 1901 not only declared a charge on the plaint house in favour of Sundaram Iyengar to the extent of Rs. 1,500, but that it should be treated as a decree directing the sale of that property in execution of that same decree without

SARJU DIN PANDEY v. KAMTA SINGH.

imposing upon Sundaram Iyengar the necessity to bring a separate suit for sale in enforcement of the charge, the short answer to the 2nd defendant's above contention seems to be that Sundaram Iyengar's execution application, Exhibit N, and the records connected with that application clearly show that he attached the plaint house and brought it to sale, not in execution of that portion of the decree in Original Suit 12 of 1901 which created the charge on the house in his favour, but in execution of the personal decree passed in that same suit against Srinivasachariar for the amount of Rs. 1,500, and that he attached the property as the property of Srinivasachariar on the date of the attachment in 1910 and brought to sale the right, title and interest of Srinivasachariar as it stood in 1910, and not the right, title, and interest of Srinivasachariar as it stood in 1902, when the charge was created under the decree. But Srinivasachariar had lost all right, title and interest in the plaint house when the plaintiff's predecessor purchased it in Court auction in 1903 in execution of the decree in the suit of 1900 and hence the 2nd defendant purchased merely a bag of wind in 1911. In other words, as the 1st defendant did not bring the property to sale in execution of the mortgage-decree for sale passed in Original Suit No. 12 of 1901 (assuming that it was a mortgage-decree for sale of the plaint house) but attached and sold it in execution of the money-decree passed in that same suit, the contention of the appellant (2nd defendant) that such a sale prevailed against the previous Court auction purchase of 1903 (under which the plaintiff claims) cannot be accepted.

In the result, I would confirm the lower Appellate Court's decree, though not for the reasons given in the judgment of the lower Appellate Court, and would dismiss the second appeal with costs.

NAPIER, J.—I concur.

V. R. P.

Appeal dismissed.

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 38 of 1915.

January 24, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.

SARJU DIN PANDEY—DEFENDANT—
APPELLANT

versus

KAMTA SINGH AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Construction of document—Settlement decree, interpretation of—Under-proprietary title claimant—Claim admitted by superior proprietor—Alienation, decree restraining, effect of.

Where in a claim before a Settlement Court for under-proprietary title, the superior proprietor admitted the claim, and the Court declared the claimant to be entitled to under-proprietary rights subject to the payment of a certain annual rent without any power of mortgage or sale:

Held, that the above imposition of a restraint on alienation was void and ineffectual. [p. 354, col. 1.]

Gaya Din Singh v. Syed Mumtaz Husain, 10 O. C. 136, followed.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 10th December 1914, reversing that of the Probationary Munsif, Sultanpur, dated the 4th May 1914.

Babu Rudra Datta Sinha, for the Appellant.

Babu Putton Lal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption in respect of a *sankalpnama* executed by defendants Nos. 3 to 6 in favour of defendant No. 1 and the father of defendant No. 2 in lieu of Rs. 82 on the 6th December 1912, by which an under-proprietary right to the plots given was created in favour of the transferees. The lower Appellate Court found that the transaction in question was really a sale in the disguise of a *sankalp*, and in view of the fact that the payment of the consideration was recited in the deed itself, the correctness of that finding cannot be impugned. The Court further found that the plaintiffs were entitled to pre-emption as members of the village community, inasmuch as they were co-sharers in another *mahal* of the village. It also held that the defendants-vendees did not possess any under-proprietary rights in the *mahals* in which the land sold was situated and that they had consequently no preferential right of purchase. On behalf of the defendant-appellant reliance is placed on a settlement decree, dated the 20th February 1877, in

SUBBANNA ACHARIAR v. GOPALAKRISHNA ACHARIAR.

respect of 32 *bighas* 11 *biswas* of land, situated in the *mahals* in which the property in dispute exists, whereby his predecessor-in-interest was declared to be entitled to under-proprietary rights subject to the payment of an annual rent of Rs. 63 without any power of mortgage or sale. The condition in the decree restraining alienation was inconsistent with the grant of under-proprietary rights, and as the decree was passed on an admission of the then plaintiff's under-proprietary title by the superior proprietors, the imposition of a restraint on alienation can only be regarded as void and ineffectual. That was the view taken in *Gaya Din Singh v. Syed Mumtaz Husain* (1). The predecessors-in-interest of the defendants-vendees were, it is manifest, either granted under-proprietary rights or not. If they were granted under-proprietary rights, as the decree specifically stated ("*Digri isteqrar haqiat matahti*"), the subsequent condition that they would have no power of alienation could only be regarded as surplusage. If the latter condition be given effect to, that portion of the decree by which under-proprietary rights were declared would become ineffectual. No such condition was imposed by the superior proprietors when they admitted the under-proprietary rights of the claimants in the Settlement Court. The intention will, therefore, be taken to be that an under-proprietary right was granted to the then claimants, and in that view of the case the defendants-vendees were entitled to preference as against the plaintiffs, who were co-sharers in another *mahal*.

The appeal is, therefore, allowed and the plaintiffs' claim dismissed with costs throughout. The defendant-appellant will get his costs from the plaintiffs-respondents in all the Courts.

Appeal allowed.

(1) 10 O. C. 136.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 8 of 1915.

February 25, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

SUBBANNA ACHARIAR AND ANOTHER—
PLAINTIFFS NOS. 1 AND 4—APPELLANTS

versus

GOPALAKRISHNA ACHARIAR AND
OTHERS—DEFENDANTS AND PLAINTIFFS NOS. 2
AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Madras Estates Land Act (I of 1908), s. 189—Revenue Courts—Jurisdiction—Decision on question of title—Subsequent suit on same title in Civil Court—Res judicata—Suit for rent—Improper addition of prayer for declaration to oust jurisdiction—By which Court suit cognizable.

The decision of a Revenue Court on a question of title will not operate as *res judicata* in a claim based on the same title laid subsequently in the Civil Court. [p. 355, col. 1.]

Rangayya Appa Rou v. Ratnam, 20 M. 392, followed.

A claim for arrears of rent is one exclusively cognizable by a Revenue Court, even if it contains a *bona fide* prayer for a declaration of title. [p. 355, col. 2.]

Where such a claim is laid in a Civil Court, the plaintiff may be allowed to amend the plaint by striking out the prayer for recovery of rent, and on the plaint so amended, the Civil Court can take cognizance of the suit. [p. 355, col. 2.]

If, however, the prayer for a declaration of title is added to that for rent with the improper object of ousting the jurisdiction of the Revenue Court, the suit is liable to be dismissed. [p. 355, col. 1.]

Venkata Kumar Mahipati Surya Rao v. Sreerama Charyulu, 12 Ind. Cas. 430; (1911) 2 M. W. N. 307, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, in Second Appeal No. 280 of 1914, preferred to the High Court against the decree of the District Court of South Arcot, in Appeal Suit No. 45 of 1913, (Original Suit No. 454 of 1912, on the file of the Court of the District Munsif of Mannargudi).

Mr. T. R. Venkatarama Sastri, for the Appellants.

Mr. T. Muthia Pillai, for Mr. R. Kuppusamy Aiyar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs Nos. 1 and 4 are the appellants. The suit was brought for the following reliefs: (a) a declaration that the plaintiffs are entitled to the *melvaram* of certain lands and (b) recovery of arrears of rent due on those lands for *Faslis* 1319, 1320 and 1321. The

LAL JAGROOP SINGH v. BANKTAISHWAR RAWAN BAHADURPAL SINGH.

suit was brought in the District Munsif's Court of Mannargudi, South Arcot District. The District Munsif and the District Judge (on appeal) held that the suit was substantially one for recovery of arrears of rent, that the adding of a prayer for declaration cannot alter the substantial character of the suit and that section 189 of the Madras Estates Land Act, which gives exclusive jurisdiction to Revenue Courts in respect of suits for arrears of rent, cannot be evaded by adding a prayer for declaration. The suit was, therefore, dismissed as brought in a wrong Court. The District Munsif dismissed the suit on another ground also, namely, that the Revenue Court had, in Suits Nos. 5 and 8 of 1909, found that the plaintiffs' father was not the *melvaramdar* of the plaint lands and hence the question was *res judicata*. The District Judge, however, differed from the District Munsif on the question of *res judicata*, but upheld the District Munsif's decision on the question of jurisdiction. The 1st to 3rd respondents' Vakil argued before us that the dismissal of the suit by the lower Courts could also be supported on the ground of *res judicata* decided against the 1st to 3rd respondents in the District Court. If we assume that the Civil Court, and not the Revenue Court, has the jurisdiction over the present suit, a Revenue Court's decision on the question of title cannot be *res judicata* under section 11, Civil Procedure Code, the decision in the first suit by a Court not competent to try the second suit cannot be pleaded as *res judicata* in the second suit. [See also *Rangayya Appa Rou v. Ratnam* (1).]

The second appeal preferred to this Court was dismissed by Ayling, J., who agreed with the views of the District Judge. Hence this Letters Patent Appeal. We cannot say that the addition of the prayer for declaration was made in this case by the plaintiffs with the improper object of ousting the jurisdiction of the Revenue Court. The 1st defendant had denied the plaintiffs' *melvaram* right in the two Revenue Suits Nos. 5 and 8 of 1909 and also in Suit No. 9 of 1909 brought for enforcement of *patta* for *Fasli* 1319

(1) 20 M. 392.

and 1320. But we think that as the claim for rent is exclusively cognizable by the Revenue Court, the Civil Court cannot be given jurisdiction over that claim by the addition of that claim to a *bona fide* claim for declaration of title. Following *Venkata Kumara Mahipati Surya Rao v. Sreenama Charyulu* (2), we shall direct the plaintiffs Nos. 1 and 4 (the 1st and 4th plaintiffs' learned Vakil Mr. Venkatarama Sastriar consenting to that course on their behalf) to amend the plaint by striking out the prayers relating to the recovery of arrears of rent and by confining the suit to a prayer for declaration of the plaintiffs' title to *melvaram*. If this amendment is made within two weeks from the date of the receipt of the records in the District Munsif's Court, the District Munsif will re-try the suit as for pure declaration of title and dispose of it in due course of law, provided also that the costs hitherto incurred by the contesting defendants are paid into Court of the District Munsif for payment to them in any event. If the amendment is not made and the costs are not paid up as directed, this Letters Patent Appeal shall be deemed to have been dismissed with costs.

MOORE, J.—I agree.

Amendment of plaint allowed.

V. R. P.

(2) 12 Ind. Cas. 430; (1911) 2 M. W. N. 307.

POUDH JUDICIAL COMMISSIONER'S
COURT.

CIVIL MISCELLANEOUS APPEAL No. 54
OF 1914.

May 25, 1915.

*Present:—*Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

**LAL JAGROOP SINGH AND OTHERS—
DEFENDANTS—APPELLANTS**

versus

versus
Babu BANKTAISHWAR RAWAN
BAHADURPAL SINGH—PLAINTIFF—
RESPONDENT.
Arbitration—

RESPONDENT.
Arbitration—Award—Execution, award to be capable of—Intervention of Court, award made without—Uncertain award, setting aside of—Court, power of—Parties to arbitration, option of.

LAL JAGROOP SINGH v. BANKTAISHWAR RAWAN BAHADURPAL SINGH.

An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties; in other words, it ought not to be infructuous and incapable of execution. [p. 356, col. 2.]

Where an award, made without the intervention of, and then filed in, Court, is uncertain and does not specify either the amount or the land awarded or does not give directions sufficient to enable it to be ascertained or identified, it is liable to be set aside on account of uncertainty. The Court has no power to remit such an award to the re-consideration of the arbitrator, but it is nevertheless open to the parties to go back to him and ask him to make a complete award, treating the arbitration as still pending. [p. 356, col. 2, p. 357, col. 1.]

Appeal against the order of the Subordinate Judge, Partabgarh, dated the 31st August 1914.

Syed Ali Mohammad, for the Appellants.

Mr. Mohammad Wasim, for the Respondent.

JUDGMENT.—In this case the father of the plaintiff and the defendants executed an agreement to refer the matters in difference between them to the arbitration of certain *talukdars*. The dispute between the parties related to the method of payment of the maintenance and the expenses of marriage and funeral ceremonies allowed to the defendants and the title to certain groves, personal and ancestral, which the defendants claimed as their property. There was also a dispute in regard to the provision to be made for the construction of two houses for the residence of the defendants. The agreement authorized the arbitrators to settle the above disputes in accordance with the terms of a previous compromise entered into between the parties in another case on the 31st January 1883, and gave them the option of either fixing a money payment or of awarding land in perpetuity yielding income sufficient to meet the expenses aforesaid. By the previous compromise referred to in the agreement Surajpal Singh, the father of the plaintiff, was recognised as the sole proprietor of the Chandapur estate, and the present defendants and their heirs were declared to be entitled to an allowance of Rs. 1,000 per year, besides the expenses of marriage and funeral ceremonies according to their status, from the *talukdar*. It was further therein agreed that the *talukdar* shall provide for the construction of two

houses for the residence of the defendants, wherein they shall have absolute proprietary right, and that in regard to groves, which were ancestral or personal, the defendants would get their share of the produce of fruits and wood as claimed.

The arbitrators made a unanimous award on the 10th July 1913, giving the defendants land yielding Rs. 1,200 per year in lieu of the maintenance and the expenses of marriage and funeral ceremonies payable to them, allowing them a heritable but not transferable right in the same. They also directed the plaintiff to give 3 *bighas* of land to the defendants for building houses close to the land given in lieu of the maintenance and to pay them Rs. 600 for the costs of the construction of the two houses over the same. In regard to the groves they held that the *talukdar* had acquired 20 groves by right of escheat, and that the parties were entitled to have the remainder partitioned. The arbitrators, however, did not specify the numbers or boundaries of the land awarded or of the groves which were held to be liable to partition. The plaintiff applied to have the award filed in Court. The objection of the defendants was that the award was vague and indefinite and that the arbitrators had exceeded the powers given them by the agreement of reference. The learned Subordinate Judge accepted the award. But it is obvious that the failure of the arbitrators to specify the land allotted in lieu of the maintenance and expenses of marriage and funeral ceremonies or for the construction of houses rendered the award infructuous and incapable of execution. "Any award," says Russell, "ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties." (Russell on Arbitration, 9th Edition, page 204.) When the award is uncertain and does not specify either the amount or the land awarded or does not give directions sufficient to enable it to be ascertained or identified, it is liable to be set aside on account of uncertainty. We have no power to remit the award to the arbitrators for the specification of the land and groves dealt with therein. But it is open to the

MUHAMMAD ABDUL JALIL v. RAM DAYAL.

parties to go back to the arbitrators and ask them to make a complete award treating the arbitration as still pending. The plaintiff-respondent is willing to withdraw his application for the filing of the award to enable him to approach the arbitrators again with a request to make a complete and definite award.

The application is, therefore, allowed ■ withdrawn with liberty to file ■ fresh one after the award is completed. The parties will, under the circumstances, bear their own costs throughout.

Case withdrawn.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 28 OF 1915.
May 15, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Lindsay.

MUHAMMAD ABDUL JALIL,
Shams-ul-Ulema—PLAINTIFF—APPELLANT
versus

Babu RAM DAYAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Copyright—Selections of courses of study, lists of, by member of Board of Studies—Publication of lists by University, effect of—Surrender of copyright.

The plaintiff, a member of the Board of Studies of the Allahabad University, was asked by the Convener of the Board to prepare lists of selections from Persian authors suitable for courses of study for the Matriculation, the Intermediate and the B. A. Examinations. The lists prepared by the plaintiff for the Matriculation and the Intermediate Examinations were approved as they stood and the list for the B. A. Examination was passed with slight alterations. The Syndicate of the University published the lists in the syllabus. The plaintiff desired that the books that he was preparing on the basis of his selections should be prescribed and his right protected by copyright, or in the alternative wanted the University to remunerate him for the labour. The defendants on the basis of the information contained in the syllabus sought out the original texts and printed and published the listed extracts in book form before the plaintiff published them. The plaintiff sued for a perpetual injunction and damages:

Held, that the plaintiff retained no copyright in the selections as such, inasmuch as when he laid the results of his skill and experience before the Board of Studies and then joined with the other members of the Board in preparing the syllabus for the examinations he placed the result of his labours unreservedly at the disposal of the University Authorities. [p. 360, col. 1.]

Held, further, that although the plaintiff desired that the University Authorities should either remunerate him for his labours or take suitable ■■■■ to protect his copyright in the selections themselves, the University Authorities when they published their syllabus surrendered any copyright, which may or may not have existed, unreservedly into the hands of the general public. [p. 360, col. 1.]

First appeal from the decision of the District Judge, Allahabad, dated the 21st May 1914.

FACTS of the case material for the report are as follows:—

In 1910, the Allahabad University decided to substitute a pure Persian Course for the mixed Persian and Arabic Course, which had up to that time been prescribed for the various University Examinations. Its preparation was entrusted to one *Moulvi Amjad Ali*. The Course prepared by *Moulvi Amjad Ali* was considered by Dr. Horivitz, the Convener of the Board of Studies, and referred to *Shams-ul-Ulema Abdul Jalil*, Professor of Arabic and Persian in Queen's College, Benares, and also a member of the Board of Studies, for opinion. The latter criticised the book adversely, with the result that it was not accepted by the Board. The Convener of the Board then suggested to *Moulvi Abdul Jalil* that he himself might suggest suitable Courses of Study for each of the three examinations Matriculation, Intermediate and B.A. *Moulvi Abdul Jalil* prepared two tabular forms or lists showing the scope of each selection, one for the Convener's own use and the other to be shown to any other member of the Board of Studies. These lists were passed by the Board of Studies and Faculty of Arts and printed, and formed the prescribed Courses for the three examinations. The extracts contained in these lists were then printed and published by the firm of Ram Dayal and Ram Narain in book form and were registered for copyright on different dates, in July and September 1912. *Moulvi Abdul Jalil* shortly afterwards printed his own Courses for the three examinations and obtained copyright in respect of them. He then sued Messrs. Ram Dayal and Ram Narain and one *Mirza Muhammad Ismail Khan* for alleged breach of copyright in connection with Persian Courses prescribed for the B. A.

MUHAMMAD ABDUL JALIL T. RAM DAYAL.

Intermediate and Matriculation Examinations of the Allahabad University for the year 1914. He alleged that he had acquired copyright in virtue of the lists of selected passages which were placed before and approved by the Board of Studies and that the defendants, in printing the selected passages from the lists, committed a breach of copyright, and claimed perpetual injunction and substantial damages.

The District Judge of Allahabad tried the suit in the first instance and dismissed it with costs. Hence this appeal.

Dr. S. M. Sulaiman (with him Messrs. Abdul Raoof and Jang Bahadur Lal), for the Appellant, contended that the sole question to be decided in the case was whether the appellant had any copyright in the selections he made in the lists.

[PIGGOTT, J.—One part of the appellant's case was that the lists on the basis of which the defendants compiled the Courses was the product of the appellant's skill, experience, and learning for which he was entitled to protection. The other part of the case was that the defendants had in some unexplained manner got hold of the actual proofs and thus saved themselves the trouble of searching for the passages.]

Yes.

[PIGGOTT, J.—Do you deny that the University had the right to publish the lists?]

If the appellant prepared the list he had a copyright in it. The Dean of the Faculty understood that he claimed copyright or in the alternative compensation.

[PIGGOTT, J.—If the University took your copyright you should have right against the University.]

If the University did not take the copyright it remained in my client.

[PIGGOTT, J.—The issue to be decided was, whether the appellant's act of placing the product of his skill and labour at the disposal of the Board of Studies did not amount to the resigning of his rights into the hands of the Board.]

Yes.

[LINDSAY, J.—It is a labour of love.]

He was a member of the Board and his duty as such was not to write books but only to review.

[PIGGOTT, J.—Once the University had published the lists, any firm could publish the books. The copyright exists in mere selection as it is a matter of experience and skill. *Macmillan v. Suresh Chunder Deb* (1).]

A Professor has copyright in the lectures he delivers. There is difference in offering suggestions, etc., and making selections. The latter requires skill, labour and experience.

[LINDSAY, J.—How can you get over the fact that the defendants' books were published before your books were published?]

The defendants knew that the appellant was going to publish the books and they wanted to forestall him and published them first.

[LINDSAY, J.—You have to prove that.]

JUDGMENT.

PIGGOTT, J.—This is an appeal by the plaintiff in a suit claiming a perpetual injunction in respect of an alleged breach of copyright, with substantial damages, from the defendants, who are a firm of publishers in Allahabad. The books which are alleged to have infringed the plaintiff's copyright are three volumes of graduated selections from standard Persian authors, the said selections having been prescribed at the end of the year 1911 by the Allahabad University for the subject-matter of its examinations in the Matriculation, Intermediate and B. A. Courses respectively, to be held in the year 1914. The plaintiff, *Moulvi Muhammad Abdul Jalil, Shams-ul-Ulema*, is a Professor of the Queen's College, Benares, and a member of the Board of Studies of the Allahabad University. In the early part of the year 1911 the question of the Courses to be prescribed for the examinations in the Persian language in the year 1914 began to be discussed by the Board of Studies. A project for a book of selections suitable to the B. A. Course had been prepared by Mr. Amjad Ali; this was submitted to the Convener of the Board of Studies and by him referred to the plaintiff for opinion. The plaintiff criticised this book adversely, and it was suggested to him by the Convener of the Board that he might himself propose

MUHAMMAD ABDUL JALIL V. RAM DAYAL.

suitable Courses of Study for each of the three examinations. The correspondence which followed is on the record of the case and has been laid before us in detail. It would seem from the plaintiff's own evidence that the idea of preparing graduated extracts from standard Persian authors, suitable for students preparing for each of the three examinations, had been previously present to the plaintiff's mind. At any rate he now offered, not merely to prepare lists of selections for the approval of the Board of Studies, but to prepare books or readers embodying the result of his selections. He was warned by the Convener that what was immediately required by the Board of Studies was merely lists of selections suggested as suitable, and eventually the plaintiff laid such lists before the Board of Studies of which, ■ already remarked, he was himself a member. The lists prepared by him for the Matriculation and Intermediate Examinations were approved as they stood, and the list prepared for the B. A. Examination was passed with slight alterations. Towards the end of December 1911 the Syndicate of the Allahabad University published a syllabus, including amongst other items the selections already referred to prescribed for students presenting themselves for the three examinations in question in the year 1914. In the meantime and thereafter, correspondence continued between the plaintiff, the Dean of the Faculty of Arts and the Registrar of the University on the subject of remuneration claimed by the plaintiff on account of the labour undertaken by him. The plaintiff in fact desired that the books which he was preparing, on the basis of the lists approved by the Board of Studies, should be prescribed by the University as the Persian readers recommended for the use of students preparing for the 1914 examinations and that his rights as the compiler of these three books should be protected by copyright. He made an alternative suggestion that the University should remunerate him for the labour which he had expended, and he named a sum of Rs. 4,029 as the remuneration to which he considered himself entitled.

This is not ■ suit for damages against the Authorities of the Allahabad University and it is not necessary for us to enter into ■ discussion of the position as between

the plaintiff and the University Authorities, except in so far as we find it necessary to do so in order to throw light on the present litigation. The University of Allahabad was quite aware that by prescribing any particular edition of selections from standard Persian authors for the use of students preparing for its examinations it would add considerably to the market value of any edition so prescribed. It is clear also that the Allahabad University had no intention of thus enhancing the market value of any edition prepared under the supervision of its own Board of Studies, or by a member of the said Board. The defendants obtained access, as any member of the public was entitled to do and as any enterprising firm of publishers was practically certain to do, to the syllabus printed under the authority of the University at the end of the year 1911. Their case is that the three books which form the subject-matter of the present litigation owe nothing to the plaintiff personally. The defendants obtained the information they wanted from the syllabus of studies published by the University Authorities. On the basis of the information so obtained they sought out the original texts, and so prepared their edition of extracts in book form for each of the three examinations. The plaintiff contends that he has copyright in the results of his own labours as embodied in the lists published in the syllabus of the University. It may be conceded that a considerable amount of learning, experience and labour was applied by the plaintiff to the preparation of the lists which he submitted to the Board of Studies. It may also be that it was never the plaintiff's personal intention that this service on his part should be rendered gratuitously. He undoubtedly desired to prepare readers on the basis of the suggestions laid by him before the Board of Studies, and to obtain remuneration for himself by the sale of the readers so prepared. As a matter of fact the plaintiff has himself prepared readers for each of the three standards on the basis of his own selections, and has published the same; but in each case the publication by the plaintiff took place subsequently to the publication by the defendants. We think that when the plaintiff, as a member of the Board of Studies, laid

SAHIB-UN-NISSA v. ABDUL GHAFUR.

the results of his skill and experience before the Board, and then joined with the other members of the Board in preparing the syllabus for the examinations to be conducted in the Persian language in the year 1914, he placed the results of his labours unreservedly at the disposal of the University Authorities. He may have desired that those Authorities should either remunerate him for his labours, or take suitable measures to protect the copyright in the selections themselves. But when the University Authorities published their syllabus they surrendered any copyright, which may or may not have existed owing to the skill, learning, experience and labour expended on the preparation of these lists of passages from standard authors, unreservedly into the hands of the general public. The avowed intention of the University Authorities was that any enterprising firm of publishers which considered it a remunerative speculation should bring out the passages in question in book form. They were of opinion that the interests of the public, and of the general body of students, would best be served by allowing free competition in this matter. We think these facts need only be set forth in order to make it clear that the plaintiff retains no copyright in the selections as such.

In the Court below a strenuous effort was made on the part of the plaintiff to put his case upon another, or an alternative, basis. It was suggested on his behalf that the defendants had saved themselves the labour of referring to the original Persian authors by getting hold, in some way or other, of the plaintiff's own manuscripts as they were passing through the press. This question has been very fully dealt with by the learned District Judge. The suggestion put forward on the part of the plaintiff admittedly rested upon no direct evidence. It was sought to base it merely on a comparison of the two editions, that is to say, of the edition first published by the defendants and the edition subsequently published by the plaintiff. The learned District Judge has sufficiently shown that there is no basis in fact for the plaintiff's plea on this point, and that such coincidences as were relied upon by him have been sufficiently explained in the evidence given by the defendants.

For the reasons stated we find no force whatsoever in this appeal. We dismiss it accordingly, with costs, including fees on the higher scale.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 340 OF 1914.

March 14, 1916.

*Present:—*Mr. Lindsay, J. C.

Musammât SAHIB-UN-NISSA—PLAINTIFF
—APPELLANT

versus

ABDUL GHAFUR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Pleader and client—Pleader advancing money to client on mortgage—Interest—Void transaction—Public policy—Legal Practitioners Act (XVIII of 1879), s. 6—Oudh Civil Digest, para. 267, cl. (8)—Purchase of actionable claim—Transfer of Property Act (IV of 1882), s. 136.

Where a Pleader advanced money on a mortgage to a client of his resident in the district in which he practised for the purpose of payment towards a redemption decree passed in the client's favour:

Held, that the transaction amounted to advancing money on interest within the meaning of clause (8), paragraph 267, Oudh Civil Digest, that though the conduct of the Pleader was not absolutely forbidden by law, it was opposed to public policy, being a violation of the rule which imposes in the interests of the public certain restrictions upon dealings between Pleaders and their clients, and that the transaction was consequently void. [p. 362, col. 1.]

Held, also, that the transaction did not amount to a transfer of an actionable claim within the meaning of section 136 of the Transfer of Property Act. [p. 361, col. 2.]

Appeal against the order of the District Judge, Rai Bareli, dated the 27th April 1914, reversing that of the Subordinate Judge, Rai Bareli, dated the 12th December 1913.

Sayed Zahur Ahmad, for the Appellant.

Sayed Ali Mohammad, for Respondent No. 3.

JUDGMENT.—This appeal has its origin in a suit brought by the plaintiff-appellant Musammât Sahib-un-nisa to recover joint possession as mortgagee over a certain house and compound No. 372/506 situated in one of the *mohallas* of the town of Rai Bareli. The plaintiff is the daughter of one Sheikh Abdul Ghaffur, Pleader in

SAHIB-UN-NISSA v. ABDUL GHAFUR.

Rai Bareli who died in September 1910. The property in suit was property over which Abdul Ghaffur at the time of his death held a mortgage with possession. It seems that the property belonged at one time to a woman named *Musammât Said-un-nissâ* who mortgaged it. She brought a suit for redemption in which Sheikh Abdul Ghaffur, it is said, acted as her Pleader. Having obtained a decree for redemption she found herself without funds to pay the necessary money and for that purpose, it is said, she borrowed the money from Abdul Ghaffur, who obtained a usufructuary mortgage in consideration of a sum of Rs. 800. The amount which was paid into Court to obtain redemption of the property was over Rs. 500. After the execution of the mortgage Abdul Ghaffur is said to have got possession of the property. The principal defendant in the case was *Musammât Khair-un-nissâ*, a widow of the deceased Abdul Ghaffur and step mother of the plaintiff. It may be mentioned here that the mortgage-deed by which the property came into possession of Abdul Ghaffur was executed *benami* in the name of one Chaudhari Abdul Hamid, who is the fourth defendant in the case. The defence of *Khair-un-nissâ* was to the effect that the money which had been advanced on this mortgage was her money. The Courts below, however, have both found that Abdul Hamid was a *tenamidar* for Abdul Ghaffur. This plea of the first defendant having been overruled, she fell back upon a plea of law and set up the defence that Abdul Ghaffur obtained, no interest in this property under the mortgage by reason of the fact that the transfer to him was barred by the provisions of section 136 of the Transfer of Property Act. It was further pleaded that the mortgage transaction was void with reference to the provisions of section 23 of the Indian Contract Act, inasmuch as the dealing with the property by Abdul Ghaffur in the circumstances just mentioned was contrary to public policy. These pleas were overruled by the Court of first instance. The Subordinate Judge gave the plaintiff a decree for possession in accordance with her share and also allowed her Rs. 56 as mesne profits. In appeal the District Judge accepted the pleas based upon section 136 of the Transfer of Property Act and section 23 of the Indian Contract Act and has dismissed the claim.

So far as the decision of the lower Appellate Court with respect to the interpretation of section 136 of the Transfer of Property Act is concerned, I am of opinion that it is erroneous. That section prohibits Legal Practitioners from dealing in actionable claims. It has been argued here, and I think rightly, that this transaction of mortgage to which reference has just been made did not in any way amount to the taking of a transfer of an actionable claim. Clearly the interest which *Musammât Said-un-nissâ* had in this property at the time when the mortgage-deed was executed was not an actionable claim within the meaning of that term as defined in the Transfer of Property Act. There remains, however, the other question as to whether this contract of mortgage was void under the provisions of section 23 of the Indian Contract Act. It appears from the terms of the mortgage-deed that Abdul Ghaffur had been acting as Counsel for *Musammât Said-un-nissâ* in the redemption suit in which she obtained a decree, and the mortgage-deed expressly sets out that a portion of the mortgage-money had been received by *Musammât Said-un-nissâ* from Abdul Ghaffur for the prosecution of that suit. The amount which the Pleader had advanced to *Musammât Said-un-nissâ* for the costs of the suit is stated in the deed to have been Rs. 260. The mortgage is a mortgage with possession. The terms of the mortgage are of an onerous character and one of the conditions was that the mortgage money was to carry interest at the rate of Rs. 24 per cent. per annum. This Court has under the provisions of section 6 of the Legal Practitioners Act framed certain rules regarding the conduct of Pleaders who have been admitted to practise in Oudh. One of these, which is to be found in paragraph 267, clause VIII, of the Oudh Civil Digest, lays down that "any person, who having been admitted as a Pleader shall..... enter into trade or business or shall advance money on interest to any person resident in the district or districts in which he practises or shall acquire any interest in any pending suit or in any property in respect of which a suit is intended to be brought in the province, shall give notice thereof to the Judicial Commissioner, who may thereupon suspend such Pleader from practising or pass such orders as he may think fit." While it may very well be contended that in the

SESHA IYER v. ARIMUTHU VATHYAR.

present case Abdul Ghaffur was not seeking to acquire any interest in any pending suit or in any property in respect of which a suit was intended to be brought, it is nevertheless patent that he was transgressing the rule just referred to, inasmuch as he was advancing money on interest to the mortgagor Musammatt Said-un-nissa. It is not pretended that when Abdul Ghaffur advanced this money he gave the notice which is required by the rule and it must be, therefore, held that his conduct in the matter was such as would have attracted the condemnation of this Court had it been brought to its notice, and it seems to me, therefore, that it must be held that even if the conduct of the Pleader in this matter was not absolutely forbidden by law, that is to say by a statutory rule having the force of law, it was at any rate conduct which this Court regards as being opposed to public policy. The rule to which I have referred imposes in the interest of the public certain restrictions upon dealings between Pleaders and their clients and any violation of the rule must, therefore, be deemed to be an act contrary to public policy. I have given this matter my careful consideration and I have come to the conclusion that the learned Judge was right in holding that the contract of mortgage in this case was void in accordance with the provisions of section 23 of the Indian Contract Act. This being the case, it must necessarily follow that Abdul Ghaffur acquired no interest in the mortgage and it further follows that the plaintiff cannot, therefore, ask for any share of Abdul Ghaffur's interest under this deed on the ground that she is one of his heirs under the Muhammadan Law. I dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1074 OF 1914.

February 25, 1916.

*Present:—*Mr. Justice Seshagiri Aiyar.

C. S. SESA IYER—DEFENDANT No. 10—
PETITIONER

versus

ARIMUTHU VATHYAR AND OTHERS—
DEFENDANTS NOS. 1 TO 7—RESPONDENTS.

Execution—Power of executing Court—Suit by prior mortgagee for sale of property—Failure of puisne mortgagee to prove amount due to him though impleaded—Executing Court, whether can ascertain amount due to puisne mortgagee.

Ordinarily when a decree is to be executed, the executing Court only has the power to carry out the specific orders contained in the decree. [p. 363, col. 2.]

A suit was brought by the 1st mortgagee impleading both the mortgagor and the 2nd mortgagee for sale of the property. A decree was passed directing the property to be sold. The 1st plaintiff was paid out of the sale-proceeds and the balance deposited in Court. The puisne mortgagee allowed the suit to go on *ex parte* as against him and did not prove the amount due to him under the mortgage. He sought to do so in the Court executing the decree:

Held, that it was not open to the petitioner to apply to the executing Court to ascertain the amount due to him on his mortgage, as he had failed to take the necessary steps in the suit in which he was properly impleaded. [p. 363, col. 2.]

Berhamdeo Pershad v. Tara Chand, 33 C. 92 at p. 97; 9 C. W. N. 989; *Debendra Nath Sen v. Mirza Abdul Samed Seraji*, 1 Ind. Cas. 264; 10 C. L. J. 150 at p. 159; *Sir Jehangir v. Hope Mills, Ltd.*, 9 Bom. L. R. 1350, referred to.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Melur at Madura, in Execution Application No. 69 of 1914 (in Execution Petition No. 261 of 1913 and Original Suit No. 793 of 1912).

Messrs. T. Narasimha Aiyangar and K. S. Krishnaswamy Aiyangar, for the Petitioner.

Mr. K. R. Rangaswamy Aiyangar, for the Respondents (*amicus curiæ*).

JUDGMENT.—In this case as the counter-petitioner was not represented before me I requested Mr. Rangaswami Iyengar to assist me as *amicus curiæ*, and I must express my indebtedness to him for the assistance he has rendered in the decision of this case. The matter which has to be decided has been fully argued before me and I think there is no object to be gained by reserving judgment. The facts are these:—A suit was brought by the 1st mortgagee impleading the mortgagor and the 2nd mortgagee for sale of the property. A decree was

SIESHA IYER v. ARIMUTHU VATHYAR.

passed directing the property to be sold. The sale-proceeds were brought into Court and the plaintiff, the 1st mortgagee, was paid out. The direction as regards the other defendants is simply "that the balance, if any, be paid to the defendants." The puisne mortgagee, who is the petitioner before me, was *ex parte*. He did not prove the amount due to him under the mortgage. He now seeks to prove the amount due to him under the mortgage in the Court executing the decree and prays for an order that the mortgagor be directed to pay the amount due to him. I may mention here that when the sale-proceeds were brought in after paying the first mortgagee, the surplus was paid out to the mortgagor.

The question under these circumstances is, whether the executing Court can enquire into the amount due to the second mortgagee and direct the amount to be paid out of the surplus sale-proceeds. There are no direct decisions on the point, but the observations of Justice Henderson, to which my attention was drawn by Mr. Rangaswamy Iyengar, in *Berhamdeo Pershad v. Tara Chand* (1) cover this case. The learned Judge there says, "Moreover, the amount due on their encumbrance had not been ascertained and no steps had been taken to have it ascertained, and, therefore, the Court executing the decree of the appellants was not in a position, after defraying the expenses of the sale and the prior encumbrance of the appellants, to apply the surplus proceeds in discharging the interest and principal money due on the plaintiff's mortgage." In that case the second mortgagee who had been a party to the suit and whose claim was not ascertained sued subsequently. It was objected that no suit lay as the matter was one to be enquired into in execution. The learned Judge points out that the second suit does lie and that it is open to the second mortgagee to treat the surplus sale-proceeds as representing the mortgaged property and proceed to realise the sum due to him from that. The observations of the learned Judges in *Debendra Nath Sen v. Mirza Abdul Samed Seraji* (2) also show that if the claim of the puisne mortgagee has not been ascertained a second suit will not be barred. However, I am expressing no definite opinion as to whether a second suit will lie. I am only

(1) 33 C. 92 at p. 97; 9 C. W. N. 939.

(2) 1 Ind. Cas. 264; 10 C. L. J. 150 at p. 159.

concerned to decide whether this matter can be enquired into in execution.

Mr. Krishnaswamy Iyengar has drawn my attention to the practice of the English Courts under which the master is directed to take an account of the amount due to the puisne encumbrancers. I take it that that is in consequence of a direction contained in the decree, and not that the master has an inherent power in execution to take accounts if there is no such direction in the original decree. The decision in *Sir Jehangir v. Hope Mills Ltd.* (3) does not take the matter any further. Mr. Justice Davar therein says that it is open to the Court which passed the decree to give directions to ascertain the amount due in respect of the decree that has been passed. Ordinarily when a decree is to be executed, the executing Court has only the power to carry out the specific orders contained in the decree. The power to enquire into the amount due to the mortgagee would necessitate the issue being raised as to whether the amount had been discharged and whether there is any amount remaining due. This is not a matter which should be left to be disposed of by the executing Court. A decree may have to be executed in a Court different from the Court which passed the decree and it would be unduly enlarging the powers of the executing Court to enable that Court to enquire into a matter which has not been heard and decided by the Court which passed the decree.

On the whole I have come to the conclusion that it is not open to the petitioner to apply to the executing Court to ascertain the amount due to him on his mortgage, as he has failed to take the necessary steps to ascertain the amount in the suit to which he was made a party. I dismiss the petition.

Petition dismissed.

V. R. P.

(3) 9 Bom. L. R. 1350.

RAMAN LALJI MAHARAJ v. HARI DAS.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 182
OF 1915.

May 13, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Sundar Lal.

Goswami Sri RAMAN LALJI MAHARAJ
AND ANOTHER.—JULGMENT-DEBTORS
— APPELLANTS

versus

HARI DAS—RESPONDENT.

*Succession Certificate Act (VII of 1889), s. 4 (1),
scope of.—Assignee of debt, succession certificate, if
required by, to collect debt.*

An assignee of a debt due to the estate of a
deceased person can recover the debt without
producing a succession certificate. [p. 365, col. 2; p.
366, col. 2.]

Allahdad Khan v. Sant Ram, 17 Ind. Cas. 486; 35
A. 74; 10 A. L. J. 506, not followed.

Rang Lal v. Annu Lal, 22 Ind. Cas. 349; 36 A. 21; 11
A. L. J. 968, referred to.

The Succession Certificate Act purports to facili-
tate the collection of debts, to regulate the adminis-
tration of succession and to protect persons who
deal with the alleged representatives of deceased
persons against the contingency which so often
occurs, when disputes arise as to whether a claimant
is or is not entitled as such personal representative.
[p. 364, col. 2.]

Per Walsh, J.—Section 4 (1) of the Succession
Certificate Act indicates that the claim contemplated
by this section is a claim made by a person in the
capacity of and as a personal representative of a
deceased person. [p. 365, col. 1.]

Per Sundar Lal, J.—An inquiry as to the validity
of transfers made by a certificate-holder is foreign
to the scope and object of Act VII of 1889. [p. 366,
col. 2.]

Execution first appeal from the decision
of the Subordinate Judge, Muttra, dated
the 30th April 1915.

Mr. P. L. Banerji (with him Mr. D. C.
Banerji), for the Appellants.

Mr. Jang Bahadur Lal, for the Respondent.

ORDER.

WALSH, J.—In this case the facts appear
in the judgment of my brother Mr. Justice
Sundar Lal. There is only one point of
law involved in the appeal. But it is an
important question of principle, the determina-
tion of which must necessarily involve the
rights and interests of a considerable number
of persons. I am deciding this case upon the
hypothesis, which I adopt as correct, that
this is a case of debt, and that if the author-
ity of *Allahdad Khan v. Sant Ram* (1)
relied upon by Mr. Pearey Lal Banerji was

(1) 17 Ind. Cas. 486; 35 A. 74; 10 A. L. J. 506.

rightly decided Mr. Banerji is entitled to
succeed. On the other hand if it was not
rightly decided this appeal must fail. On
■ consideration of that case, the subsequent
authority to which I will refer in one
moment, and the language of the section
itself, I entertain no doubt whatever that
the decision relied upon by Mr. Banerji
cannot be regarded as sound law. The
contention is that an assignee of ■ debt
due to the estate of ■ deceased person cannot
recover the debt without producing ■
succession certificate. That argument is
based upon the language of section 4, sub-
section 1, of the Succession Certificate Act
(VII of 1889) which begins with these
words: "No Court shall pass a decree against
a debtor of a deceased person for payment
of his debt to a person claiming to be
entitled to the effects of the deceased person
or to any part thereof except on production
of, amongst other things, (1) Probate, (2)
■ certificate." Now, to my mind ■ person
claiming as an assignee of a debt which
was due to the estate of a deceased person
is not claiming "the effects of the deceased."
From the date of assignment, the debt
due, to the deceased ceases to be part of
the deceased's effects. The consideration for
the assignment is substituted for the debt
due to the estate, and it is the consideration
for the assignment which from the date
of the assignment takes the place of the
debt as part of the effects of the deceased
person. I further think, apart from ■ narrow
examination of the language used, though
after all such an examination is really
necessary for the determination of this
question, that in order to arrive at a right
conclusion it is necessary to bear in mind
the scope and ambit of the Succession
Certificate Act itself. All that it is
purporting to do is to facilitate the collec-
tion of debts, to regulate the ad-
ministration of succession and to protect
persons who deal with the alleged
representatives of deceased persons against
the contingency which so often occurs, when
disputes arise as to whether ■ claimant
is or is not entitled as such personal
representative, and the language used in
sub-section 1 of section 4 is the language
which is not merely appropriate but is the
language which is invariably adopted to

RAMAN LALJI MAHARAJ v. HARI DAS.

describe in legal terminology the position and claim of a person claiming as a personal representative of a deceased person. And my view of the language used in that subsection is that it was specially adopted in order to keep clear the narrow limits which the section was imposing for the requirements, and this is borne out in my view by the words which follow on the word "production" viz., "by the person so claiming." I think that clearly indicates that the claim contemplated by this section is a claim made by a person in the capacity of and as a personal representative of a deceased person. It is quite clear that in the case which followed shortly afterwards and is reported as *Rang Lal v. Annu Lal* (2), two learned Judges of this Court were confronted with a concrete example involving consequences, possibly unforeseen, of the decision in *Allahdad Khan v. Sant Ram* (1) to which I have referred and which they felt a difficulty about following. It is perfectly clear that they did not adopt the reasoning upon which the earlier case had proceeded. It is equally clear that, as they point out in their judgment, the *ratio decidendi* of the earlier case turned upon the construction of section 16 of the same Act. Looking at the report it would appear, as Mr. Banerji has pointed out just now in the course of his arguments, that the mind of the Court which decided the case of *Allahdad Khan v. Sant Ram* (1) was really diverted from the real point by the argument which was addressed to them based upon the difference in the language employed with reference to the production of Probate and that employed with reference to the production of a certificate. The result was that the difficulty which I feel is the real difficulty in the way of adopting the view which they took, viz., the words "effects of the deceased person," was not brought clearly to the notice of the Court. If it had been, I cannot but think that they would have taken a different view. Feeling as we do no doubt whatever about the matter and that it is important to put the matter right and that two Judges of this Court have already in substance declined to follow that decision, I have no hesitation.

in holding that the decision in *Allahdad Khan v. Sant Ram* (1) is no longer law.

SUNDAR LAL, J.—I have arrived at the same conclusion. I may shortly state the circumstances of the case in dealing with the two contentions which have been urged by Mr. Pearey Lal Banerji in support of the appeal. The facts broadly appear to be this. On the 31st of March 1907, *Goswami Sri Raman Lalji* and *Brijpal Lalji* sold certain property to one *Seth Kishan Das* by a deed of sale. They undertook to give possession to the purchaser of certain items of the property which were in the hands of a prior mortgagee. On the death of *Seth Kishan Das* the property passed on by the law of survivorship to his son *Seth Amar Chand*. *Seth Amar Chand* and his wife *Musammatt Golab Bai* brought a suit in the Court of the Subordinate Judge for possession of certain items of property which has been sold to them, and in the alternative for the damages to the extent of Rs. 8,000. On the 24th of November 1909, the Subordinate Judge of Agra made a decree directing the defendants to deliver possession over the property in dispute and pay future mesne profits up to the date of possession with costs. From the original decree itself it is not very clear whether the learned Subordinate Judge intended to give a decree for Rs. 2,625 in the event of possession not being delivered, though the judgment of the Court might possibly give them that relief as well. We are not, however, construing the decree in this particular case at this stage of the case. This decree was appealed against to this Court and affirmed on the 9th of May 1911. In the meantime *Musammatt Golab Bai* had died on the 25th of November 1909. Under the Hindu Law *Seth Amar Chand*, the husband of *Golab Bai*, was her sole heir, and he succeeded to her estate. On February 1st, 1914, *Amar Chand* sold his interests in the decree, namely, that which he had as one of the original decree-holders as also as the heir to his wife to *Hari Das*, the respondent in this appeal. It also appears that on February 25, 1915, *Amar Chand* obtained Letters of Administration to the estate of his wife *Musammatt Golab Bai* from the Bombay High Court under Act V of 1881. *Hari Das* as such purchaser has applied for the execution of the decree

(2) 22 Ind. Cas. 349; 35 A. 21; 11 A. L. J. 968.

RAMAN LALJI MAHARAJ v. HARI DAS.

and the question before the Court is, is he competent to do so?

The first point urged by Mr. Pearey Lal Banerji is that the grant of Letters of Administration on the 25th of February 1915 did not operate to validate the sale of February 1914, and Hari Das must obtain a further sale-deed from Amar Chand to entitle him to execute the decree. The grant of Letters of Administration to the estate of the deceased person takes effect and operates from the date on which the deceased died and under section 14 of the Probate and Administration Act Amar Chand's sale-deed would be an operative sale-deed in the same way as if he had obtained Letters of Administration prior to February 1, 1914. Apart from this fact, under the Hindu Law the property of *Musammatt* Golab Bai vested in Amar Chand and it is not disputed that under the Hindu Law he was entitled to sell the property so inherited by him. The provisions of section 191 of the Indian Succession Act do not apply to Hindus and Muhammadans. In these Provinces the estate of the deceased person in such cases vests at once on the heir, who is competent to dispose of the same. The first point, therefore, taken by him fails. The second point raised in the appeal is that under section 4 of the Succession Certificate Act, although Letters of Administration had been granted to *Seth* Amar Chand, it was necessary in law for Hari Das to obtain fresh Letters of Administration to entitle him to apply for the execution of the decree. It may be noted that the decree was in favour of both Amar Chand and Golab Bai. Amar Chand alone as a decree-holder was entitled to execute the decree. All that the Court has to do in such a case is to safeguard the rights of the other decree-holder under rule 15 of Order XXI of the Code. As a vendee from him he was also entitled to execute the decree in the same way as his vendor Amar Chand. Hari Das, therefore, as transferee of *Seth* Amar Chand and in his capacity as such is entitled to execute the decree and the application for execution cannot, therefore, be defeated on that ground. He is entitled to proceed with the execution of such a decree under the rule already quoted. It is, however, urged that as he has also purchased the rights of *Musammatt*

Golab Bai which by inheritance had vested in *Seth* Amar Chand, so much of the decree as was in favour of Golab Bai could not be executed in this instance unless he obtains Letters of Administration or a certificate to collect the debts of Golab Bai. In the first place the decree was a joint and several decree and as purchaser of Amar Chand's rights he was entitled to execute the whole decree, and as Amar Chand himself was the heir of the other decree-holder the Court could have easily safeguarded his rights as such by a suitable order. But the execution of the decree could not be defeated. Again, Mr. Pearey Lal Banerji has relied upon a ruling of this Court in *Allahdad Khan v. Sant Ram* (1) and urged that the purchaser could not execute the decree without obtaining a certificate or a fresh Letters of Administration in respect of so much of the decree as represents her interest therein. In my opinion Act VII of 1889 was, as the preamble itself states, intended to facilitate the collection of debts on succession and offers protection to parties paying debts to the representatives of deceased persons. The Act was intended to offer protection to debtors and to assure that the certificate-holder was the person entitled as successor to the effects of the deceased person to receive payment of the debt. It was not intended to guarantee that the successor who had so obtained a certificate had also validly transferred his rights to a third party. An enquiry as to the validity of transfers made by a certificate-holder is, I think, foreign to the scope and object of Act VII of 1889. If that were so, the result might be that where an heir obtained a certificate to collect ten items of debts and subsequently transferred each item of the debts to different transferees, the ten transferees would have each to obtain ten certificates to collect the debts transferred to them and to apply for the revocation of the certificate granted to the original vendor. I do not think that it was ever intended by the Act that this should be so. I entirely agree with the observation made by another Bench of this Court in *Rang Lal v. Annu Lal* (2) on the point. If it were necessary to decide this point in this particular case I would

SURAJ DIN V. WAJID ALI.

have been inclined to come to a conclusion that the case of *Allahdad Khan v. Sant Ram* (1) was not correctly decided, and that it has, in fact, been overruled by the later ruling of *Rang Lal v. Annu Lal* (2). But for the reasons given by me it is not necessary to decide this point. I think ■ representative of Amar Chand alone Hari Das was entitled to take out execution and his application could not be defeated. I would dismiss the appeal with costs, but in doing so I may observe that the other points of objection raised by the judgment-debtors have not been disposed of by the Court below and nothing that we say now would prevent the Court below from disposing of the said points.

By THE COURT.—The order of the Court is that we dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 111 OF 1915.

March 8, 1916.

Present:—Mr. Lindsay, J. C.

SURAJ DIN AND OTHERS—DEFENDANTS
—APPELLANTS

versus

Saiyid WAJID ALI—PLAINTIFF—
RESPONDENT.

Contract Act (IX of 1872), ss. 69, 70—Contribution—Mortgage—Foreclosure decree—Redemption by one of the parties—Contribution, claim for, against part transferee of mortgaged property—Non-joinder in foreclosure suit—Party impleaded as owner found to be trespasser—Action misconceived—Maintainability of suit.

A foreclosure decree having been passed in a suit W, one of the defendants therein, redeemed the entire mortgage by payment of the decretal amount in full. He then instituted the present suit for contribution against a number of defendants who were said to possess some interest in portions of the mortgaged property. Defendants Nos. 9 to 12, who were alleged to be transferees of part of the mortgaged property after the execution of the mortgage, pleaded *inter alia* that they were not liable to contribution as they were not parties to the foreclosure suit. In that suit defendants Nos. 7 and 8 were alleged to be owners of the property and were joined as such owners. They were, however, found to be trespassers in a subsequent action for their ejection by the present defendants Nos. 9 to 12:

Held, (1) that plaintiff could not claim contribution against defendants Nos. 9 to 12 either under section 69 or section 70 of the Contract Act, as the payment was made by the plaintiff in his own interest for ■ decree to which the defendants were not parties; [p. 368, col. 1.]

(2) that defendants Nos. 9 to 12 had ■ right redemption in respect of the property in their possession, if it was included in the mortgage, and could not be compelled by a suit for contribution to pay to the plaintiff any portion of the money which he paid up under the mortgage-decree. [p. 368, col. 2.]

Appeal against the order of the District Judge, Rai Bareilly, dated the 16th January 1916, modifying that of the Munsif, Dalmau dated the 12th May 1914.

Pandit Gokaran Nath Misra, for the Appellants.

Mr. S. Ali Muhammad, holding brief of Mr. Sami Ullah Beg, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for contribution brought by the plaintiff-respondent Saiyid Wajid Ali against ■ number of defendants. The appellants in the present case were defendants Nos. 9 to 12 in the suit. The claim has been decreed in part by the Courts below and the above defendants come here in appeal. The facts of the case may be briefly stated here. They are not correctly set out in the judgment of the learned Judge. It appears that in 1882 a mortgage was executed in favour of one Ram Bakhsh by certain of the defendants and their predecessors-in-interest. According to the recitals contained in this mortgage-deed, there was an earlier mortgage in which the property mortgaged was Mauza Newada along with Mauza Samanpur. When the mortgage of 1882 was executed, the earlier mortgage deed was taken back and it was expressly stated that the only property which was being mortgaged to Ram Bakhsh was Mauza Newada. Subsequently, the successors-in-interest of the mortgagee brought ■ suit for foreclosure of this mortgage. The plaintiff in the present suit Saiyid Wajid Ali was one of the defendants in that case, being impleaded as ■ transferee of ■ portion of the mortgaged property. A foreclosure decree was passed and eventually the mortgage-money was paid up by the plaintiff. It is not denied that in the foreclosure suit referred to the present defendants-appellants were no parties. It is alleged that these appellants have become the owners of certain

SURAJ DIN V. WAJID ALI.

interests in this village of Newada, which they have derived from one Debi Din. It was alleged in the plaint that 29 *bighas* in the village, which was mortgaged, had been sold to Debi Din and that after this a perpetual lease had been executed in favour of Debi Din affecting another area of 45 *bighas*. After Debi Din died the property came into the hands of the defendants Nos. 7 and 8 in the case, who were afterwards found to be trespassers and who were ejected in a suit brought for the purpose by the present defendant-appellants Suraj Din and others. At the time the foreclosure suit was brought the 7th and 8th defendants were impleaded. The plaintiff, having paid up the money which was due under the mortgage-decree, brought the present suit against a number of parties demanding contribution from them of their shares of the mortgage debt.

It being admitted that the present defendants-appellants (defendants Nos. 9 to 12) were no parties to the mortgage-decree, it is difficult to understand how either of the Courts below came to entertain the suit. These appellants are certainly not bound by the decree and, therefore, were under no obligation to pay any money in order to satisfy the decretal debt, and so the plaintiff cannot be heard to maintain that he has a right of contribution by reason of the fact that he has paid up any money which these appellants were under a legal obligation to pay. It will be obvious from what has been said above that the case cannot possibly fall under the provisions of section 69 of the Indian Contract Act. Nor again can it be brought within the purview of section 70 of the same Act for, so far as can be ascertained, the payment by the plaintiff was made in his own interest and was certainly not done on behalf of these defendants-appellants. The Court of first instance, while holding that these appellants were not bound by the decree in the foreclosure suit, nevertheless came to the conclusion that they were liable to contribute by reason of the fact that the two interests of which they are now possessed, that is to say, the proprietary interest in 29 *bighas* of land and the interest of perpetual leases in another area of 45 *bighas*, had been carved out of the mortgaged estate subsequent to the date of the mortgage, that is to say, subsequent to the year 1882.

There is, I may observe, on the record no reliable evidence to show that the area of 29 *bighas* was detached from the mortgaged estate after the mortgage was executed, and again it appears to me to be a matter for some doubt as to whether this area of 29 *bighas* is really included in the property described in the mortgage of 1882. There is a great deal of confusion on the record on this point. We find in the mortgage-deed of 1882 that the mortgaged property is described as "Manza Newada excluding Mauza Samanpur." It is stated that the 29 *bighas* to which reference has just been made are situated in Mauza Samanpur, and there are certain copies of village papers on the record which leave me in doubt as to whether the *manzas* of Newada and Samanpur have any separate existence or not. I do not, however, propose to deal with this matter which does not call for discussion in deciding the present appeal. Even if it be assumed for the sake of argument that the two interests which I have mentioned above were carved out of the mortgaged estate subsequent to the date of the mortgage which was afterwards foreclosed, the plaintiff is not entitled to call upon the persons who now hold those interests to contribute any proportionate share of any mortgage-debt which has been paid off by him. If these two properties now in possession of the appellants were part of the mortgaged property, then it is obvious that the appellants had a right to redeem and that right to redeem still exists by reason of the fact of its not having been foreclosed in the suit brought by the representatives of the mortgagee, and these persons can certainly not be compelled by a suit for contribution to pay to the plaintiff in this case any portion of the money which he paid up under the mortgage-decree. The plaintiff has mistaken his remedy altogether and his suit ought to have been thrown out at once. I hold, therefore, that on the facts as disclosed the plaintiff has no cause of action for this suit against the defendants-appellants. I allow the appeal, set aside the decree of the Court below and direct that the plaintiff's claim against these defendants-appellants be dismissed with costs to them in all three Courts.

Appeal allowed.

MUHAMMAD YUNUS ALI KHAN v. KAIAN SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1636 OF 1914.

April 18, 1916.

Present:—Mr. Justice Walsh.

Chaudhri MUHAMMAD YUNUS ALI
KHAN—PLAINTIFF—APPELLANT

versus

KAIAN SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 41, 97—Agreement to enhance rent—Attestation—Verbal agreement, if valid.

An agreement enhancing the rent of a tenant under section 41 of the Agra Tenancy Act must be contained in a written document and attested under section 97 of the Act, if not registered under the provisions of the Registration Act, but must not be a verbal attested agreement. [p. 369, col. 2.]

Second appeal from the decision of the Second Additional Judge, Aligarh, dated the 15th June 1914.

Mr. Ishaq, for the Appellant

Mr. Gokul Prasad, for the Respondents.

JUDGMENT—I have come to the conclusion that this appeal must be dismissed. The question really is, whether there is an agreement which the *zamindar* plaintiff in this case is entitled by law to rely upon for enhancement of rent. This question in the present condition of legislation is by no means easy and is certainly difficult to anybody like myself unfamiliar with the subject-matter. I think that where there is a question of enhancement or abatement of rent the Court has to find the starting point. Now in the case of occupancy tenants the starting point, so far as acquisition of rights is concerned, is section 11 of the Agra Tenancy Act. For the ascertainment of rent at which they are assessed it is agreed that the starting point is to be found in sections 34 and 35, which appear to me to cover the whole ground of a case where no actual recorded agreement is in existence. Now taking section 35 as the starting point in this particular case, it is proved by entries in the revenue papers that the rent actually paid by the defendant at the last Settlement before 1312 *Fasli* was Rs. 38-2-6. I say the last Settlement before 1312 *Fasli*, because the actual date has not been given to me. From the date of that Settlement down to 1312 *Fasli* it must, therefore, be presumed that that was the rent which the tenants had actually paid, and in accordance with section 35 of the Tenancy Act it was, therefore, the

rent presumed by law. From that time it seems to me that the law with regard to occupancy tenants and ex-proprietary tenants is practically the same, that is to say, once rent has been fixed by law it can only be enhanced or abated or determined within the four corners of the legislation itself and if it cannot be done in that way it cannot be done at all. Section 41 of the Tenancy Act says that the rent of an occupancy tenant, that is to say, Rs. 38-2-6 in this particular case shall be liable to enhancement only by registered agreement or by decree or order of a Revenue Court. It is admitted that there is no decree or order of a Revenue Court in the present case. But it was found that there was a verbal agreement which in some way or other was attested before a *Kanungo*.

I will assume in every possible way so as to make it equivalent to a registered agreement within the meaning of section 41, if it could be done. The question on which this appeal really turns is, whether such an agreement comes within the Act. Now although section 41 says that it can only be done by a registered agreement, section 97 in a limited number of cases says that it may in lieu of registration be rendered just as valid as if it had been registered, by complying with the formalities of that section. Mr. Gokul Prasad tells me that that is a provision for the benefit of parties who do not in small cases want to incur expenses of registration and I dare say that that is so. But taking section 97 as a whole and particularly finding the word "instrument" in sub-section (3) used to describe an agreement, I have no hesitation in holding that such agreement must be contained in a written document and that, therefore, although it need not be a registered agreement, it must be a written agreement which through the medium of section 97 complies with the provisions of section 41. It is admitted that this agreement was not in writing and that seems to me to put an end to the case of the appellant. The appellant's Counsel told me that the practice of carrying out or attempting to carry out the provisions of section 97 is, not to put in a written agreement, but to draw up on a slip the details which would be comprised in a written agreement and to hand this slip to the official and get them attested. I am unable to say whether this is the practice or not. All I can say

RAM BAHADUR SINGH v. AJODHYA SINGH.

is that this is a kind of practice, if it really exists, which business people adopt in order to save the lawyer's fee and also apparently to save the stamp duty. It is not within the section. This appeal is, therefore, dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 511 OF 1914.

April 6, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

RAM BAHADUR SINGH AND OTHERS—
DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

AJODHYA SINGH—PLAINTIFF—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Attestation of mortgage-deed—'Attest', meaning of—Scribe who witnesses execution and subscribes as scribe, whether attesting witness—Presumption as to execution.

Per Chamier, C. J.—A mortgage-deed is duly 'attested' within the meaning of section 59 of the Transfer of Property Act when the attesting witnesses the execution of the deed and subscribes as an attesting witness. [p. 371, col. 1.]

The scribe of a document who was present at its execution and subscribed only as scribe, cannot be deemed to have attested the document. [p. 371, col. 1.]

Where, therefore, a mortgage-deed was signed by five persons who described themselves as attesting witnesses, but of whom only one witnessed its execution, and the scribe who signed as scribe was tendered to prove that he was present from the beginning to the end of the transaction:

Held, that the mortgage was not proved. [p. 371, col. 1.]

Shamu Patter v. Abdul Kadir, 16 Ind. Cas. 250; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 546; 35 M. 607; 39 I. A. 28; 16 C. W. N. 1009, relied on.

Per Jwala Prasad, J.—There is no presumption that a scribe or a person describing himself as the attesting of a document witnessed its execution. The fact must be established by evidence. [p. 371, col. 2.]

Appeal against the judgment and decree of the District Judge, Mozufferpur, dated the 22nd July 1914, reversing the decree of the Munsif, Hajipur, dated the 22nd April 1914.

Mr. Atul Krishna Ray, for the Appellants.

Mr. Lakshmi Narain Singh, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondent Ajodhya Singh upon a simple mortgage made by an ancestor of the appellants to secure the re-payment of Rs. 100 and interest thereon. The only defence with which we are now concerned is that the document is not proved to have been attested by two witnesses as required by section 59 of the Transfer of Property Act. The execution of the document purports to have been witnessed by five witnesses, who have signed their names as attesting witnesses in the margin in the usual place. In the right hand bottom corner of the document there is the signature of a man named Lalbihari who describes himself as *katib tamassuk*. It is contended that Lalbihari was an attesting witness. It has been found by both the Courts below that none of the persons who signed their names in the margin as attesting witnesses were present when the executant signed his name on the document except Gangotri Prasad, and unless it can be held that Lalbihari was an attesting witness the suit must be dismissed. The Court of first instance held that Lalbihari was not an attesting witness, but on appeal the District Judge observed that according to the evidence adduced by the plaintiff Lalbihari was present throughout the whole transaction from the drawing up of the bond up to the time when the parties went away. "If so," says the learned Judge, "he was present when the bond was signed. Plaintiff does not say in so many words that Lalbihari actually witnessed the executant's signature, but his witness No. 2 does say so. I believe this evidence and I find that the scribe saw the bond signed." What witness No. 2 said was that he and the persons whose names appear in the margin of the document and Lalbihari were present when the executant signed his name. The learned District Judge appears to hold that as Lalbihari was present when the mortgagor signed the document and afterwards signed his own name on the document, he must be regarded as an attesting witness. As authority for this view he cites the case of *Raj Narain Ghosh v. Abdur Rahim* (1) and

RAM BAHADUR SINGH v. AJODHYA SINGH.

Dinamoyee Debi v. Bon Behari Kapur (2), and he disagreed with the interpretation that was put upon those rulings by Mr. Justice Griffin and myself in the case of *Badri Prasad v. Abdul Karim* (3). The present case, no doubt, differs from the Allahabad case just mentioned, for in that case the scribe of the document wrote his name on the deed before the deed was signed by the executant. But we were of opinion in that case that an attesting witness within the meaning of section 68 of the Indian Evidence Act, 1872, was a witness who has seen the deed executed and who has signed the deed as a witness. I am of the same opinion now and I rest my decision on the judgment of their Lordships of the Privy Council in the matter of *Shamu Patter v. Abdul Kadir Rowthan* (4). In that case their Lordships quoted the decision in *Burdett v. Spilsbury* (5) with approval and in particular approved of the statement of the Lord Chancellor that a party who sees a Will executed is in fact a witness to it and if he subscribes as a witness, he is then an attesting witness. Their Lordships held that the word "attested" in section 59 of the Transfer of Property Act, the section with which we are concerned in the present case, was used in that sense. In the Allahabad case we said that although the scribe might have witnessed the execution of the deed in suit he did not sign the deed as a witness. The same remark may be made here. Lalbihari on the finding of the learned District Judge must be held to have seen the execution of the mortgage-deed, but it is evident that he did not sign the deed as a witness. I, therefore, hold that Lalbihari is not an attesting witness within the meaning of section 59 of the Transfer of Property Act. In my judgment the Munsif was right in dismissing the suit. I would allow this appeal, set aside the order of the District Judge remanding the

suit for re-trial and dismiss the suit with costs in all three Courts.

JWALA PRASAD, J.—The only point that arises in this appeal is whether the mortgage-bond in suit was duly attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The bond bears the signatures of a number of persons as attesting witnesses to it and also the signature of Lalbihari Lal described therein as the scribe of the bond. Upon the evidence in the case the learned Munsif held that one only of the witnesses of the bond was present at the time of the execution thereof by the mortgagor. The learned District Judge held that the scribe was present throughout the whole transaction from the drawing up of the bond till the parties went away. From this he infers that the scribe was present when the bond was signed and he says that the plaintiff No. 2 deposed that the scribe actually witnessed the signature of the mortgagor. On looking into the evidence, I find that that witness does not say that the scribe witnessed the execution of the deed. The fact that Lalbihari Lal is described as *katib tamassuk* does not show that he did witness the execution. It often happens that the scribe of a deed does witness the execution and he may sign the deed because he has done so and yet describe himself as *katib*. In the present case there is no evidence that Lalbihari Lal did witness the execution of the deed and it cannot be presumed that he did. I agree with the order proposed by the learned Chief Justice.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the District Judge set aside and the suit is dismissed with costs.

Appeal allowed.

(2) 7 C. W. N. 160.

(3) 19 Ind. Cas. 250; 35 A. 254; 11 A. L. J. 260.

(4) 16 Ind. Cas. 250; 39 I. A. 218; 16 C. W. N. 1009; 35 M. 607; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596.

(5) (1842) 10 Cl. & F. 340; 59 R. R. 195; 8 E. R. 772.

SUPPU NAYAKAN v. PERUMAL CHETTY.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 318 OF 1914.

February 25, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

SUPPU NAYAKAN—PLAINTIFF—

PETITIONER—APPELLANT

versus

PERUMAL CHETTY—DEFENDANT'S

LEGAL REPRESENTATIVE—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 115, O. XXII, rr. 3, 4—Decree—Abatement—Appeal—Revision, where appeal permitted—Charter Act (24 § 25 Vic., c. 104), s. 15.

An order declaring a suit to have abated is a decree from which an appeal lies. [p. 373, col. 1; p. 374, col. 2.]

Subbaya v. Saminadayyar, 18 M. 496; 5 M. L. J. 63, *Meenatchi Achi v. Ananthanarayana Ayyar*, 26 M. 224; 12 M. L. J. 380, *Bhikaji Ramchandra v. Purshotam*, 10 B. 220, relied upon.

Although rules 3 and 4 of Order XXII, Civil Procedure Code, do not expressly state that the abatement of a suit has the same effect as the dismissal of a suit, that appears to be the meaning of the Legislature. [p. 373, col. 2; p. 375, col. 1.]

Under the present Code it is not necessary to make an order that the suit shall abate, inasmuch as it abates *ipso facto* if no application is made under rule 3 or rule 4 of Order XXII, Civil Procedure Code. [p. 375, col. 1.]

Upon a suit abating under rule 3 or rule 4 of Order XXII of the Code of Civil Procedure, a decree dismissing the suit must follow. [p. 375, col. 1.]

Per *Sadasiva Aiyar, J.*—Where there is an appeal to the District Court and a second appeal to the High Court, section 115, Civil Procedure Code, cannot apply. [p. 373, col. 1.]

Visvanathan Chetty v. Ramanathan Chetty, 24 M. 646; *Subbiah Pillai v. Kailasam Pillai*, 26 Ind. Cas. 19; 1 L. W. 905, relied upon.

The power under section 15 of the Charter Act can only be exercised in extraordinary cases and subject to the enactments of the Indian Legislature. [p. 374, cols. 1 & 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, in Civil Revision Petition No. 513 of 1913, for revision of the decree of the Court of the District Munsif of Melur, in Original Suit No. 634 of 1912 (Original Suit No. 178 of 1911 on the file of the Court of the District Munsif of Dindigal.)

Mr. K. S. Jayarama Aiyar, for the Appellant.

Mr. T. V. Muthukrishna Aiyar, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The appellant was the plaintiff in Original Suit No. 178 of 1911 on the file of the District Munsif's Court of Dindigal. The only defendant in the suit

died in March 1912. On the 15th April 1912, the plaintiff applied to bring in the defendant's son Perumal Chetty on the record as the defendant's legal representative. He failed to mention the Order and rule of the Civil Procedure Code, under which the application was filed. On the 23rd April 1912 the Court returned the application to him for amendment giving him three days' time to take it back, amend and re-present it. The District Court transferred the suit about the end of April 1912 to the District Munsif's Court of Melur for disposal. The records were sent away from the District Munsif's Court of Dindigal accordingly to the District Munsif's Court of Melur but retaining the above application (which was not taken back by the plaintiff for amendment and re-presented). The other records were sent away from the District Munsif's Court of Dindigal on 25th May 1912 and the suit was numbered Original Suit No. 634 of 1912 on the file of the District Munsif's Court of Melur. The plaintiff's application which he had been ordered to take back seems to have been sent to the District Munsif's Court of Melur separately in October 1912. Then on the 13th November 1912 the plaintiff put in a petition in the Melur District Munsif's Court to excuse the delay in taking back, amending and re-presenting the application. The petition was ordered without notice having been sent to the respondent (the deceased defendant's son) and he was brought on the record and was designated as the 2nd defendant in the case. When summons was served on him, he contended that the suit had abated in September 1912 on the expiry of six months from his father's death, that the plaintiff had no right after the suit had abated to put in any application in the suit other than an application to set aside the abatement, as the suit must be taken to have come to an end on the abatement and that the order of the Court extending time for re-presenting the application to bring in the legal representative and directing the legal representative to be brought on record was passed without jurisdiction. Thereupon an additional issue was framed in the suit, namely, "Whether the suit should abate for the reasons given in the written statement of the 2nd defendant?"

The District Munsif decided this issue in the 2nd defendant's favour and dismissed the suit with costs on 17th March 1913.

SUPPU NAYAKAN v. PERUMAL CHETTY.

The plaintiff then filed Civil Revision Petition No. 513 of 1913 under section 115, Civil Procedure Code, in this Court. Mr. Justice Ayling dismissed the revision petition, on the ground that the decree of the District Munsif was appealable and hence no petition lay under section 115 of Act V of 1908 to the High Court.

This Letters Patent Appeal is against the above order of the learned Judge, the grounds of appeal being:—

"2. The learned Judge erred in holding that the order sought to be revised was a decree and hence appealable."

"3. The learned Judge failed to note that the order in question did not conclusively determine any of the rights of the parties in controversy in this suit and such was not a decree within the meaning of the Civil Procedure Code of 1908."

"4. The learned Judge should have interfered at least on the ground that there is no defence to the contentions of the petitioner and that any appeal to the District Court would only multiply proceedings."

The fourth ground cannot be accepted, as where there is an appeal to the District Court and a second appeal to the High Court, section 115 cannot apply. See *Visvanathan Chetty v. Ramanathan Chetty* (1) and *Subbiah Pillai v. Kailasam Pillai* (2).

As regards the other two grounds, there are no doubt observations in certain decisions of the Calcutta and Allahabad High Courts [see *Hamida Bibi v. Ali Husen Khan* (3), and *Walayat Husain v. Ram Lal* (4)] which support the appellant's contention, but on the other hand this Court has held in *Subbayya v. Saminadayyar* (5), and in *Meenatchi Achi v. Ananthanarayana Ayyar* (6), following *Bhikaji Ramchandra v. Purshotam* (7), that an order declaring a suit to have abated is a decree from which an appeal lies. The appellant's learned Vakil, Mr. K. S. Jayarama Aiyar, has called our attention to the fact that whereas under

section 366 of the old Code, when a plaintiff died the Court had to pass an order that the suit shall abate if no application is made within the time limited by law, etc., under Order XXII, rule 3, of the new Code the suit abates without a formal order of the Court that the suit shall abate. But I do not think that this makes any difference in principle. Under the old Code, section 368, when a defendant died and the right to sue survived but the plaintiff failed to make a proper application within the period prescribed, the suit abated without any formal order. It was only to make the wording of the provisions prescribed for the two sets of circumstances to conform with one another as far as possible that Order XXII, rule 3, has used the words "the suit shall abate" instead of the expression in the old section 366 "the Court may pass an order that the suit shall abate." The practice in the Madras Courts so far as I know is that when the suit has abated, the Court also *ipso facto* dismisses the suit, that is, it takes it off from the file of the pending suits. Though Order XXII, rules 3 and 4, do not expressly state that the abatement of a suit is of the same effect as the dismissal of the suit, I think that that is the meaning of the Legislature and in *Subbayya v. Saminadayyar* (5) there was a decree dismissing the suit drawn up on the abatement of the suit and against that decree the learned Judges held that an appeal lay. Again the analogous Order XXII, rule 8, (old section 370) states in clause (1) that the insolvency of a plaintiff shall not cause the suit to abate if the assignee or Receiver wishes to continue the suit. And then in clause (2) it is said that if the assignee or Receiver neglects or refuses to continue the suit and the defendant applies for the dismissal of the suit, the Court may make an order dismissing the suit. Thus the abatement of the suit and the passing of an order which has the force of a decree dismissing the suit are treated as closely connected, if not identical, proceedings. I might, however, suggest that the Rule Committee might make it clear by the enactment of a rule that in cases where suits have abated without the necessity of a formal order, a decree dismissing the suit should be drawn up as on the date of the abatement, unless of course the abatement is set aside by appropriate proceed-

(1) 24 M. 646.

(2) 26 Ind. Cas. 19; 1 L. W. 905.

(3) 17 A. 172; A. W. N. (1895) 42.

(4) 25 Ind. Cas. 643; 12 A. L. J. 1113.

(5) 18 M. 496; 5 M. L. J. 63.

(6) 111 M. 224; 12 M. L. J. 380.

(7) 10 B. 220.

SUPPU NAYAKAN v. PERUMAL CHETTY.

ings. In *Subramania Iyer v. Venkataramier* (8) myself and Napier, J., held that an order of the Court declaring that the suit has abated owing to the cause of action not surviving, was a decree as it determined that the rights of the plaintiff ceased to exist on his death and, therefore, it fell within the definition of a decree, "there being no appeal provided for in the Code from that order as an appeal from an order. See exception (a), section 2, clause (2), Civil Procedure Code." Mr. Jayarama Iyar, however, argued that the definition of a decree in section 2, clause 2, applied only where the order disposing of the suit contained an express adjudication on the defences raised by the defendant or the rights set up by the plaintiff, (defences not only on the merits but on technical questions like limitation or *res judicata*) but that where the adjudication of the suit had proceeded on mere questions of procedure (such as where the suit is dismissed for default, etc.) the order is not a decree within the definition. He relied upon several cases decided by the other High Courts for the establishment of this proposition. But as I said before this High Court has held that where the suit is finally determined by the order it is a decree, unless it is excepted specially or unless an appeal is provided for by the Code itself from such an order as an appeal from an order. In fact, the new Code when it says that the definition of a decree "shall not include any order of dismissal for default", clearly implies that but for the exception so expressly enacted an order of dismissal for default would be a decree as it determines the rights of the parties with regard to the matters in controversy in the suit. The controversy as to preliminary and final decrees in the Bombay High Court which was set at rest finally by *Chanmalswami v. Gangadharappa* (9), which was relied on by Mr. Jayarama Aiyar, has not much relevancy on this question of the definition of a decree. I, therefore, hold that Ayling, J., was right in dismissing the revision petition before him. We were asked to interfere finally under section 15 of the Charter Act, but the power under that section can only be exercised in extraordinary cases

and subject to the enactments of the Indian Legislature. I, therefore, dismiss the Letters Patent Appeal with costs.

MCORE, J.—I agree. The question raised by this appeal is whether the District Munsif's order dismissing the suit on the ground that it had abated under Order XXII, rule 4 (3), of the Code of Civil Procedure, by reason of the application which had been made under sub-rule (1) of Order XXII, rule 4, of the Code to make the legal representative of the deceased defendant a party not having been re-presented within the time fixed by law, is a decree and appealable as such.

In *Subbayya v. Swaminadayyar* (5) following *Bhikaji Ramchandra v. Pursetham* (7), it was held that an appeal lay against an order rejecting an application under section 366 of the Code of 1882 to bring on record a person claiming to be the legal representative of a deceased plaintiff and dismissing the suit on the ground that it had abated, and also against the dismissal of the suit. In *Bhikaji Ramchandra v. Purshotam* (7) Sargent, C. J., and Birdwood, J., held that an order under section 366 of the Code of Civil Procedure that a suit does abate, was virtually a decree within the meaning of section 2 of Act XIV of 1882 as it disposed of the plaintiff's claim effectually as if the suit had been dismissed, and appealable. In a recent case, *Subramania Iyer v. Venkataramier* (8), my learned brother and Napier, J., ruled that an order declaring that a suit had abated owing to the cause of action not surviving was a decree as it determined that the right of the plaintiff ceased to exist on his death and, therefore, came within the definition of decree in section 2 (2) of the Code of Civil Procedure.

I respectfully follow these decisions. It is true the words "the suit shall abate" in sub-rule (2) of Order XXII, rule 3, of the Code of Civil Procedure have been substituted for the words "the Court may make an order that the suit shall abate" which occurred in section 366 of Act XIV of 1882.

The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable, the Madras

(8) 31 Ind. Cas. 4.

(9) 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954.

JAGARNATH PRASAD v. JAIKISHUN PRASAD.

and Bombay High Courts holding that such an order was a decree, and, therefore, appealable, while the Allahabad High Court took a different view. It is probable, I think, that the alteration in the wording was made in order to give effect to the Madras and Bombay rulings and bring the language of the two rulings into conformity. Under the present rule it is not necessary to make an order that the suit shall abate. The suit abates *ipso facto* if no application is made under sub-rule 3, rule 4, of Order XXII of the Code of Civil Procedure within the time fixed by law, and must be dismissed.

As pointed out by my learned brother although rules 3 and 4 of Order XXII of the Code of Civil Procedure do not expressly state that the abatement of a suit has the same effect as the dismissal of a suit, this appears to have been the intention of the Legislature. Upon a suit abating under rule 3 or rule 4 of Order XXII of the Code of Civil Procedure, a decree dismissing the suit must follow.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 242 TO 244
OF 1913.

March 22, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Mullick.

JAGARNATH PRASAD AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

JAIKISHUN PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Gift to woman—Nature of interest conveyed—Presumption—Restraint on alienation void—Alienation by woman—Discharge of debts incurred in business—Estoppel—Representatum which does not mislead—Evidence Act (I of 1872), s. 115.

In the absence of words of limitation, gifts to women in Hindu Law, with the exception of a widow, must be presumed to convey an absolute interest, unless there is something repugnant in the context. [p. 378, col. 2.]

Atul Krishna Sircar v. Sanyasi Churn Sircar, 32 C. 1051; 2 C. L. J. 50; 9 C. W. N. 784; *Musammatt Kollany Kooer v. Luchmee Pershad*, 24 W. R. 395; *Bhoba Tarini Debya v. Peary Lall Sanyal*, 24 C. 646; 1 C. W. N. 578 and *Ramasami v. Papayya*, 16 M. 466; 3 M. L. J. 205, referred to.

There is no presumption that a Hindu woman, other than a widow, is incapable of taking anything more than a life-interest. [p. 378, col. 2.]

Where the main purpose of a Will is to bequeath an absolute estate of inheritance to a Hindu woman, terms which purport to create a perpetuity or to impose restraints on alienation repugnant to the estate created are inoperative and the Will is otherwise valid. [p. 376, col. 2; p. 378, col. 2.]

Under section 115 of the Evidence Act an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of his preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. [p. 377, col. 1; p. 379, col. 2.]

Gregg v. Wells, (1839) 10 Ad. & E. 90; 113 E. R. 35; 2 P. & D. 296; 8 L. J. Q. B. 193; 50 R. R. 347; *Thomas Barclay v. Syed Hossein Ali Khan*, 6 C. L. J. 601, distinguished.

Per Mullick, J.—A bequest only of the income of a property creating something in the nature of a perpetuity must be, and is, void under the Hindu Law. [p. 378, col. 2.]

Shookmoy Chandra Das v. Monoharri Dassi, 11 C. 684; 12 I. A. 103; 4 Sar. P. C. J. 639; 9 Ind. Jur. 234, followed.

A Hindu widow can alienate property for the payment of debts incurred in the management of a business which forms part of the family estate. [p. 379, col. 1.]

Sham Sundar v. Achhen Kunwar, 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417, referred to.

First appeals from the decision of the Officiating Sub-Judge, Darbhanga, dated the 19th March 1913, in Suits Nos. 340, 338 and 339 of 1911.

Mr. Pugh (with him Messrs. K. P. Jayaswal and Baldeo Narayan Singh), for the Appellants.

Sir Rash Behari Ghosh (with him Messrs. Purnendu Narayan Sinha and Fakhruddin and Dr. Dwarkanath Mitter), for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—These are three appeals, namely, Nos. 242, 243 and 244 of 1913, arising respectively out of suits Nos. 340, 338 and 339 of 1911. In all the three suits there are the same plaintiffs. Plaintiff No. 1 is the son of a lady named Sahodra Bibi and the plaintiffs Nos. 2 and 3 appear to be speculative purchasers from plaintiff No. 1 with regard to 7 annas of the interest that plaintiff No. 1 may be held to be entitled to. The defendants in the three suits are purchasers from Sahodra Bibi herself. The plaintiffs' suit is that Sahodra

JAGARNATH PRASAD v. JAIKISHUN PRASAD.

Bibi had only a life-interest under ■ Will executed by Fateh Chand on the 25th Chet 1255 Fasli and that as only a life-holder she had no right to alienate the properties, which, are the subject of the suits, by conveying to the defendants an absolute interest in those properties. The Will in question is to be found at page 41 of the paper-book in appeal No. 243. A translation of the Will has also been given by the Subordinate Judge in his judgment. It appeared that one Fateh Chand, who was a wealthy banker and landholder having an extensive business and dealings with other firms, had his principal place of business in Patna, but he had a branch at Muzafferpur as well. He was an old man without any issue. He made a Will as already observed, by which he gave some interest to his widow *Musammât Sheodei*, but the interest so given to her was no doubt a limited interest because we find in the Will the testator stating that *Musammât Sheodei* held the properties *tahin-i-hayat*, that is to say, during her lifetime. Sahodra Bibi was a daughter of the testator's brother Sakhi Chund. It appeared that Sahodra Bibi from her infancy was brought up by the testator. He also celebrated her marriage at his own cost. He has made a certain provision for this niece of his, and the question for the purpose of the present appeal is, as to whether the estate given to Sahodra Bibi was an estate only for life or an absolute and heritable estate. There can be no doubt that the testator had affection for Sahodra Bibi, because we find that when making a provision for his widow Sheodei he enjoined Sheodei to make over ■ sum of a lakh of rupees to Sahodra Bibi for her maintenance. The disposition made in the Will is to the following effect, that if a son or a daughter be born to the testator that son or daughter will be the *malik* of the whole property, moveable and immoveable, and if no son or daughter be born then his niece Sahodra will get one lakh of rupees from *Musammât Sheodei*, upon which Sahodra will maintain herself. Then after Sheodei's death Sahodra will get the balance of the properties; but while making a provision for Sahodra it is important to note that there is no limitation or restriction by restricting her estate to her lifetime. It seems to me that at the time of the execution of the Will there were two

ideas prominent in the mind of the testator. *First*, to perpetuate his own name, and *second*, that the properties left by him should not be transferred in any case. He laid down a condition that even Sahodra Bibi is not to alienate the properties in her possession under the Will. But if Sahodra acquired an absolute interest the condition is invalid and she had full authority to alienate any and all of the properties in favour of anybody she liked. The question, therefore, is as to whether the estate given to Sahodra was an estate for life or an absolute estate. From a certain passage in the Will it appears to me that the estate given to Sahodra by the testator was an absolute estate, an absolute and heritable estate, because I find it is stated therein, "if my wife or my niece directly or indirectly, or the latter's heirs born of her womb, deviate from paying the expenses of, and repairing the temples as before, she or they will bring disgrace upon themselves in this world and shall be answerable in the other world." If the intention of the testator had been to give only a life-interest to his niece there was no necessity of mentioning anything about the heirs born of her womb, and the injunction of keeping the worship and also the repair of the places of worship is one not only to his niece but also to his niece's heirs. It is clear, therefore, from this that the idea in the mind of the testator was that his niece Sahodra should get an absolute title. The Subordinate Judge has also come to the same conclusion. That being so, Sahodra had full authority to convey any portion of the property in her hands to the defendants; on the interpretation that I give to the Will these three suits have been rightly dismissed.

Many objections were taken during the course of argument on behalf of the respondents, but for the purposes of the present appeal it is not necessary to discuss those questions, questions which do not form part of the pleadings of the case. It was urged that the plaintiffs were estopped from alleging that the Will gave to Sahodra only a life-interest. From the evidence it appears that during the lifetime of Sahodra, and during her management of the business, the business failed with large debts due to other people. On the failure of the business there was a regular clamour among the creditors to adopt means to secure repayment of those

JAGARNATH PRASAD v. JAİKISHUN PRASAD.

debts. Sahodra's business had no money and the means that were thought of to pay off the debts was by sale of the properties. In the negotiations of the sale Sahodra's son Jagarnath, plaintiff No. 1, took part, and it is alleged that he induced and persuaded intending purchasers to purchase the properties on the assurance that his mother Sahodra had an absolute interest. It is a proved fact that Fateh Chand was very wealthy. He had businesses in Patna, Muzafferpur and various other places. He was very well known in society; it is not likely that when the creditors went to Muzafferpur to the house of Sahodra and held a meeting there, that they did not come to know that she was holding the estate under a Will of her grand-uncle Fateh Chand. I find there is no evidence on the record to show that the purchasers from Sahodra had no knowledge of the existence of the Will at the time when they purchased the properties from Sahodra. There can be no doubt that under section 115 of the Evidence Act, an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. None of the purchasers examined say that he did not know about the existence of the Will, and that he believed the representations made by Jagarnath.

The next question raised was that the suit was barred by limitation. I do not think that it is necessary to discuss that question after having held that the Will gave an absolute interest to *Musammât* Sahodra, and that being my opinion, the appeals are dismissed with costs.

MULLICK, J.—I agree with the result which has been arrived at by my learned brother, and I will deal very shortly with the points which have been argued by the parties before us. It is necessary at the outset to give the salient dates upon which the cases of the parties rest. Fateh Chand's Will, that is, the Will in suit, was executed

on the 13th April 1848. Fateh Chand died either the same year or the following year. Plaintiff No. 1, Jagarnath, was born in 1852; Sheodei the wife of Fateh Chand died in 1853. In 1869 Sahodra executed a power-of-attorney appointing her husband Manohar Lal as her agent. After this year, the firm of which Sahodra was the proprietor and manager, got into difficulties. On the 17th June 1884, Sahodra and Jagarnath sold one of the properties left by Fateh Chand to one Banwari Lal. That sale is not disputed in the suits before us. On the 24th July 1884, Sahodra made the first of the sales with which we are here concerned, namely, the sale to Domi Lal, the father of Bisheshar, the principal defendant in Suit No. 339, out of which arises Appeal No. 244. That deed was signed by Manohar on behalf of Sahodra and witnessed by Jagarnath. On the 18th September 1884, Jagarnath filed a petition of insolvency in the High Court of Calcutta. On the 29th December 1884, Sahodra sold to Mathura Mohan and Hanuman Das the properties covered by Appeal No. 243, which arises out of Suit No. 338. On the 10th January 1885, Sahodra made the sale to Sri Kishen, the uncle of the defendant Jai Kishen, of the property covered by Appeal No. 242, which arises out of Suit No. 340. On the 4th March 1885 Jagarnath withdrew his application for insolvency. Now, the first question which arises in the appeals, and which is common to all of them, is with reference to the Will. The learned Vakils who have appeared for the respondents have maintained, firstly, that there was no Will at all, or that if there was a Will it was revoked, and that the title of Sahodra rests on adverse possession as against Jagarnath or the heirs of Fateh Chand. There was some attempt made in the Court below to make out a case of heirship, but that case has been abandoned before us, and the position is that if there is a Will then the only way in which defendants can succeed is by showing that Sahodra acquired a title by adverse possession. I will address myself first of all to the case whether there was any Will.

It is urged, firstly, that the evidence to the execution of the Will is insufficient; secondly, that there is no evidence that the Will was given effect to, or that it

JAGARNATH PRASAD v. JAIKISHUN PRASAD.

was operative; *thirdly*, that there is no trace of the Will in Sheodei's lifetime; *fourthly*, that there is no evidence that the original Will was ever lost. In my opinion all these contentions are groundless. The contemporaneous documents show that, not only was a Will executed, but that it was acted upon. There is also evidence to show that the registration proceedings in connection with that Will, so far at least as it is possible to ascertain at this distance of time, were regular, and that the story that the Will has in fact been lost is a true story. Then it is contended that even if the Will was executed, it did not contain any valid disposition of property. In my opinion, the terms of the Will, so far as they purport to create a perpetuity and in so far as the restriction upon alienation is repugnant to the estate created, are inoperative; but the main purpose of the Will is, as my learned brother has stated, to bequeath an absolute estate of inheritance to Sahodra, and so far as that estate is concerned, the Will, in my opinion, is a valid document.

I will next refer to the attacks which have been made upon the mode in which the Will has been proved. It is contended that the Will has not been legally proved, and that no case has been made out for the admission of secondary evidence. It appears that under section 9, Regulation XXXVI of 1793, the Will was duly registered and a copy was kept in the Registration Office and the original was returned to the testator. We have in evidence that Jagarnath saw the Will in the possession of his mother Sahodra at some period after Sheodei's death. We have also evidence to the effect that the Will was kept after the death of Sahodra by Jagarnath in a two-storied house which was destroyed by rain, and that in consequence of that destruction, a number of papers kept in that house disappeared. I agree with the learned Subordinate Judge that the story of the destruction of the Will at the time, notwithstanding many discrepancies, is on the whole true. Therefore, the Will having been destroyed, the certified copy which has been produced in evidence in the Court below is admissible as secondary evidence. As to the allegation that the Will was revoked there is no evidence whatever. The Will, in my opinion,

was a valid Will at the time of Fateh Chand's death, and the distribution of the property merely depends upon the construction which we are to place upon that Will. I will turn, therefore, to the main question of the case, namely, the construction.

I agree with my learned brother that the estate which was conferred upon Sahodra was not a life-estate but an estate of inheritance. It is no one's case; that it was the intention of the testator to create an intestacy upon the death of Sahodra is not well-founded. There is no reason why the testator should have intended to create an intestacy. It was his intention to make provision not only for Sahodra herself, but for her children. There is a clear indication that the estate of Sahodra was to be an estate something different from the estate of Sheodei and I do not see why, if he intended Sahodra to have only a life-interest, he should have enjoined upon her and her heirs the duty of preserving the temples and performing the religious observances.

Taking the documents as a whole, I am satisfied that it was his intention that Sahodra should have complete control of the property, in order that the testator's name might be preserved for ever. We must assume that it was not the intention of the testator to assign merely the profits of the property, in view of the case of *Shookmoy Chandra Das v. Monoharri Dassi* (1), which lays down that a bequest only of the income of a property creating something in the nature of a perpetuity must be and is void. Another argument against our holding that the estate created in favour of Sahodra was only a life-interest in the English sense, is that in the absence of words of limitation, gifts to women in Hindu Law, with the exception of a widow, must be presumed to convey an absolute interest, unless there is something repugnant in the context. It does not necessarily follow that because Sahodra was a woman, therefore she was incapable of taking anything more than a mere life-interest. The following cases are authority for this: *Atul Krishna Sircar v. Sanyasi Ohurn Sircar* (2); *Musammatt*

(1) 11 C. 684; 12 I. A. 103; 4 Sar. P. C. J. 639; 9 Ind. Jur. 234.

(2) 32 C. 1051; 2 C. L. J. 50; 9 C. W. N. 784.

JAGARNATH PRASAD V. JAIKISHUN PRASAD.

Kollany Kooer v. Luchmee Pershad (3); *Bhoba Tarini Debya v. Peary Lall Sanyal* (4) and *Ramasami v. Papayya* (5).

Finally, it has been contended on behalf of the respondents that even if the estate conferred upon Sahodra was not an absolute interest, yet her interest was not a life-interest such as is known to English Law but something corresponding to the interest of a Hindu widow, and that on the proof of justifying necessity the transfers with which we are dealing in the present appeals passed a good title. In my opinion this argument is well founded, and even if the estate passed to Sahodra was not an absolute estate, even then there was justifying interest for the transfers in question. That interest was the payment of the debts incurred in the management of the business. Sahodra owed those debts, and it was her duty to discharge them, and, therefore, she was competent to alienate the immoveable property of Fateh Chand, for the purpose of discharging the debts thus created. The case of *Sham Sundar Lal v. Achhan Kunwar* (6) is sufficient authority for this proposition. So far, therefore, as the case of the respondents rests on the Will I am satisfied from every point of view that the Will conferred a transferable interest upon Sahodra, and the title which passed to the vendees, the defendants, and their predecessors, was a good title. Then arises the question of estoppel and that question is independent of the Will.

I agree with my learned brother that there can be no estoppel in this case, for the simple reason that the vendees of Sahodra could not possibly have been deceived. It is in evidence that the parties were well known to each other, and that the transactions were all carefully tested by expert legal advisers. It is impossible to believe that the assertions of Sahodra to the effect that she was the heir of Fateh Chand and the sole *malik* of the properties, or to the effect that she had acquired a title by adverse possession, really misled the vendees. Being the niece of Fateh

Chand, Sahodra could not possibly have been an heir. Being the mother of Jagarnath, and Jagarnath being, ■ the evidence discloses, her manager, it was scarcely possible that she could have acquired a title by adverse possession against Jagarnath. In these circumstances the representation that she had acquired a good title to the properties, even if made by Jagarnath, could not have possibly deceived any one. Therefore, all those cases which have been cited on behalf of the respondents in support of the argument that silence ■ the part of Jagarnath when his mother was transferring his properties estops him from now setting up the truth, seem to me to be irrelevant. Upon this point the authorities, which have been placed before us, are *Gregg v. Wells* (7) and *Thomas Barclay v. Syed Hossein Ali Khan* (8), and I say that these authorities do not apply to the facts before us. The general principle is, that section 115 of the Evidence Act does not apply where the statement relied upon is made to a person who knows the real facts and who is not misled by the untrue statement. When both parties are equally conversant with the true state of the case it is absurd to refer to the doctrine of estoppel. They and their legal advisers all knew what they were purchasing, and it is idle for them now to try and set up a case of estoppel against the plaintiff. The transactions were clearly in the nature of an attempt to get the better of the numerous other creditors, not less than 143, who were attempting to enforce their debts against Jagarnath and Sahodra. An examination of the circumstances makes this clear. In the transfers of the 29th December 1884, and the 10th January 1885, the vendees knew that Jagarnath could not be a party to the sales for he had included these properties in his schedule of insolvency before the High Court. The only way to get any interest in the properties was to take a transfer from Sahodra and to risk the invalidity. In the sale of the 24th July 1884, although it was before the petition for insolvency, a suspicion arises that the very

(3) 24 W. R. 395.

(4) 24 C. 646; 1 C. W. N. 578.

(5) 16 M. 466; 3 M. L. J. 205.

(6) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

(7) (1839) 10 Ad. and E. 90; 2 P. and D. 296; 8 L. J. Q. B. 193; 113 E. R. 35; 50 R. R. 347.

(8) 6 O. L. J. 601.

JAGARNATH PRASAD v. JAİKISHUN PRASAD.

same motives operated, for that transaction took place only two months before the schedule was filed. I have no doubt that the vendees knew perfectly well that Sahodra could not have had the full title which she was purporting then to transfer. In these circumstances the case of estoppel does not arise.

Then there is the objection that Jagarnath has not proved his heirship, that is to say, that he has not affirmatively established that he is the nearest heir of Fateh Chand. Reliance has been placed upon *In re Jackson*, *Jackson v. Ward* (9) for the proposition that in a suit for recovery of possession of land there must be reasonable evidence to show that the plaintiff is the nearest heir. It is unnecessary to challenge this proposition. The evidence, in my opinion, clearly shows that there was such reasonable evidence before the learned Subordinate Judge, and that the rebutting evidence which has been furnished by Thakur Das and Budri on behalf of the respondents is totally insufficient for the purpose of defeating the plaintiff. The learned Subordinate Judge has not recorded any finding upon this point, which was one of the issues in the case, but on an examination of the evidence I have no doubt that the plaintiff has made out the heirship which he claims.

Then the defendants have resisted the suit on the ground of limitation. It is said by the plaintiff that Sahodra died on the 9th November 1899; the suits were instituted on the 9th November 1911, that is, on the very last day on which 12 years' limitation expires. The defendants plead that Sahodra died about the 1st *Kartik*, corresponding to the 29th October 1899. They base this plea upon an application for mutation filed by Jagarnath immediately after the death of Sahodra, in which it is stated that Sahodra died about the beginning of *Kartik*. Two witnesses are also called to prove that Sahodra died on the 1st *Kartik*. On the other hand in the plaint filed on the 21st May 1901, against his sisters, Jagarnath stated that Sahodra died on the 29th *Kartik*, corresponding to the 16th November 1899. It is possible that this figure

29 was a slip for the figure 21, and that corresponds to the 9th November. But in any event the applicants' right having accrued it is difficult to get over the statement in the mutation application which speaks of the beginning of *Kartik*. I can scarcely believe that Jagarnath meant the 21st *Kartik* when he said that Sahodra died in the beginning of *Kartik*. On the other hand the plaintiffs prove an account-book kept in the regular course of business in the firm of Bishunath Mahton, which shows that certain presents were sent to Jagarnath on the occasion of the *shrad* ceremony of his mother. The date of the entry is the 22nd November 1899, and it is urged that Sahodra could not have died earlier than the 7th November, because the ceremony cannot, in Hindu families, take place later than 15 days after the death. No doubt this entry is entitled to some weight as corroborative evidence; but it is not admissible as independent evidence because Sri Kishen, the writer, has not been called, and it has not been proved that he is dead or that he cannot be produced. Now accepting the entry as corroborative evidence, it merely raises a possibility or a presumption that the articles were sent some time before the 22nd November and that the death took place not earlier than the 7th November. In my opinion this evidence, taken with the oral evidence produced on behalf of the plaintiffs, fails to rebut the evidence of the entry in the mutation application. I would hold, therefore, that the suit is barred by limitation.

There remains only one other point which has been urged by the learned Vakils for the respondents. They say that plaintiff is not entitled to succeed to the whole of the claim in the present suits because in a previous consent decree he made a compromise with one Chamru, agreeing to give to Chamru a certain share in the properties in suit. An examination, however, of the agreement shows that the properties now in suit are not affected by the agreement, because one of the conditions of the agreement was that Chamru was to get a share in respect of those properties, for the recovery of which he advanced money to the plaintiff Jagarnath. As Chamru does not appear to have paid anything for the re-

PALIKANDY MAMMAD v. CHINGORAN KELOTH VALIA APPA.

covery of the present properties he has no title in them. The result, therefore, is that the appeals fail and are dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 90
OF 1914.

February 9, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

PALIKANDY MAMMAD—PETITIONER—
APPELLANT

versus

CHINGORAN KELOTH VALIA APPA
alias KRISHNAN NAIR—COUNTER-

PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 60 (n)—
Maintenance—Right to future maintenance, whether
liable to attachment—Appointment of Receiver.*

A mere right to future maintenance is not liable to attachment and sale in execution of a decree. A Court, therefore, has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. [p. 383, cols. 1 & 2]

Nanammal v. Collector of Trichinopoly, 5 Ind. Cas. 879; 20 M. L. J. 97; *Tara Sundari Debi v. Sarada Charan*, 7 Ind. Cas. 80; 12 C. L. J. 146; *Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry*, 27 C. 38; 4 C. W. N. 87, followed.

Ranee Annapurni Nachiar v. Swaminathan Chetty, 6 Ind. Cas. 439; 34 M. 7; 8 M. L. T. 108; (1910) M. W. N. 505; 20 M. L. J. 785; *Palaniappa v. Lakshmanan*, 16 M. 429 at p. 434; *Monessur Doss v. Beer Pratap Sahee*, 15 W. R. 188, dissented from.

Vaidyanatha Sastri v. Eggia Venkatarama Dikshitar, 30 M. 279; 17 M. L. J. 373; *Muthuraman Chettiar v. Sundra Kumara Ettappa Sami*, 9 M. L. J. 113 at p. 115; *Gorinda Pillay v. Meenatchi Achi*, 11 Ind. Cas. 152; (1911) 2 M. W. N. 563; 10 M. L. T. 493; 22 M. L. J. 204; *Uday Kumari Ghatwalin v. Hari Ram Shaha*, 28 C. 483, distinguished.

Syed Tuffuzool Hossein Khan v. Rughoonath Pershad, 14 M. L. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656 20 E. R. 701; *Asad Ali Molla v. Haidar Ali*, 6 Ind. Cas. 826; 14 C. W. N. 918; 12 C. L. J. 130; 33 C. 13; *Paquine v. Snary*, (1909) 1 K. B. 698; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. 212; *Holmes v. Millage*, (1893) 1 Q. B. 551; 63 L. J. Q. B. 380; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551; *Kocharla Seettamma v. Pillala Venkataramanayya*, 21 Ind. Cas. 387; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 303 at p. 309, referred to.

Appeal against the Appellate Order of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 74 of 1913, preferred against the order of the Court of the District Munsif of Tellicherry, in Execution Petition No. 648 of 1912 (Original Suit No. 415 of 1906).

Mr. K. R. Subramania Sastri, for the Appellant.

Mr. T. R. Narayana Aiyar, for the Respondent.

JUDGMENT.

MOORE, J.—Under a family *karar*, Exhibit A, the respondent, the deposed *karnaran* of the *tarwad*, was allotted properties yielding an annual income of 1,120½ *edangalis* of paddy and Rs. 92-4. The *karar* further provided that the respondent should be paid Rs. 276 every year in monthly instalments of Rs. 23 before the 5th of each month for the purpose of meeting extra expenses, such as entertaining guests. The appellant who holds a money-decree against the respondent, applied for the appointment of a Receiver to realise the monthly allowances as they fell due in satisfaction of his decree-debt. Both the lower Courts held that right to receive future maintenance could not be attached, and that a Receiver could not be appointed to collect the allowance due to the respondent. Mr. Subramania Sastri for the appellant contends that the lower Courts have misconstrued the *karar* and erred in holding that the allowance in question is maintenance, that the monthly allowance is property which can be attached, and that the proper and convenient course would be to appoint a Receiver to collect the monthly instalments.

I think that it is clear upon the construction of the document that the sum of Rs. 276, which is payable in monthly instalments, forms part of the respondent's maintenance allowance, and that it represents an extra allowance granted to the respondent to enable him to maintain the dignity of his position as a retired *karnavan* of the *tarwad*. It is not, however, made payable out of any definite fund or estate, nor is any charge created. The allowance in question is clearly not a debt—a debt must be specific, existing and definite. [*Syed Tuffuzool Hossein Khan v. Rughoonath Pershad* (1)], and not merely a sum of money which may or may not become payable at some future time, and the payment of which depends upon contingencies which may or may not happen: *Haridas Acharjia Chowdhry v. Baroda*

(1) 14 M. L. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

PALIKANDY MAMMAD V. CHINGORAN KELOTH VALIA APPA.

Kishore Acharjia Chowdhry (2). Section 60 (n), Civil Procedure Code, provides that "a right to future maintenance" shall not be liable to attachment or sale, the prohibition being presumably based on grounds of public policy. The learned Vakil for the respondent argues that the right of the judgment-debtor to receive a monthly allowance is a right to future maintenance within the meaning of section 60 (n), Civil Procedure Code, that such right is not assignable, and that it cannot be attached prospectively before it becomes due.

The question whether a right to future maintenance can be attached and sold has been exhaustively considered by Mr Justice Mookerjee in *Asad Ali Molla v. Haidar Ali* (3) and *Tara Sundari Debi v. Sarada Charan* (4), in which the various decisions on the point are reviewed. The learned Judge observes at page 151* of the report that "while the cases in the books are by no means easy to reconcile on any intelligible principle, there is a well-marked distinction between two classes of cases, namely, the one in which the right is merely to receive an allowance by way of maintenance periodically, and the one in which the right relates to immoveable property granted and accepted in lieu of a periodical allowance for maintenance," and at page 156* "that the true test to be applied, when a question arises as to whether a right to maintenance is assignable or not, is whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee, and consequently inalienable, or whether his intention was to create an interest in property, either a fund or an estate, which should be treated as alienable property." A similar test has been applied in England. It has been held that alimony payable to a wife is not assignable, because it is not in the nature of property but only money paid by the order of the Court from time to time to provide for the maintenance of the wife: *In re Robinson* (5). See also

(2) 27 C. 38; 4 C. W. N. 87.

(3) 6 Ind. Cas. 826; 12 C. L. J. 130; 14 C. W. N. 918; 38 C. 13.

(4) 7 Ind. Cas. 80; 12 C. L. J. 146.

(5) (1884) 27 Ch. D. 160; 53 L. J. Ch. 986; 33 W. R. 17.

*The page referred to is of 12 C. L. J.—Ed.

Paquine v. Snary (6). "On the other hand, a life-annuity is assignable. In *Holmes v. Millage* (7) the Court of Appeal held that the Court has no jurisdiction to enforce satisfaction of a judgment-debt by appointing a Receiver of the future earnings of a judgment-debtor, and that unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable." Coming now to the Madras decisions cited by the appellant's Vakil, in *Vaidyanatha Sastrial v. Eggia Venkatarama Dikshitar* (8) which followed *Muthuraman Chettiar v. Sundra Kumara Ettappa Sami* (9), it was ruled that a hereditary right to an allowance out of the *melvaram* of certain lands was attachable but that case is, we think, distinguishable on the ground that a heritable right is not a mere personal right and consequently ought to be treated as assignable.

In *Muthuraman Chettiar v. Sundra Kumara Ettappa Sami* (9) Mr. Justice Subramania Aiyar observes that the word "maintenance" in section 266 of the Code of 1882 means nothing more than personal sustenance the right to which must under any circumstances cease with the life of the party entitled thereto, while a right of annuity payable to a man and his heirs is not a personal and limited right of that character. The decision in *Nanammal v. Collector of Trichinopoly* (10), where it was held that a decree for maintenance is a right to future maintenance and under section 266 of Act XIV of 1882 cannot be attached nor can it be treated as a money-decree as against the appellant. *Govinda Pillay v. Meenatchi Achi* (11) does not also help the appellant? What was held in that case was that the crops standing on land allotted to a widow for maintenance were her property

(6) (1909) 1 K. B. 688; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212.

(7) (1893) 1 Q. B. 551; 62 L. J. Q. B. 380; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.

(8) 30 M. 279; 17 M. L. J. 373.

(9) 9 M. L. J. 113 at p. 115.

(10) 5 Ind. Cas. 879; 20 M. L. J. 97.

(11) Ind. Cas. ; 22 M. L. J. 204; (1911) 11 M. W. N. 563; 10 M. L. T. 493.

PALIKANDY MAMMAD v. CHINGORAN KELOTH VALIA APPA.

and as such available for her debts and could be attached and consequently did not fall within the interdiction in clause (n) of section 60 of the Civil Procedure Code.

The learned Vakil for the appellant has referred us to *Ranee Annapurni Nachiar v. Swaminathan Chetty* (12). In that case ■ widow had hypothecated her claim to past and future maintenance and the plaintiffs asked for the appointment of a Receiver to collect the amounts hypothecated and for a decree ordering the sale of the hypotheca. The observations of the learned Judges at page 9* of the report lend some support to the appellant's contention that a right to future maintenance is transferable but the actual point decided was that, where the amount payable for maintenance is subsequently fixed by agreement or decree, ■ transfer of such an interest may be valid. The learned Judges did not express any opinion on the question whether ■ right to future maintenance is liable to attachment.

Following the rulings in *Nanammal v. Collector of Trichinopoly* (10) and *Tara Sundari Debi v. Sarada Charan* (4), I am inclined to hold that a mere right to future maintenance is not liable to attachment and sale and that the appellant was not entitled to attach the monthly allowance payable to the respondent for maintenance. I am also of opinion that the lower Courts were right in holding that they had no power to appoint a Receiver to collect the future maintenance due to the respondent. The learned Vakil for the appellant relies on section 51 (d) of the Civil Procedure Code, but that section merely declares in general terms the powers of a Court to enforce execution, one of which is by the appointment of a Receiver. Rule 1 of Order XL of the Civil Procedure Code gives power only to that Court in which the suit is brought or by which the property has been attached to appoint a Receiver. The said right to receive future maintenance is not property and cannot be attached. "A Court cannot appoint ■ Receiver except it has seisin of the property either by ■ suit being pending or by

proceedings in execution of a decree made in a suit being pending, and attachment having been made." See *Ameer Ali and Woodroffe's Civil Procedure Code*, page 1186.

The learned Vakil for the appellant relies on *Monessur Doss v. Beer Protap Sahee* (13). In that case, maintenance payable in instalments had been awarded by a decree, and it was held that the Court might at the instance of ■ person who held a decree against the maintenance decree-holder make an order for the non-payment of an instalment by the party chargeable and for its non-receipt by the decree-holder (judgment-debtor in the second suit), i. e., by the issue of a prohibitory order. In *Ameer Ali and Woodroffe's Commentaries on the Civil Procedure Code* the learned authors say at page 293 that this has not been the practice since. See *Haridas Acharya Chowdhry v. Baroda Kishore Acharya Chowdhry* (2). In *Uday Kumari Ghatwalin v. Hari Ram Shaha* (14) the learned Judges, while holding that future rents and profits due to a *ghatwal* cannot ■ such be attached in execution of a decree against him, sent the case back to the lower Court with directions to consider the propriety of appointing ■ Receiver to collect the rents and profits as they fell due. The facts of that case are, however, plainly distinguishable from the present one.

In the result the appeal fails and is dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree. As regards the case *Ranee Annapurni Nachiar v. Swaminathan Chetty* (12), I am inclined with the greatest respect to hold that a right to receive future maintenance cannot be validly alienated. Shephard and Brown in their Commentaries hold that it is not alienable as it is not property within the enabling words of section 6 of the Transfer of Property Act. The learned Judges, following the observation in *Palaniappa v. Lakshmanan* (15), hold that a right to future maintenance, though not "property" under the Transfer of Property Act and though not attachable under the Civil Procedure

(12) 6 Ind. Cas 439; 34 M. 7; 8 M. L. T. 103; (1910) M. W. N. 605; 20 M. L. J. 785.

*The page referred to is of 34 M.—Ed.

(13) 15 W. R. 188.

(14) 28 C. 483.

(15) 16 M. 429 at p. 434.

PARAMESWARAM MUNPU v. NARAYANAN NAMBOODRI.

Code, might be alienable under the principles followed by Courts of Equity in England. We know that Courts of Equity have held that even the contingent right of an heir-presumptive can be validly charged. I think the Courts in India are bound by the Transfer of Property Act, the clear implication of section 6, clauses (d) and (h), of that Act being that a right to receive future maintenance cannot be validly alienated. I think that "a transfer not recognised by the Transfer of Property Act" as legally effective cannot create any right in the alleged transferee.

Mr. Subramania Sastriar contended that if a decree awarding future maintenance can be attached the rights granted by a private deed to receive future maintenance of definite rates can also be attached, but I think we are bound by the decision in *Nanammal v. Collector of Trichinopoly* (10) to hold the contrary. Whatever may be the law in England, it has been held that the law applicable in this country is that "a right to recover damages for assault is not assignable." [See *Kocharla Seetamma v. Pillala Venkataramanayya* (16).] While the prohibition against attachment found in the provision to section 60 of the Civil Procedure Code and the prohibitions against transfer found in the clauses of section 6 of the Transfer of Property Act have been both enacted on grounds of public policy, the prohibition against attachment, so far as it relates to some of the properties mentioned in section 60 of the Civil Procedure Code, (such as tools of artisans, necessary cooking vessels, etc.,) is not intended to interfere with the right of the owner to effect private alienations of those properties. The prohibition of private alienation itself found in the Transfer of Property Act rests, therefore, on rules of public policy of at least equal stringency with the prohibition against attachment found in the Civil Procedure Code and instead of being sought to be evaded by the Courts should, in my opinion, be liberally given effect to.

Appeal dismissed.

(16) 21 Ind. Cas. 387; 38 M. 308 at p. 309; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 984 of 1915.
January 25, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

PONNIATHAKATHOOT PARAMES-
WARAM MUNPU AND OTHERS—
COUNTER-PETITIONERS—PETITIONERS

versus

MOOTHEATH MALLSERI ILLATH
NARAYANAN NAMBOODRI AND ANOTHER
—PETITIONER AND PLAINTIFF No. 1—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. I, r. 10—Public trust—Suit by two worshippers with Advocate-General's sanction—Death of one plaintiff, if causes suit to abate—Court's power to add parties—Sanction of Advocate-General, if necessary for such addition.

A suit brought under section 92 of the Code of Civil Procedure, 1908, is a representative suit. [p. 385, col. 1.]

As soon as a suit is instituted by two persons with the previous sanction of the Advocate-General, all the worshippers become parties thereto as a representative suit and the subsequent death of one of the plaintiffs does not cause the suit to abate. The Court has ample power under Order I, rule 10, Civil Procedure Code, to add other worshippers as additional parties and the previous sanction of the Advocate-General is not necessary for such addition. [p. 385, col. 1.]

Chhabila Ram v. Durga Prasad, 26 Ind. Cas. 681; 37 A. 296; 13 A. L. J. 379, not followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Malabar, dated the 18th October 1915, in Civil Miscellaneous Petition No. 646 of 1915 in Original Suit No. 21 of 1914.

FACTS.—Two of the worshippers interested in a public temple instituted a suit under section 92, Civil Procedure Code, with the previous sanction of the Advocate-General. Subsequently one of the plaintiffs died and other worshippers obtained the sanction of the Advocate-General and applied to be added as parties to the suit. The defendants opposed the application on the ground that the suit had abated and that the application was barred by limitation. The District Judge, however, overruled the objections and added the applicants as parties under Order I, rule 10. The defendants thereupon preferred this civil revision petition.

Mr. A. Sundaram, for the Petitioners.—
The suit must be deemed to have abated

JOGENDRA NATH DEY v. GOUR SINGH MURA.

[*Chhabila Ram v. Durga Prasad* (1)], ■ two persons are necessary [*Abdul Rahman v. Cassum Ebrahim* (2)].

Mr. P. R. Ganapathi Iyer, for the Respondents.—The decision of the Privy Council reported as *Venkatanarayana Pillay v. Subbammal* (3) has set at rest the conflict of decisions in the Madras High Court regarding revivor of representative suits. A suit under section 92 of the Civil Procedure Code is ■ representative suit as much as one under Order I, rule 8, Civil Procedure Code. *Lakshmandas Raghunathdas v. Jugalkishore* (4); *Budree Das Mukim v. Ohooni Lal Johurry* (5). See also *Varadappa Chetty v. Munusami Chetty* (6); *Ragava v. Rajaratnam* (7) and *Gopal Dei v. Kanno Dei* (8). The previous sanction of the Advocate-General is not necessary to the addition of parties and it is quite competent to the Court to add them of its own accord. The case of *Chhabila Ram v. Durga Prasad* (1) is wrongly decided.

JUDGMENT.—We agree with Mr. Justice Bakewell's decision in *Varadappa Chetty v. Munusami Chetty* (6). We think (a) that a suit brought under section 92 of the Code of Civil Procedure is a representative suit and (b) that the Court has power to add other worshippers ■ parties, not because they are the legal representatives of the two persons who instituted the suit with the Advocate-General's sanction, but because they had become parties to the representative suit as soon as it was brought on behalf of all the worshippers and the Court has power under Order I, rule, 10, clause (2), of the Code of Civil Procedure to add persons as additional parties "whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the suit."

With respect, we do not agree with the decisions of the Allahabad High Court [see the recent decision of *Chhabila Ram v. Durga*

Prasad (1)] which hold that the suit under section 92 of the Code of Civil Procedure abates on the death of one of the two plaintiffs who first instituted the suit, or that the consent of the Advocate-General is necessary for any other worshipper to be added ■ ■ party in order that the suit may be further prosecuted. The point of limitation taken by Mr. Sundaram for the appellants is based on the view that the application made by the 3rd plaintiff to be added as a party was one to set aside the abatement of the suit and to be brought in as legal representative of the 2nd plaintiff. The point does not arise on our above view and the learned District Judge's order is right.

We, therefore, dismiss the petition with costs.

Petition dismissed.

V. R. P.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1775 OF 1913.

September 2, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Mullick.

JOGENDRA NATH DEY AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

GOUR SINGH MURA—DEFENDANT—
RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 81, 83, 87, 256—Decree obtained before operation of Act—Execution after operation of Act—Procedure—Mundari khuntkati tenant, right of—Jurisdiction—Settlement Officer, powers of.

Where a suit for arrears of rent was brought and a decree was obtained under Act X of 1859, and the execution of the decree was applied for after the Chota Nagpur Tenancy Act came into force:

Held, that the execution proceedings must be governed by the provisions of the Chota Nagpur Tenancy Act, as the suit having terminated with the decree, the application for execution, although an application in the suit, was a separate proceeding. [p. 386, col. 2.]

A Settlement Officer has jurisdiction to record ■ tenant as *mundari khuntkatidar* in a settlement proceeding under the Chota Nagpur Tenancy Act on deciding ■ dispute under section ■ of the Act between the tenant who claimed to be a *mundari khuntkati* tenant and the landlord who said he was not, although there was no suit between the parties under section 87 which the Settlement Officer was called upon to decide. [p. 386, col. 2.]

Appeal against the decree of the District Judge, Manbhoom-Sambalpur, dated the 8th

(1) 28 Ind. Cas. 681; 37 A. 296; 13 A. L. J. 379.

(2) 11 Ind. Cas. 726; 36 B. 168; 13 Bom. L. R. 583.

(3) 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 29 M. L. J. 851 42 I. A. 125.

(4) 22 B. 216.

(5) 33 C. 789; 10 C. W. N. 581.

(6) 13 Ind. Cas. 232; 16 M. L. T. 514.

(7) 14 M. 57.

(8) 26 A. 162; A. W. N. (1903) 227

JOGENDRA NATH DEY v. GOUR SINGH MUKA.

March 1913, reversing that of the Subordinate Judge, Purulia, dated the 28th of June 1912.

Babu Bepin Behary Ghosh, for the Appellants.

Babus Mohendra Nath Roy and Abani Bhushan Mukerjee, for the Respondent.

JUDGMENT.

D. CHATTERJEE, J.—The ancestor of the plaintiffs purchased *Mauza Urma* in execution of a rent-decree in 1880. The defendant held some lands in the *mauza* and in 1905 he gave a *kabuliyat* to the plaintiffs in respect of 23 plots of land at a consolidated rate of rent. He fell into arrears and on the 21st of December 1909, the plaintiffs brought a suit for rent under Act X of 1859 and obtained a decree. In the meantime on the 22nd December 1909 the Chota Nagpur Tenancy Act was applied to the District of Manbhoom. Execution was taken out of the rent-decree obtained by the plaintiffs and the holding of the defendant was sold on the 1st of August 1910 and purchased by the plaintiffs, who took delivery of possession from the Court in February 1911. In the meantime settlement proceedings were going on under a notification made in September 1909 (evidently under Chapter X of the Bengal Tenancy Act which then applied). The Chota Nagpur Tenancy Act having been applied from December 1909, the settlement operations were continued under this Act and the plaintiffs applied for the record of their names as owners by purchase of these 23 plots of land. The defendant set up a *mundari khuntkati* right and the Settlement Officer held in his favour and recorded him as the *mundari khuntkatidar* in March 1911, and the Record of Rights was finally published on the 17th November 1911.

The plaintiffs brought this suit in September 1911 for declaration of title to and recovery of possession of the said 23 plots. The Court of first instance gave a decree to the plaintiffs, holding that the entry in the Record of Rights was without jurisdiction. The lower Appellate Court has reversed the decree of the first Court, holding that the lands were really the *mundari khuntkati* lands of the defendant, that the Settlement Officer had perfect jurisdiction to make the entry that he did make and

that as these rights are not transferable the plaintiffs have acquired no right to the lands.

The rent suit of the plaintiffs was brought under Act X of 1859 and the decree obtained under that Act. The execution of the decree was evidently applied for after the new Act came into operation. The execution proceedings must, therefore, be governed by the new Act, *Deb Narain Dutt v. Narendra Krishna* (1). The new Act could not certainly affect pending proceedings and it did not affect the suit; but the suit terminated with the decree and the application for execution, although an application in the suit, was a separate proceeding. That seems to be the result of the Full Bench case. Now under this Act, section 250 (1), *mundari khuntkati* property is not saleable either by private sale or in execution. The property in this case has been found to be *mundari khuntkatidari* property first by the Settlement Officer and later by the lower Appellate Court, which relies upon the Record of Rights as conclusive evidence under section 256. It is contended, however, that the Settlement Officer's order is without jurisdiction and the Record of Rights is, therefore, a nullity. Under section 81 the Settlement Officer had to record (a) the name of the tenant or occupant, (b) whether the tenant was a tenure-holder, *khuntkatidar*, etc. Now the defendant was no doubt the occupant of the land at the time as found by the Courts below and the Settlement Officer was bound to record his name as the person in occupation. Being in occupation he claimed to be *mundari khuntkati* tenant and the landlord said he was not. There was a dispute under section 83 and the Settlement Officer decided in favour of the defendant. The Settlement Officer was competent to decide a suit under section 87 as to whether the relationship of landlord and tenant existed or whether the land was held rent-free. There was no such suit in this case, but the provision for such a suit implies that the Settlement Officer has to decide such questions in making his record. I am not, therefore, prepared to say that the Settlement Officer had no jurisdiction to record the defendant as a *mundari khuntkati* tenant. If the property was of this description, it was not

Musammât RANJITA v. Musammât RUKMIN.

saleable and the sale that was held was ineffectual to pass any title.

As the Chota Nagpur Tenancy Act was extended to Manbhoom before the plaintiffs acquired any right by purchase, they cannot complain that any vested right of theirs has been interfered with. In this view of the case I would dismiss the appeal. The defendant is responsible for not taking the objection of his *mundari* right in proper time and I think each party should bear his own costs in all Courts.

MULLICK, J.—I agree.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 25 OF 1916.

April 4, 1916.

Present:—Mr. Lindsay, J. C.

Musammât RANJITA—DEFENDANT—
APPLICANT

versus

Musammât RUKMIN—PLAINTIFF—
OPPOSITE PARTY.

Mortgage—Deposit of consideration with mortgagee—Agreement to pay mortgagor piecemeal, when required—Suit for recovery of deposit—Whether enforcement of a contract to lend—Maintainability of suit.

Where a mortgagor allows the whole or part of the amount of his loan to remain with the mortgagee, on the understanding that it is to be taken by the mortgagor from time to time, the transaction is in the nature of a deposit with a banker or agent repayable on demand without interest. A suit lies for the recovery of the amount, which is not for enforcement of a contract to lend. [p. 387, col 2; p. 388, col. 1.]

Ramanand v. Nakhed, 8 O. C. 5; *Mehdi Abbas v. Muhammad Fakhr-ul-Din*, 11 O. C. 217; *Phul Chand v. Chand Mal*, A. W. N. (1908) 105; 5 A. L. J. 491; 30 A. 252; *Nawab Jaffree Begum v. Mahomed Zahoor Ahsun Khan*, 2 N. W. P. II. C. R. 409, referred to.

Application for revision of the order of the Additional Judge, Small Cause Court, Lucknow, dated 11th September 1915.

Mr. Mahabir Pershad, for the Applicant.

Mr. Lakshman Pershad, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act. The suit was brought for the recovery of a sum of Rs. 320. The facts of the case are as follows:—On the 2nd of April 1914 the plaintiff, *Musammât Rukmin*, executed a mortgage-deed with possession in favour of one *Raghubar Singh*, who was the husband of

the defendant, *Musammât Ranjita*. The mortgage-money was described as being Rs. 2,000 in the deed. The details of the mortgage-money were set out at the bottom of the deed and one of the items with which we are now concerned was an item of Rs. 320. With regard to this sum it was stated that this money had been left in deposit with the mortgagee and was to be taken from time to time by the mortgagor on receipts to be furnished by her. The mortgagor alleged that she had applied for payment which had been refused by the defendant, and hence the suit was brought to recover this money in the Small Cause Court. The defendant's statement was that the suit was not maintainable being a suit brought for the purpose of enforcing a contract of loan. The learned Judge of the Court below held that the suit was not one of this nature and he decreed the claim. It is argued here in revision that in substance the suit was one brought for the purpose of enforcing a contract to lend. In my opinion the Judge of the Court below took a proper view of the case. The parties have referred to various decisions of this Court on the question of suits brought to enforce contracts for the loan of money, one of these being *Ramanand v. Nakhed* (1) and the other *Mehdi Abbas v. Muhammad Fakhr-ul-Din* (2). I have also been referred to a ruling of the Allahabad High Court to be found in *Phul Chand v. Chand Mal* (3). It appears to me, however, that there is a distinction to be drawn between the facts of this case and the facts of the other cases referred to. The position of the parties here is not merely that existing between a borrower and a lender. The recital in the deed that the money had been deposited *amanatan* with the mortgagee to be taken from time to time by the plaintiff, places the parties on a different footing. The learned Counsel for the opposite party has referred me to a decision reported in *Nawab Jaffree Begum v. Mahomed Zahoor Ahsun Khan* (4). There it was held that where a mortgagor allows the amount of his loan to remain in the hands of the mortgagee taking a receipt

(1) 8 O. C. 5.

(2) 11 O. C. 217.

(3) A. W. N. (1903) 105; 5 A. L. J. 491; 30 A. 252.

(4) 2 N. W. P. II. C. R. 409.

KOTIGARI RANGIAH CHETTI v. CHINTALAPALLI NARASAYYA.

for it, the transaction is to be regarded as a deposit of money with a banker or agent repayable on demand without interest. That I think is the position of the parties in this case and it follows, therefore, that the plaintiff was entitled to maintain this suit, in view of the contract between the parties expressed in the mortgage deed. I dismiss this application with costs.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 97 OF 1915.

February 1, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

KOTIGARI RANGIAH CHETTI—
TRANSFEREE-DECREE-HOLDER—APPELLANT
versus
CHINTALAPALLI NARASAYYA AND
ANOTHER—DEFENDANTS NOS. 1 AND 2—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 19—Joint and several money-decree against two judgment-debtors—Both judgment-debtors individually awarded costs exceeding the decree in aggregate—Execution—Decree-holder, whether can execute decree against only one judgment-debtor without deducting costs of both.

A held a "joint and several" money-decree against B and C. In the same decree both B and C were individually awarded costs which in the aggregate exceeded the amount due to A. After deducting the amount of costs due to B under the decree A took out execution against B for the whole balance due to him from both B and C.

Held, that A could proceed as he did, until C made an application in execution to recover the amount due to him from A. [p. 389, col. 1.]

Appeal against the order of the District Court of North Arcot, on Civil Miscellaneous Petition No. 746 of 1914 and Execution Petition No. 55 of 1914, in Original Suit No. 18 of 1903.

Messrs. L. Venkataraghava Aiyar and A. Ramachandra Aiyar, for the Appellant.

Mr. V. C. Seshachariar, for the Respondents.

JUDGMENT.—In Letters Patent Appeal No. 36 of 1910, the appellant was given a decree for Rs. 665-2-3, with interest Rs. 467-2-8 and costs Rs. 138-4-0, in all Rs. 1,270-8-11, against both the defendants "jointly and severally." Under the same

decree the plaintiff had to pay 2nd defendant Rs. 1,003-11-5 for costs and 1st defendant Rs. 412-6-1 for costs.

The appellant who had obtained a transfer of the decree applied in Execution Petition No. 55 of 1914 to the District Court, North Arcot, to execute the decree against the 1st defendant. In the execution petition he claimed Rs. 665-2-3 and interest thereon and deducted the costs which plaintiff had to pay 1st defendant under the decree, the net amount of the claim being Rs. 559-2-10. The District Judge dismissed the execution application, holding that the appellant was not entitled to execute the decree against either of the defendants, on the ground that the amount which the decree-holder had to pay to the respective defendants exceeded the amount due to the decree-holder by the defendants jointly and severally. It is contended on behalf of the appellant that the provisions of Order XXI, rule 19, Civil Procedure Code, do not apply, and that, inasmuch as the decree made the defendants jointly and severally liable for a sum of Rs. 1,270-8-11 to the plaintiff and made the plaintiff liable to pay only Rs. 412-6-1 to the 1st defendant, the plaintiff is entitled to take out execution against the 1st defendant for the balance due to the plaintiff from both defendants.

The question whether the appellant is under the circumstances entitled to execute the decree against the 1st defendant is not free from difficulty.

Order XXI, rule 19, Civil Procedure Code, provides that "where application is made to a Court for execution of a decree under which two parties are entitled to recover sums of money from each other,..... if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum, and for so much only remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree." The object of the rule is to prevent each side executing a decree in respect of sums due whether for costs or otherwise under the same decree. In this case, the plaintiff holds a decree against the two defendants "jointly and severally." The two defendants are individually entitled to different amounts

KOTIGARI RANGIAH CHETTIY. CHINTALAPALLI NARASAYYA.

for costs, which in the aggregate exceed the sum due to the decree-holder. We do not think there is anything in Order XXI, rule 19, Civil Procedure Code, to prevent the appellant from taking out execution of the decree against the 1st defendant alone for the balance due to him by both the defendants, until the 2nd defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree.

If the view taken by the District Judge is to be accepted, it is difficult to see how and by whom the decree for the balance due by the plaintiff could be executed. Should the 2nd defendant take out execution for the costs due to him he would be met by a similar objection that, the sum to which he alone is entitled under the decree being less than the amount for which he and the 1st defendant are jointly and severally liable to the plaintiff under the decree, he (the 2nd defendant) is also not entitled to execute the decree.

We think that the words "two parties" in the phrase "two parties are entitled to recover sums of money from each other" in Order XXI, rule 19, means the two parties or sets of parties who are parties not only to the suit in which the decree was passed but also to the application referred to in the opening sentence of the rule. In the present case the application is directed only against the 1st defendant and hence in applying the provisions of Order XXI, rule 19, the two parties to be considered are "entitled to recover sums of money from each other" are the plaintiff and the 1st defendant only. The old section 247 did not contain the words "where application is made to a Court for the execution of a decree" which have been inserted in the present Order XXI, rule 19. It may be that the second defendant may not care to recover the costs due to him alone by the plaintiff. If he applies for execution, then, of course, as between him and the plaintiff the Court would be bound to enter satisfaction for the smaller sum of Rs. 500 and odd due to the plaintiff by 2nd defendant (jointly and severally with the 1st defendant) and to set it off towards the sum of Rs. 1,000 and odd due to the 2nd defendant. When satisfaction is so entered, the plaintiff cannot

continue the execution for that smaller sum of Rs. 800 and odd under the present application against the 1st defendant alone, as satisfaction for the smaller sum entered upon the 2nd defendant's application for execution would *ipso facto* enure as satisfaction in the 1st defendant's favour also. In that case, the 2nd defendant would be entitled to take out execution only for the difference between the Rs. 1,000 and odd and the Rs. 800 and odd.

If the 2nd defendant had first applied for execution against the plaintiff for the Rs. 1,000 and odd, or if the plaintiff had first applied for execution against the 2nd defendant for Rs. 1,200 and odd, then only Rs. 200 and odd would have remained due to the plaintiff against both the defendants Nos. 1 and 2, and the 1st defendant to whom Rs. 400 and odd was due by the plaintiff would in that case have been the party entitled to take out execution against the plaintiff for the difference of Rs. 200 and odd between the Rs. 400 and odd due to 1st defendant and the Rs. 200 and odd due to the plaintiff. That there would be a difference in the person entitled to execute for the above-mentioned balance of Rs. 200 and odd (namely, whether it is to be the 1st or the 2nd defendant), and that it should depend upon whether (1) the plaintiff or the 1st defendant first put in an application for execution (one against the other) or whether (2) the plaintiff or the 2nd defendant put in an application for execution (one against the other) is no doubt an anomaly; but we think that under the provisions of Order XXI, rule 19, which necessitates an application as a preliminary condition of the exercise of the power and duty of the Court to enter satisfaction of the smaller sum between the parties to the application, such a result follows. Any other construction of the section would lead to more serious anomalies and inconveniences.

It was alleged in the course of the arguments that the 2nd defendant had since applied against the plaintiff for execution but there is nothing on the record to show it, and we have no doubt that the Court would act on that application according to law, and it may be that the plaintiff's present application against the 1st defend.

SURAJPAL SINGH v. DEBI BAKHSH SINGH.

ant cannot proceed further if the Court, in so acting, has to enter satisfaction to the plaintiff's claim. On the materials before us, we must set aside the District Judge's order and direct him to restore Execution Petition No. 55 of 1914 to the file and dispose of it according to law.

As the plaintiff is complicating the proceedings in execution by not applying for execution against both the defendants which he could legally do and thus in a simple manner get satisfaction of his decree (he could even have filed two separate applications one against the 1st defendant and the other against the 2nd defendant in any order he pleased so as to favour the one or the other as regards the claim for execution for the balance against him), we make no order as to the costs of this appeal.

Order set aside.

V.R.P.]

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 408 OF 1913.

March 7, 1916.

Present:—Mr. Lindsay, J. C.

SURAJPAL SINGH—DEFENDANT—
APPELLANT

versus

DEBI BAKHSH SINGH—PLAINTIFF,
SRIPAL SINGH AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Construction of document—Sale-deed, interpretation of—Shares sold—Plots omitted inadvertently—Pleader, authority of—Withdrawal of plea—Client's position in appeal.

The body of a sale-deed contained a description of the property sold,—certain distinct shares in a village, together with their respective areas. At the end of the deed there was a table giving a detail of those shares by showing the *khata* numbers with their respective areas. The village was sub-divided into enormous numbers of *khata*s, some of which were of very small areas, and a few small-plots were omitted to be mentioned in the sale-deed by inadvertence.

Held, that the intention of the vendor was to transfer the whole of the shares to which he was entitled, and that, therefore, the fact that certain numbers had been omitted from the list attached to the sale-deed made no difference in the case. [p. 392, col. 1.]

A Pleader has full authority to withdraw any plea raised in the pleadings, and his client is not at liberty to have the issues, based on such a plea and withdrawn from trial in the first Court, re-opened in appeal. [p. 392, cols. 1 & 2.]

Appeal from the decree of the Additional Judge, Lucknow, dated the 20th June 1913, upholding the order of the Subordinate Judge, Bara Banki, dated the 19th August 1912.

Babu Surendro Nath Roy, holding brief of Babu Aditya Prashad, for the Appellant.

Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff respondent, Debi Bakhsh Singh, to recover possession of certain property specified in a list, which was attached to the plaint. This property is situated in a village called Dewaitpur, which is a *bhaiyachara* village. Debi Bakhsh Singh claimed under a deed of sale which was executed in his favour on the 29th of October 1909 by the second and third defendants, Sripal Singh and Sheoraj Singh. In order to understand how this deed came to be executed, it is necessary to refer shortly to a pedigree which is set out in the opening part of the first Court's judgment. The 1st defendant Surajpal Singh and the 2nd defendant Sripal Singh are cousins descended from a common ancestor Sardar Singh, who was their grandfather. This Sardar Singh had four brothers whose lines have become extinct. Sardar Singh had also a cousin named Jit Singh whose line has also become extinct. The only surviving members, therefore, of the family are the two defendants Surajpal Singh and Sripal Singh. It is clear from the pedigree that each of these defendants inherited certain shares in the village from their ancestor Sardar Singh and as the lines of each of the brothers of Sardar Singh became extinct, they also inherited collaterally various shares which had belonged to those brothers also to Jit Singh who was a cousin of their grandfather. The case for the plaintiff was that Surajpal Singh had seized upon the whole of the property which had descended collaterally and that he was entitled to recover it by virtue of the sale-deed which had been executed in his favour in October 1909. Previous to this sale-deed it appears that the 2nd defendant

SURAJPAL SINGH v. DEBI BAKHSI SINGH.

Sripal Singh, who had a title to this property, made a gift of it in favour of the 3rd defendant Sheoraj Singh and it was about three months after the execution of this deed of gift that Sripal Singh and Sheoraj Singh combined in executing this sale-deed in favour of the plaintiff. Surajpal Singh set up a number of defences, some of which it is not necessary to consider here. The case was tried out in the Court of the Subordinate Judge, who gave the plaintiff a decree for possession of the property specified in the list attached to the plaint. A sum of Rs. 39-9-0 was also awarded as mesne profits. An appeal against this decision was brought in the Court of the Additional Judge of Lucknow and after a remand had been made to the Court of first instance for the determination of a further issue, the case was finally decided by Mr. Kirton, Additional Judge, on the 20th of June 1913. He dismissed the appeal of the defendant Surajpal Singh.

I come now to the points which have been pressed here in appeal. The first ground taken is that the decree of the Court below is wrong, inasmuch as it has awarded possession to the plaintiff of certain *khatas* which are not specified in the sale-deed executed in his favour. The case for the defendant-appellant in this connection is that inasmuch as the property which was sold to the plaintiff by the 2nd and 3rd defendants has been specified by numbers and areas in the sale-deed, the plaintiff is not entitled to recover any specific plot of land which is not included in the deed. On the other hand, the contention is that the sale-deed executed in favour of the plaintiff was a sale of the entire shares which once belonged to Sripal Singh and which he afterwards gifted to Sheoraj Singh. It is argued that even if certain plots were inadvertently omitted in drawing up the sale-deed, the intention was clearly to transfer to the plaintiff the entire shares to which Sripal Singh was entitled. Both the Courts below, I may observe, accepted this contention of the plaintiff and the question is whether or not they were correct in so doing. It is not disputed now that under the deed of gift which was executed by the 2nd defendant Sripal Singh in favour of the 3rd defendant Sheoraj Singh on the 27th

July 1909, the entire shares of Sripal Singh to which he had a title were transferred to Sheoraj Singh. The document sets out clearly that Sripal Singh divested himself of the whole of his property, which he divided into three classes, namely, *malans*, *golans* and *bapans*, that is to say, property which had been acquired by purchase, property that had come to him collaterally and property which had descended to him directly by inheritance. Coming now to the sale-deed which was executed by Sripal Singh and Sheoraj Singh in favour of the plaintiff on the 29th of October 1909, it appears to me to be quite clear that it was the intention of these two vendors to hand over to Debi Bakhsh Singh the entire property which had been specified in the deed of gift executed a few months previously. The reason for the sale in favour of the plaintiff is set out in the introductory portion of the deed. Sripal Singh found himself unable to bring a suit against the trespasser Surajpal Singh to recover his shares in this property in Dewaitpur. He first of all transferred the shares by gift to Sheoraj Singh, the latter having undertaken to maintain Sripal Singh for his life and also to bring a suit against the trespasser for the recovery of the lands. In the sale-deed it was stated that Sheoraj Singh had found himself unable to undertake the responsibility of bringing a suit against Surajpal Singh and for this reason it was stated that he and Sripal Singh joined in conveying the property by sale to the plaintiff Debi Bakhsh Singh for a sum of Rs. 2,000. In the body of the deed there is a description of the property which is being sold. First of all we have it recited that one parcel of the property which is being conveyed consists of a share the area of which is 13 *bighas* 8 *biswas* and 10 *biswansis*. This share is described in the deed as *hissa zati*. The next parcel consists of a share consisting of 86 *bighas* 14 *biswas*, 15½ *biswansis*, being half the area to which Sripal Singh had become entitled after the decease of his collateral relations. This share is mentioned as *hissa jo werastan mila hai*; and lastly we have another share referred to, consisting of 3 *bighas* 18 *biswas* which is described as *hissa sar-kharid* and which is called *Patti Kapura*. At the end of the deed there is a table which bears the following heading: "Details of the

SURAJPAL SINGH v. DEBI BAKHSI SINGH.

share which have been sold together with the *khata* numbers," where then follows a long list of numbers each of which is described by its area. Having regard to the language of the whole of this deed it seems to me impossible to doubt that the intention of the vendors was to transfer the whole of the shares to which Sripal Singh was entitled; and if, as appears to be the case, certain numbers were omitted from this list attached to the sale-deed that ought not, in my opinion, to make any difference in the case. I find from the record that some ten small plots were so omitted the area of which comes to a little over 3 *bighas*. It is evident from the revenue papers which have been prepared for this village that it is sub-divided into enormous numbers of *khata*s some of which are of very small areas, and it is small matter for surprise that in drawing up a sale-deed like that which was executed on the 29th of October 1909 a few of these plots should be omitted by inadvertence. If on the true construction of the sale-deed it appears that the intention was to transfer shares then the maxim "*falsa demonstratio non nocet*" applies to the case. I agree with both the Courts below that the intention was to transfer shares and, therefore, this first point must be determined adversely to the appellant. The next point which was argued was based upon a certain plea which was raised in the first Court by Surajpal Singh in defence. He alleged that certain plots which were shown in the list A attached to the plaint were held by him as a mortgagee and that, therefore, in any case the plaintiff could not recover possession without redeeming the mortgage. After issues had been raised upon this defence the plea relating to the defendant's right to retain possession of these plots as mortgagee was withdrawn by his Pleader, consequently the Subordinate Judge who tried the suit found it unnecessary to determine issues which had been struck in this connection. When the defendant went up in appeal before the District Judge, he contended that his Pleader had no authority to withdraw a plea of this kind and he asked that the issues relating to the mortgage should be tried and decided. The learned District Judge refused to accept this contention, being of opinion, and rightly as I think, that the defendant's Pleader had full authority to withdraw any plea which had been raised in defence. The same point

has been raised here and I must decline to entertain it. The issues having been withdrawn from trial in the first Court cannot be re-opened now and it would be quite impossible to yield to an argument that a client is at liberty in appeal to take up a position of this kind. The last plea which has been pressed here is with regard to that portion of the property in suit which is described in the deed of gift and in the sale-deed as the personal share of Sripal Singh, the area of which is given as 13 *bighas*, 8 *biswas* 10 *biswas*s. It was argued in the Court below that Sripal Singh was only entitled to a half share in this area and that the other half belonged to the defendant Surajpal Singh. This claim on behalf of the defendant was based upon an assertion that his father Ram Adhin and the father of Sripal Singh whose name was Gaya Din were joint in estate, and also it was argued that where the name of Gaya Din appeared in the Record of Rights it ought to be assumed that Gaya Din represented not only himself but his brother Ram Adhin. Consequently it was said that with respect to all properties entered in the name of Gaya Din above it should be understood that Ram Adhin the father of the defendant had a half share. The learned District Judge held that there was no force in this plea, inasmuch as the *khatwat* showed that in other cases the names of all the other co-sharers in the village were given and further he pointed out that the defendant himself had admitted a division in the family, for he had pleaded that the members of the family had divided and that after this division one Gajraj Singh who was the son of Atwant Singh had reunited with him. This latter point was decided against the defendant in both the Courts. I have examined the numerous village papers on the record and it appears to me that this contention that Gaya Din and Ram Adhin the father of the defendant No. 1 were joint in estate cannot be supported. There is ample material on this record to justify the conclusion that Gaya Din enjoyed his own share of the property separately and that after his death it devolved upon his two sons Sripal Singh and Prithipal Singh, the latter of whom died childless, and similarly there are other entries to show that Ram Adhin's share in this property devolved upon his own son Surajpal Singh,

PERUMAL NAICKER v. DAVOOD ROWTHER.

the present defendant No. 1. It is not possible, therefore, for the appellant to succeed in this plea, to the effect that he and Sripal Singh were joint owners of the area which is described in the sale-deed executed in favour of the plaintiff as the personal share of Sripal Singh.

I have now dealt with all the points which have been pressed before me in appeal and upon all of them I find against the appellant, with the result that the appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 93 OF 1914.

January 7, 1916.

Present:—Mr Justice Sadasiva Aiyar and Mr. Justice Moore.

PERUMAL NAICKER AND OTHERS—
PETITIONERS—APPELLANTS

versus

Sheik DAVOOD ROWTHER—

RESPONDENT.

*Civil Procedure Code (Act XIV of 1882), s. 210—
Civil Procedure Code (Act V of 1908), s. 48, O. XX,
r. 11—Order recording application under O. XX, r. 1
(2), effect of—Order postponing execution, whether order
for amendment of decree—Execution—Limitation.*

An order postponing execution of a decree or ordering payment by instalments under section 210, Civil Procedure Code, 1882, or under Order XX, rule 11, of the Civil Procedure Code of 1908 is virtually an order amending the decree, and an application for execution made within 12 years of the date when the said order is to take effect is not barred under section 48, Civil Procedure Code, 1908. [p. 394, col. 1.]

On an application for postponement of a decree signed by all parties, the Court endorsed the expression 'recorded':

Held, that it was an order granting the application and amending the decree in the terms of the prayer. [p. 394, col. 1.]

Jhoti Sahu v. Bhubun Gir, 11 C. 143; *Tata Charlu v. Konadala Ramachandra Reddi*, 7 M. 152, followed.

Abdul Rahaman Sodagur v. Dullaram Marwari, 14 C. 348; 11 Ind. Jur. 377, distinguished.

Appeal against the Appellate Order of the District Court, Tanjore, in Appeal Suit No. 68 of 1913, preferred against the order of the Court of the Subordinate Judge, Nega-patam, in Execution Petition No. 215 of 1912 in Original Suit No. 20 of 1900.

Mr. V. K. Venugopal Naidu, for the Appellants.

Mr. T. Narasimha Aiyangar, for the Respondent.

JUDGMENT.—The decree in this case was passed on 1st August 1900. A petition signed by all the parties was filed on 1st December 1900 under section 210 (old Civil Procedure Code) and another under section 257A of that Code. As a petition under section 210, it was within time, as Article 175 of the Limitation Act, allows such a petition to be filed within six months of the decree.

The Court endorsed on the petition "Mr. T. R." (Vakil) "signs for defendants under special power. Recorded." In *Jhoti Sahu v. Bhubun Gir* (1) it was held that where the Court struck off an execution application on the 11th July 1881 on the judgment-debtor's putting in an application on that date, mentioning an agreement to pay the decree amount by instalments and such an agreement was also admitted by the decree-holder and the application mentioning such an agreement was "registered" by the Court before the execution application was struck off, such registration amounted to a direction under section 210 by the Court that the decretal amount be paid by instalments as agreed upon. That decision was, no doubt, admitted to be an erroneous decision on some other point in *Abdul Rahaman Sodagur v. Dullaram Marwari* (2), as that decision overlooked the fact that the application of 11th July 1881 was barred by the six months' rule enacted in Article 175 of the Limitation Act. But if it had been filed within six months the reason given for treating an order for registration of such an application as an order granting it would still hold good.

In *Tata Charlu v. Konadala Ramachandra Reddi* (3) it was held that an order passed on a petition under section 210 granting two years' time to pay the decretal amount is an order amending the decree, though no formal amendment was made in the original decree. We might add that neither the

(1) 11 C. 143.

(2) 14 C. 348; 11 Ind. Jur. 377.

(3) 7 M. 152.

CHATTERJEE BRAHMIN V. DURGADUTT AGARWALLA.

second paragraph of section 210 of the old Civil Procedure Code nor clause (2) of Order XX, rule 11, of the new Code directs the decree to be amended, when an order is passed under those provisions, granting time or permitting payment by instalments, though such an order is in substance an order varying the decree.

In the result, though not without hesitation, we hold that the order of the Subordinate Judge, dated 1st December 1900, was an order under section 210 amending the decree and as under the amended decree, execution could not take place before 1st August 1901, the present execution application, dated in December 1912, was not barred under the 12 years' rule enacted in section 48, Civil Procedure Code. The appeal is allowed and the District Judge's order is set aside, that of the Subordinate Judge restored. As we said the question is not free from difficulty, the difficulty having been created principally by the action of the Subordinate Judge in not having passed a clearly expressed order in 1900. We, therefore, make no order as to costs here or in the lower Appellate Court.

V. R. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 18
OF 1914.

August 23, 1915.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice N. R. Chatterjea.
CHATTERJEE BRAHMIN—PLAINTIFF—
APPELLANT

versus

DURGADUTT AGARWALLA AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX, r. 5
—Summons to defendant returned unserved—Trial of
suit—Decree against defendant, whether ex parte—
Remedy of party—Principal and agent—Power-of-
attorney, construction of—Compromise of suit by
agent.*

Under Order IX, rule 5, Civil Procedure Code, the Court should not proceed with the trial of a suit when summons to a defendant has been returned un-

served. The position, in substance, is the same as if no summons had ever been issued. A decree passed against such defendant without giving him notice of the suit is in no sense an *ex parte* decree, and it is liable to be set aside. [p. 395, col. 2; p. 396, col. 1.]

The effect of an order discharging a decree on the ground that it was passed without service of summons on a defendant is that the entire decree is discharged and the suit revived for re-trial. [p. 396, col. 1.]

Khajooroonissa v. Rowshan Jehan, 26 W. R. 36; 2 C. 184 at p. 191; 3 I. A. 291; *Neale v. Gordon Lennox*, (1902) A. C. 465; 71 L. J. K. B. 939; 66 J. P. 757; 87 L. T. 341; 18 T. L. R. 791; 51 W. R. 140; *Bibee Solomon v. Abdul Aziz*, 6 C. 687; 8 C. L. R. 169 and *Sharat Chunder v. Kartik Chunder Mitter*, 9 C. 810; 12 C. L. R. 453, followed.

Bhimaji Govind v. Rakmabai, 10 B. 338 and *Kshetra Mohan v. Man Gobinda Pal*, 6 Ind. Cas. 13; 14 C. W. N. 558, dissented from.

Where a power-of-attorney authorized the agent to manage the business of the principal, to continue, institute, prosecute, defend or oppose all the suits that were or might be brought by or against the principal in respect of his business and property:

Held, that no power was conferred on the agent to compromise a suit by or against his principal. [p. 396, col. 1.]

Appeal against the decree of the Subordinate Judge, Dibrugarh, dated the 24th September 1913.

Babu Bhupendra Kumar Ghose, for the Appellant.

Babu Nanda Lal Banerjee, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit to set aside what has been described as an *ex parte* decree. The circumstances under which the decree in question was obtained against the plaintiff are beyond controversy. The first three defendants had a six-annas share in a partnership business under a deed, dated the 21st April 1909, while the plaintiff and the fourth defendant who are relations had each a five-annas share. On the 24th May 1912, the first three defendants, who were, at the time, infants, instituted a suit against the plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a Receiver and for other incidental reliefs. The claim was valued at Rs. 22,000. At that time the plaintiff, who was then the second defendant, was stated on the face of the plaint to be resident beyond the limits of British India, namely, at Somaser in Rajputana. The fourth defendant, who was the first defendant in that suit, was a resident of

CHATTERJEE BRAHMIN v. DURGADUTT AGARWALLA.

the place where the suit was instituted. On the day the plaint was filed, an application was made by the then plaintiffs for the issue of a warrant for arrest of the then first defendant and a warrant for attachment, before judgment, of all the partnership assets. The Subordinate Judge directed the issue of the warrants, ordered summonses to issue, and fixed the 10th June 1912 for the trial of the suit. The warrants of arrest and attachment were issued forthwith. The summons upon the second defendant, which was issued on the day following, reached the Political Agent at Rajputana on or about the 1st June 1912, and was returned by him to the Court with the remark that it was impossible to serve the summons upon the defendant in time, as the date fixed for hearing the case was too close at hand; at the same time a request was made by him that a more distant date might be fixed; the date suggested was six weeks from the 1st June. Before the summons so returned had reached the Court of the Subordinate Judge, the proceedings had, however, been pushed on on behalf of the plaintiffs with extreme rapidity. We find it noted in the order-sheet that on the 27th May, that is, within three days of the institution of the suit, the first defendant had been arrested, and had received intimation from the Court that unless he furnished security for Rs. 15,000, he would be forthwith sent to the Civil Jail. On the 30th May, we find that the suit had been compromised. The first defendant had paid to the plaintiffs Rs. 13,000 and had agreed to pay Rs. 5,800 in specified instalments. A decree was made on these terms and the first defendant was released from arrest. Whether a decree obtained by consent under the circumstances described would be operative against the person who had consented thereto, is a question which does not directly arise for consideration in the present appeal; but we have to determine whether such decree is binding upon the other defendant to the suit who was absent in Rajputana.

It appears from the petition of compromise that the first defendant entered into the settlement both for himself and his absent partner. He professed to represent his partner on the basis of a power-of-attorney to which reference will presently be made.

The decree, however, does not mention the petition of compromise, and does not even recite that it was made by consent; but it directs both the defendants to pay the plaintiffs the sum of Rs. 5,800 with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution. The decree, consequently, on the face of it binds both the then defendants. The plaintiff was thus driven to institute this suit on the 8th October 1912 to set aside this decree. His contention is that he is not bound by this decree; *first*, because he was in essence not a party to the suit and the Court had no jurisdiction to make a decree against him; and *secondly*, because his partner had no authority to bind him by a compromise. In our opinion, these contentions are well founded and must prevail.

As regards the *first* ground, it is plain that this is in no sense a case of an *ex parte* decree. The Code contemplates service of summons upon the party sought to be made liable. That summons may be duly served or may not be duly served. But the Code does not contemplate the contingency which has happened in this case. The plaintiffs took out summons upon the second defendant in the suit. The summons was sent, as stated, to the Political Agent at Rajputana. No attempt was made by him, rightly or wrongly, to serve the defendant, but the summons was returned to the Court. The position in substance is the same as if no summons had ever been issued for service on the defendant. Under these circumstances a decree made against the defendant cannot possibly bind him.

Order IX, rule 5, of the Civil Procedure Code clearly contemplates that where the summons has been returned unserved, the plaintiff must within a year from the prescribed date apply for the issue of a fresh summons; if he fails to do so, the suit is liable to be dismissed. The Code obviously does not contemplate the trial of a suit when the summons has been returned unserved. It is obviously just that a man should have notice of any legal proceeding that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth, it condemns no one

RAM BHAJAN v. SHEO DARSHAN SINGH.

unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

As regards the second ground, it is equally plain that the decree cannot be sustained. An extract from the power-of-attorney, dated the 22nd June 1909, is on the record. Thereby the plaintiff authorised his partner to manage the partnership business, to continue, institute, prosecute, defend or oppose, as the case might be, all the suits that were or might be brought by or against the executant in respect of his business and property. On behalf of the plaintiffs-respondents no endeavour has been made to support the view that the compromise of suit can by any stretch of language be included within any of the terms of the power-of-attorney. It is plain beyond controversy that the partner of the plaintiff had no authority to bind him by the compromise.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed. The decree in Suit No. 10 of 1912 is set aside, not only in so far as the plaintiff is concerned but also with regard to the fourth defendant, because the decree, on the face of it, is indivisible and cannot be set aside in part. The question arises, in these circumstances, what is the effect of our order upon the prior suit. The effect is obviously to discharge the entire decree in that suit and to revive it for re-trial: *Khajooroonissa v. Rowshan Jehan* (1); *Neale v. Gordon Lennox* (2); *Bibee Solomon v. Abdool Azeez* (3); *Sharat Chunder Ghose v. Kartik Chunder Mitter* (4); *Sarbish Chandra v. Hari Dayal Singh* (5); *Raj Kumar Roy v. Hara Krishna* (6), though there are expressions to the contrary effect in

Bhimaji Govind v. Rakmabai (7) and *Kshetra Mohan v. Man Gobinda Pal* (8). As the then second defendant was not served, he will have to be served, unless he chooses to enter appearance voluntarily. The appellant is entitled to his costs both here and in the Court below; but although the appeal is valued at Rs. 18,000, we assess the hearing fee in this Court at five gold mohurs, as the arguments for the respondents have not been unduly protracted.

Appeal allowed; Re-trial ordered.

(7) 10 B. 338.

(8) 6 Ind. Cas. 13; 14 C. W. N. 558.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 529 OF 1913.

July 15, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.
RAM BHAJAN—DEFENDANT—APPELLANT
versus

SHEO DARSHAN SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27 (b)—Contract of sale—Specific performance—Sale disguised as mortgage—Bona fide transfer—Notice.

A mortgage may not be quite in good faith qua a person entitled to pre-empt, if a sale was disguised under its cloak, but it may be a good and a bona fide transfer as against a person who claims specific performance of an earlier contract of sale entered into by him with the mortgagor. [p. 397, col. 2.]

Where in a suit by a prior mortgagee against the mortgagor and the subsequent mortgagee for specific performance of a contract of sale of the mortgaged property, entered into between the prior mortgagee and the mortgagor before the contract of the subsequent mortgage, it was found that the subsequent mortgagee knew of the prior mortgage and also of the sale to the prior mortgagee of the share belonging to the mortgagor's brother, and that the terms of the subsequent mortgage were such as to make that mortgage well nigh irredeemable:

Held, that none of the above circumstances could be regarded as sufficient proof of the fact that the subsequent mortgagee had notice of the contract of sale. [p. 397, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 16th October 1913, reversing the order of the Subordinate Judge, Sitapur, dated the 30th April 1913.

(1) 2 C. 184 at p. 191; 3 I. A. 291; 26 W. R. 36.

(2) (1902) A. C. 465; 71 L. J. Q. B. 939; 66 J. P. 757; 87 L. T. 341; 18 T. L. R. 791; 51 W. R. 140.

(3) 6 C. 687; 1 C. L. R. 169.

(4) 9 C. 810; 12 C. L. R. 453.

(5) 5 Ind. Cas. 236; 11 C. L. J. 346; 14 C. W. N. 451.

(6) 10 Ind. Cas. 355; 15 C. L. J. 217.

MAHADEO PRASAD V. GAJRAJ SINGH.

Babu Basdeo Lal, for the Appellant.

Messrs. St. George Jackson and Muzaffar Husain, for Respondents Nos. 1 and 3.

JUDGMENT.—In this case there was a contract of sale by Arjun Singh for the sale of his half share in certain property to the plaintiffs in lieu of Rs. 260. The plaintiffs held a mortgage on that property from before and were in possession of it as mortgagees. Arjun Singh subsequently refused to carry out the contract, and sued the plaintiffs to pre-empt a sale of the other half share which was effected by his brother Sewa Singh. To raise money for the expenses of the pre-emption case he mortgaged his half share with Ram Bhajan, the defendant-appellant, in lieu of Rs. 250 out of which Rs. 240 were paid before the Sub-Registrar. The suit for pre-emption was decreed against the plaintiffs, but the decree subsequently became abortive owing to the non-payment of the purchase-money or owing to a payment after the due date. Meanwhile the plaintiffs brought this suit to enforce the contract of sale in regard to the half share belonging to Arjun Singh. Arjun Singh and his mortgagee Ram Bhajan were made parties to the suit. The Court of first instance dismissed the suit. The lower Appellate Court, however, decreed it against both the defendants, holding that the mortgage of Ram Bhajan was illusory and was really a sale disguised as a mortgage and that the assertions of good faith on the part of Ram Bhajan were "absurd." That finding is stated to be based on the circumstances that Ram Bhajan knew of the prior mortgage on the property and of the sale by Sewa Singh, and that the terms of the mortgage in favour of Ram Bhajan were such as to make the mortgage well nigh irredeemable. None of these circumstances can, however, be regarded as sufficient proof of the fact that Ram Bhajan had a notice of the contract of sale. The learned District Judge observes that Ram Bhajan could scarcely have helped supposing that when the mortgagee had managed to buy half the property, he would attempt to prevent the other half from going out of his hands and that Arjun Singh was likely to sell it because he had no money. A party cannot, however, be charged

with notice by considerations of that nature. Under section 27, clause (b), of the Specific Relief Act a contract of sale cannot be enforced against a *bona fide* transferee for value. A mortgage may not be quite in good faith *qua* a person entitled to pre-empt, if a sale was disguised under its cloak, but it may be a good and a *bona fide* transfer as against a person who claims specific performance of an earlier contract of sale entered into by him with the mortgagor. There is no sufficient proof of notice in this case, and the finding is vague and based largely on surmises. The appeal is, therefore, allowed and the plaintiffs' claim is dismissed with costs here and below so far as the rights of Ram Bhajan under the mortgage of the 12th June 1911 are concerned. The plaintiffs-respondents will bear their own costs throughout.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 120 OF 1913.

April 13, 1915.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

Chaudhri MAHADEO PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GAJRAJ SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Attestation proper—Mortgage-deed not executed in attesting witnesses' presence—Evidence Act (I of 1872), s. 71—Amendment of plaint at late stage—Court, power of—Simple mortgage-deed treated as money-bond—Consideration of mortgage, payment of, proof as to—Simple money-decrec—Debt contracted by Hindu father, suit on—Immoral purpose, plea as to—Court, duty of.

Where a mortgagor does not execute the mortgage-deed in the presence of the attesting witnesses, there is no proper attestation of the deed as required by section 59 of the Transfer of Property Act. And in such a case the evidence of some other person is not, under section 71 of the Evidence Act, sufficient to prove the due attestation required by law. [p. 398, col. 2.]

Shamu Putter v. Abdul Kadir Rowthan, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12

MAHADEO PRASAD v. GAJRAJ SINGH.

M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.), referred to.

Where in a suit upon a simple mortgage the plaintiffs ask for a decree for sale of the mortgaged property, the Court can even at a late stage of the case allow them to amend their plaint by adding an alternative prayer for a simple money-decree. [p. 399, col. 2.]

A deed of simple mortgage can be treated as a simple money-bond, if it fails for want of proper attestation to take effect as a mortgage-deed. [p. 399, col. 2.]

The recital in a mortgage-deed to the effect that the money was paid to the mortgagor, and the statement in the registering officer's endorsement to the effect that the money was paid by the mortgagee to the mortgagor in his presence, does, in the absence of any evidence to the contrary, prove the passing of consideration, although it is found that the money was as a matter of fact paid by the mortgagee's son. [p. 400, col. 1.]

A simple money-decree can be obtained in a suit upon a simple mortgage-deed, which contains a personal covenant to pay. [p. 400, col. 1.]

Where in a suit against the sons of a Hindu father upon a debt incurred by him, they plead that they are not liable to pay the debt on the ground that it was contracted for immoral purposes, the plea thus raised should be examined and decided before the decree is passed, and not left to be determined in the execution department. [p. 400, col. 2.]

Appeal from the decree of the Subordinate Judge, Tahsil Biswan, dated the 28th August 1913.

Syed Nabi Ullah and Babu Puttoo Lal, for the Appellants.

Babu Ram Chandra, for Respondents Nos. 1, 3 and 4.

JUDGMENT.—This appeal arises out of a suit brought to recover Rs. 21,642-1-9, principal and interest, alleged to be due in respect of a mortgage executed by one Chaudhri Gajraj Singh on the 21st of June 1907. At the time the suit was brought the mortgagor had died and the two defendants who were impleaded were the sons of the mortgagor. The mortgage was described as being a simple mortgage and the plaintiffs asked for a decree for sale of the mortgaged property. At a somewhat late stage of the case the plaint was amended by the addition of a prayer in which the plaintiffs asked that if the Court for any reason could not pass a decree for sale of the mortgaged property, it should at any rate pass a simple money-decree against the defendants. Various defences were put forward in answer to the plaintiffs' suit. One plea taken was that the defendants and their

father constituted a joint Hindu family, that the property mortgaged was joint family property and that the money alleged to have been taken was not due in respect of any antecedent debt nor had it been borrowed for the benefit of the family. The defendants also pleaded that their father Chaudhri Gajraj Singh was a man of extravagant and immoral habits and that if it were shown that he had borrowed any money from the plaintiffs the defendants were not bound. It was admitted that the family was a joint family, although it was denied that the property mortgaged was joint family property. The plaintiffs also set up a case that the money which had been borrowed under the mortgage-deed in suit had been taken for joint family purposes. The document upon which the plaintiffs relied was a registered document which purported to be attested by two witnesses Har Prasad and Basit Ali, but when these witnesses were examined in the Court below it came to light that the mortgagor Chaudhri Gajraj Singh had not executed the deed in their presence and it, therefore, became apparent that there was no proper attestation of the deed required by law (section 59 of the Transfer of Property Act). According to the interpretation placed upon that section by their Lordships of the Privy Council in the case reported as *Shamu Patter v. Abdul Kadir Rowthan* (1), attestation of a mortgage-deed must be made by the witnesses signing their names after seeing the actual execution of the deed. The Subordinate Judge appears to have believed the statements of these witnesses but he was prepared, upon what we hold to be an erroneous interpretation of the provisions of section 71 of the Evidence Act, to decide that the evidence of another person, one Gajraj Singh the plaintiff No. 1, was sufficient to prove due attestation of the mortgage within the meaning of section 59. However, the plaintiffs' Counsel did not press for a decision to this effect, and the result was that the case proceeded on the footing that the suit was a suit upon a simple registered money-bond. Another

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

MAHADEO PRASAD V. GAJRAJ SINGH.

defence which was put forward was with regard to the passing of consideration. The learned Subordinate Judge was of opinion that in view of the recital contained in the deed to the effect that the money had been made over to the mortgagor and in the absence of any evidence on the part of the defendants to show that the consideration had not passed, it was proved that *Chaudhri Gajraj Singh* had actually received the money. The learned Subordinate Judge also relied upon the statement contained in the registering officer's endorsement to the effect that the money had been paid to the mortgagor in his presence. It is true that this endorsement shows that the money had been received from the mortgagees, whereas according to the evidence given by the plaintiff No. 1 *Gajraj Singh*, who is the son of one of the mortgagees, the money was actually paid by him in the presence of the Sub-Registrar. As regards this matter the Court below was of opinion that there was in reality no error in the statement contained in the endorsement to the effect that the money had been received from the mortgagees, for he held that in the circumstances *Gajraj Singh* was representing the mortgagees for the purpose of paying the money into the hands of *Chaudhri Gajraj Singh* the mortgagor. Another point which was debated in the Court below was as to whether or not the plaintiffs were entitled to a simple money-decree. The decision of this question depended upon the construction of the deed in suit and the point to be decided was, whether or not there was a personal covenant to pay. The deed was a simple mortgage-deed and the learned Subordinate Judge relying on various authorities came to the conclusion that there was a personal covenant in respect of which a simple money-decree could be given. A fourth point which was raised in this connection was one of limitation. The finding of the learned Subordinate Judge was to the effect that as the suit was one on a registered bond the plaintiffs had six years within which to sue. He held that the claim was within time. No issue was raised or tried with reference to the plea which the defendants had raised in their written statement to the effect that their

father *Chaudhri Ghjraj Singh* was a man of vicious and immoral habits. The Subordinate Judge without determining this point gave the plaintiffs a decree and referring to certain arguments which were raised on behalf of the defendants in connection with the liability to pay, he directed that the question as to whether the defendants were exempt from the liability on the ground that the debt had been contracted for immoral purposes, should be tried out in the execution department.

The defendants have appealed to this Court and twelve grounds have been taken in the memorandum of appeal. We have heard learned Counsel in support of these grounds and are of opinion that save as regards one of these grounds of appeal the appellants have no case here. In the first ground of appeal it is pleaded that the plaintiffs should not have been allowed to amend their plaint at a late stage of the case. This plea has been raised with reference to what has been stated above, namely, the amendment by which the plaintiffs were allowed to add a prayer for a simple money-decree. We can see no reason why this amendment should not have been allowed even at a late stage of the case. Then again it is contended in the second ground of appeal that the learned Judge of the Court was in error in holding that the instrument in suit had been proved. We are unable to allow this contention. It seems to us that there is ample reliable evidence on record to show that as a matter of fact *Chaudhri Gajraj Singh* did execute the deed in question. As regards the third ground of appeal it contains no substance. It is impossible to argue that the Court below should have held that the instrument in question should not be treated either as a mortgage-deed or as a bond. The Subordinate Judge was clearly entitled to treat the document as a bond, if it failed for want of proper attestation to take effect as a mortgage-deed. The fourth ground of appeal raises the question of the passing of consideration. As regards this we have very little to say. We think the Court below was entirely right in holding that it was proved that the money borrowed from the mortgagees had been actually

MAHADEO PRASAD V. GAJRAJ SINGH.

paid to *Chaudhri Gajraj Singh*. We agree with the Subordinate Judge in holding that there is not necessarily any inconsistency between the statement contained in the registration officer's endorsement and the statement made by the plaintiff No. 1 *Gajraj Singh*, to the effect that he handed over the money to *Chaudhri Gajraj Singh* in the presence of the registering officer. We have no doubt whatever that *Chaudhri Gajraj Singh* received this money and we find accordingly. The *fifth* ground treats of this same matter. We agree, as we have already said, with the Court below in holding that *Gajraj Singh* plaintiff No. 1 duly represented the mortgagees for the purpose of paying the money to the mortgagor in the presence of the Sub-Registrar. The *sixth* ground of appeal deals with the finding on the third issue, namely, whether the plaintiffs were or were not entitled to a simple money-decree. As regards this there can be no question. The document is in the form of a simple mortgage-deed and we think the Court below was right in holding that there was a personal covenant to pay—a covenant upon which a simple money-decree could be given. As regards the *seventh* ground of appeal which raises the question of limitation, we hold that the decision of the Court below was perfectly correct. The document is a registered document and the plaintiffs were entitled to bring a suit within six years from the date of the execution of the instrument. The *eighth*, *ninth*, *tenth* and *twelfth* grounds of appeal relate to the liability of the defendants. We may say here at once that we think the Subordinate Judge was wrong in not deciding the question of the liability of the sons of the mortgagor for the debt in suit. These defendants had in their written statement of defence distinctly raised the plea that they could not be held liable for payment of the sum borrowed by their father on the ground that the debt, if incurred at all, had been incurred for immoral purposes. In this connection the learned Counsel for the respondents has relied upon the provisions of sections 52 and 53 of the Code of Civil Procedure. We are not, however, dealing with procedure in execution to which these two sections relate. It seems to us that the plea taken by these defendants should have been examined and

decided before the decree was passed. It might have so happened that the investigation of this matter would have shown that the sons were in no way liable to satisfy the debt in question. In that case there would have been no necessity for bringing matters to the stage of execution. We fail to see why the defendants should be obliged to wait till execution proceedings are taken in order to have this question determined. It was clearly then right to have the matter determined before any decree was passed. The only other ground of appeal to be noticed is ground No. 11 which relates to the question of interest. As regards this all we need say is that the learned Counsel for appellants has not laid any stress upon this particular ground of appeal. As we are of opinion that the question as to whether the debt in suit was or was not tainted with immorality ought to have been tried out before the suit was decided, we find it necessary to take action under the provisions of Order XLI, rule 25, of the Code of Civil Procedure. We, therefore, direct that the following issue be remitted for trial to the Court of the Subordinate Judge:—

"Does the sum of Rs. 15,000 borrowed from the plaintiffs by *Chaudhri Gajraj Singh* under the bond in suit, or any portion of this sum, constitute a debt incurred by *Chaudhri Gajraj Singh* for immoral purposes such as the defendants are not liable under the Hindu Law to discharge."

Both parties will be at liberty to produce evidence on this issue. Two months will be allowed for return of the finding on this issue and ten days to run from the date of the finding will be allowed to the parties to file objections, if they so desire.

Issue remitted.

MUTHUVEERAPPA CHETTI v. RAMASWAMI CHETTI.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 208 OF 1910 AND
176 TO 178 OF 1911.

December 8, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.MUTHUVEERAPPA CHETTI *alias*
VELLAYAPPA CHETTI—PLAINTIFF—
APPELLANT IN NOS. 208, 177 AND RESPONDENT
IN NO. 178 AND DEFENDANT—RESPONDENT
IN NO. 176*versus*RAMASWAMI CHETTI AND OTHERS—
DEFENDANTS—RESPONDENTS IN NOS. 208,
177 AND APPELLANTS IN NO. 178 AND
PLAINTIFFS—APPELLANTS IN NO. 176.*Contract Act (IX of 1872), ss. 15, 23, 24, 72—
Coercion—Agreement to stifle prosecution of non-com-
poundable offence—Payment of money by accused to
prosecutor—Suit for return of money—Hundi executed
by accused, whether enforceable—Arbitration—Payment
under award, whether makes any difference—Malicious
prosecution, requisites of.*Where, during the pendency of a criminal pro-
secution for a non-compoundable offence, the parties
referred the matter to arbitration, and, in pursuance
of the arbitrators' decision, the accused paid a sum
of money to the prosecutor and executed a *hundi*
for the balance of the total amount agreed upon, as
consideration for the abandonment of the prosecution:*Held*, that the money, having been paid with a
view to stifle a prosecution by a person under arrest,
amounted to payment under coercion within the
meaning of section 72 of the Contract Act and that
the person to whom it was paid was bound to return
it, the parties were not *in pari delicto*; [p. 402, col.
1; p. 404, col. 2.]*Kanhaya Lal v. National Bank of India Ltd.*, 18
Ind. Cas. 949; 17 C. W. N. 541; (1913) M. W. N. 406;
13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15
Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 134
(P. C.); 40 C. 598; 40 I. A. 56; *Atkinson v. Denby*,
(1861) 6 H. & N. 778; 123 R. R. 824; 30 L. J. Ex.
361; 7 Jur. (N. S.) 1205; 4 L. T. (N. S.) 252; 9 W. R.
539; *Smith v. Monteith*, (1844) 13 M. & W. 427; 2 D.
& L. 358; 14 L. J. Ex. 22; 9 Jur. 310; 153 E. R. 178; 67
R. R. 654; *Smith v. Bromley*, 2 Dougl. 636n; 99 E. R.
441; *Williams v. Hedley*, (1807) 8 East 378; 103 E.
R. 388; 9 R. R. 473; *Unwin v. Leaper*, 1 M. & G.
747; 1 Drink 3; 10 L. J. C. P. 41; 4 Jur. 1037; 56 R.
R. 522, referred to.*Amjadenessa Bibi v. Rahim Baksh Sikdar*, 28 Ind.
Cas. 713; 19 C. W. N. 393; 21 C. L. J. 642; 42 C. 286;
Flower v. Sadler, 9 Q. B. D. 83; 46 J. P. 503
affirmed 10 Q. B. D. 572 and *In re Mapleback, Ex
parte Caldercott*, 4 Ch. D. 150; 46 L. J. Bk. 14; 35 L.
T. 503; 25 W. R. 103; 13 Cox. C. C. 374, distinguished.that even if the payment was induced only in part
by the illegal agreement, the whole consideration
must fail under section 24 of the Contract Act; [p.
404, col. 2.]*Clark v. Woods*, 2 Ex. 395; 3 New Sess. Cas. 253;
17 L. J. M. C. 189, referred to.that the mere fact that the payment had
been directed by the award of arbitrators did not
make it legal or disentitle the person who had made
it from recovering, inasmuch as the latter's consent
to the arbitration was obtained by means of the
criminal prosecution; [p. 402, col. 1.]that as the consideration for the *hundi* was
illegal under section 23 of the Contract Act, it was
unenforceable and no action lay on it. [p. 403, col. 2.]*Nujebur Rahman v. Muktashed Husain*, 15 Ind. Cas.
253; 40 C. 113; 16 C. W. N. 554; *Mottai Reddi v.
Thanappa Reddi*, 26 Ind. Cas. 181; 37 M. 385; and
Jones v. Merionethshire Building Society, (1892) 1
Ch. 173; 61 L. J. Ch. 138; 65 L. T. 695; 40 W. R. 273;
17 Cox. C. C. 389, followed.*Per Wallis, C. J.*—The right of a person, who pays
money to another under coercion or in pursuance of
an illegal agreement, to claim its refund is not lost
by the fact that it was really due to the payee. [p.
402, col. 1.]*Per Seshagiri Aiyar, J.*—The defendant in a suit for
refund of money paid to stifle a prosecution is not
estopped from showing that the money which he
seeks to retain was really due to him if he has
specifically put forth such a plea. [p. 404, col. 1.]*Shridhar Balkrishna v. Babaji Mula*, 28 Ind. Cas.
134; 16 Bom. L. R. 586; 38 B. 709; *Cocks v. Mast-
erman*, (1829) 9 B. & C. 902; 109 E. R. 335; 4 Man.
& Ry. 676; 8 L. J. K. B. (O. S.) 77; and *Imperial Bank
of Canada v. Bank of Hamilton*, (1903) A. C. 49; 72
L. J. P. C. 1; 51 W. R. 289; 19 T. L. R. 56; 87 L. T.
457, followed.To sustain an action for malicious prosecution, the
plaintiff is bound to prove that the prosecution was
launched without reasonable or proper cause and not
simply that it was improper or had an ulterior
object. The fact that, as the result of a compact
between the parties who had settled their civil
disputes, evidence as little incriminating the plaintiff
as possible was let in by the defendant, is no proof of
absence of reasonable or probable cause. [p. 403,
col. 1.]Appeals Nos. 208 of 1910 and 176 of 1911
against the decrees of the Court of the
Subordinate Judge of Madura East, in
Original Suits Nos. 75 and 122 of 1909,
respectively.Appeals Nos. 177 and 178 of 1911 against
the decree of the Court of the Subordinate
Judge, Madura East, in Original Suit No.
198 of 1908.Messrs. T. Rangachariar, S. Scundararaja
Aiyangar and S. Srinivasa Aiyangar, for the
Appellants in A. S. Nos. 176 of 1911 and
178 of 1911 and for the Respondents in A.
S. Nos. 177 of 1911 and 208 of 1910.Mr. R. Kuppuswamy Aiyar, for the Respond-
ent in A. S. Nos. 176 of 1911 and 178 of
1911 and for the Appellant in A. S. No. 177
of 1911 and 208 of 1910.

JUDGMENT.

WALLIS, C. J.—The Subordinate Judge
has found in this case—and we see no

MUTHUVEERAPPA CHETTI v. RAMASWAMI CHETTI.

reason to differ from his finding on the evidence—that the plaintiff was induced to pay Rs. 7,000 to the defendants in order that a criminal prosecution instituted by the defendants against the plaintiff for an offence which was not compoundable should not be proceeded with. The agreement to stifle the criminal prosecution was illegal, and it is said that money paid in pursuance of an illegal agreement cannot be recovered back. No doubt that is generally so according to the maxim *in pari delicto, potior est conditio defendentis*, but it appears to be well established that when a payment of money is obtained by means of such an agreement the parties are not to be considered *in pari delicto* and that the money may be recovered back. In Bullen and Leake's Precedents of Pleadings, second edition, page 51, the law is stated as follows: "But where the plaintiff having paid the money in execution of an illegal contract or for an illegal purpose is not *in pari delicto* he may in some cases recover it; as when the money was paid under oppression, as the money paid by a bankrupt to obtain his certificate [*Smith v. Bromley* (1)]: money paid by the defendant in a penal action to compound the action [*Williams v. Hedley* (2) and *Unwin v. Leaper* (3)]. In *Williams v. Hedley* (2) an action for penalties had been brought by the defendant against the plaintiff in respect of certain usurious transactions entered into by the latter, and to escape the penal action the plaintiff had been induced to pay the persons who put forward Hedley the amount of a debt due to them by a third party, and it was held the money could be recovered back. Similarly in *Unwin v. Leaper* (3) the Jury were directed that the money could be recovered if it had not been paid voluntarily but by coercion of the threatened penal actions. The Subordinate Judge held that the evidence did not show coercion within the meaning of the Contract Act; but it is now settled that that is not the test. *Kanhya Lai v. National Bank of India Ltd.* (4). It makes no

(1) 2 Dougl. 616n; 99 E. R. 441.

(2) (1807) 8 East 378; 103 E. R. 388; 9 R. R. 473.

(3) 1 M. & G. 747; 1 Dring 3; 10 L. J. C. P. 41; 4 Jur. 1037; 56 R. R. 522.

(4) 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541 (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104 (P. C.); 40 L. A. 56.

difference, in my opinion, here that money was found payable by the arbitrators as the plaintiff's consent to the arbitration was obtained by means of the criminal prosecution, or that it may have been really due, as in either case the plaintiff is entitled to get back what was obtained from him by coercion.

The appeal must be allowed with interest at 6 per cent. from the date of plaint. No order as to costs. As regards the connected appeals I agree with the judgment of my learned brother.

SESHAGIRI AIYAR, J.—The plaintiff was the agent of the defendants at Rangoon. He returned in 1905 to Madras. Disputes arose at once regarding the plaintiff's management. An attempt at mediation between the parties was not successful. About the end of 1907 matters came to a crisis. The defendants had a plaint prepared to be filed against the plaintiff in August of that year (Exhibit C). In November, they instituted a complaint for criminal breach of trust in respect of a pair of bangles. The plaintiff was arrested on a warrant on the 30th of November and was released on bail while the difference between the parties was being adjusted. Two arbitrators were selected on the 1st of December, one by the plaintiff and the other by the defendants. As a result of their mediation, the plaintiff paid Rs. 7,000 to the defendants and gave a *hundi* for Rs. 3,000. No evidence was offered by the defendants at the adjourned hearing of the criminal prosecution and the plaintiff was acquitted.

Under these circumstances three suits were instituted in the Sub-Court of Madura East which have given rise to four appeals in this Court. The plaintiff's first suit was for damages for malicious prosecution. The Subordinate Judge awarded Rs. 260 as damages. In Appeal No. 177 of 1911, the plaintiff complains against the inadequacy of the amount decreed. Appeal No. 178 of 1911 is by the defendants disputing the right to any damages. Original Suit No. 75 of 1909 was brought by the plaintiff for the refund of the sum of Rs. 7,000 paid by him. The lower Court dismissed the suit. Appeal No. 208 of 1910 is against that decree. The defendants instituted Original Suit No. 122 of 1909

MUTHUVEERAPPA CHETTI v. RAMASWAMI CHETTI.

to recover the Rs. 3,000 under the *hundi* executed in their favour by the plaintiff. That suit was also dismissed. Appeal No 176 of 1911 is against that decision.

Appeals Nos. 177 and 178 of 1911 can be disposed of shortly. I am unable to agree with the learned Subordinate Judge that the prosecution for criminal breach of trust was instituted without reasonable and probable cause. The plaintiff admits that he purchased a pair of bangles for Rs. 10 with a view to sell it at a profit. It is also admitted that it was not sold. His case is that he melted the bangles and sold the gold for Rs. 10. No explanation is given as to why this extraordinary procedure was adopted. He is unable to point to any other instance in which a similar thing was done. *Prima facie*, the explanation is very suspicious. By melting, the cost of making is lost. The entry of the sale of gold does not carry the matter any further. The plaintiff was in the habit of purchasing gold for making bangles. He has been selling gold also. The entry as to the sale of the gold for Rs. 10-4-0 may relate to the purchased gold and not to the melted gold. The total quantity of gold accounted for excluding this item is found by the Subordinate Judge not to exceed the quantity purchased. I think the explanation of the plaintiff is unconvincing. At any rate the defendants cannot be said to have had no reasonable or probable cause for believing that the plaintiff misappropriated the bangles. The immediate occasion and, very likely, the motive for instituting the complaint was to put pressure on the plaintiff to render true and proper accounts of his agency; but that is not enough; the plaintiff is bound to prove that the prosecution was launched without reasonable and probable cause, and not simply that it was improper or had an ulterior object. It was said that the evidence given by the defendants' agent at the conclusion of the criminal trial showed that the defendants were satisfied that the bangles were accounted for. The parties having settled their civil rights it was part of the compact that the criminal prosecution should not be pressed. Consequently evidence a little incriminating as

possible was given at the final trial. This evidence does not indicate that the defendants had no grounds for preferring the complaint. In my opinion, the plaintiff has failed to prove his case. Appeal No. 178 of 1911 must be allowed and Appeal No. 177 of 1911 must be dismissed. The result will be that Original Suit No. 198 of 1908 is dismissed with costs throughout.

In dealing with the other two appeals, I accept in their entirety the findings of the learned Subordinate Judge. No serious attempt was made on either side to show that he was wrong; and the evidence fully supports his conclusions. Briefly stated, the facts established are: (1) that the plaintiff failed to render proper accounts of the business, (2) that the salary chit was not returned to him (an almost conclusive indication among Nattukottai Chetties that the transaction was not closed between the parties), (3) that the defendants were prepared to institute a suit against the plaintiff for nearly Rs. 30,000, (4) that the defendants resorted to the expedient of a criminal prosecution to coerce the plaintiff to come to terms, (5) that the plaintiff was arrested, (6) that while on bail the parties referred their differences to two arbitrators and (7) that as a result of the mediation it was agreed that the prosecution against the plaintiff should not be pressed, provided he gave Rs. 7,000 at once and executed a *hundi* for Rs. 3,000 more. On these facts the question is, whether the defendants are entitled to recover the amount due on the *hundi* and whether the plaintiff is entitled to the money paid by him. There can be no doubt on the first question. As the document was given with a view to stifle the prosecution, Courts cannot give a decree on the *hundi*. Section 23 of the Contract Act makes the consideration illegal. *Nujebur Rahman v. Muktashed Husain* (5), *Mottai Reddy v. Thanappa Reddy* (6) are directly in point. In *Jones v. Merionethshire Building Society* (7) Lord Justice Lindley says: "If any bargaining could be shown here to stifle a prosecution for a criminal act, the action certainly could not be maintained." Lord

(5) 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854.
 (6) 26 Ind. Cas. 181; 37 M. 385.
 (7) (1892) 1 Ch. 174; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 17 Cox, C. C. 389.

MUTHUVEERAPPA CHETTI v. RAMASWAMI CHETTI.

Justices Bowen and Fry are equally emphatic. The Subordinate Judge was, therefore, right in dismissing the suit. The appeal should be dismissed with costs.

The claim for the refund cannot be so easily disposed of. Lord Justice Bowen in the case above referred to says: "There might be a difficulty in recovering back money paid on account of the well-known ground which is shortly expressed in the maxim *melior est conditio defendentis*." It may be that if both parties are *in pari delicto*, the position of the defendant may give him an advantage. But where one party uses his position as prosecutor to secure moneys which but for the arrest he would not have got, the principle of the parties being *in pari delicto* cannot apply. Mr. Rangachariar foresaw this difficulty and contended that the payment was under the award of the arbitrators, and that a decree directing the refund would offend against the principle of placing the parties in *status quo ante*. If, in this case, the defendants had pleaded that they were entitled to retain the amount towards what is due to them from the plaintiff, I would have been inclined to direct the trial of an issue in that behalf. I agree with the dictum in *Shridhar Balkrishna v. Babaji Mula* (8) that the defendant should not be estopped from showing that the money which he seeks to retain was really due to him. See also *Cocks v. Masterman* (9) and *Imperial Bank of Canada v. Bank of Hamilton* (10). But that is not the defendants' case. Therefore the only question is, whether the money can be recovered having been paid as a consideration for not proving the criminal prosecution. In the first place we have the statutory declaration in section 72 of the Contract Act that a person to whom money is paid under coercion must repay it. It was recently held by the Judicial Committee that the term *coercion* is not synonymous with the definition in the Act. *Kanhaya Lal v. National Bank of India Ltd.* (4). In my opinion the plaintiff would not have paid the Rs. 7,000 had he not been under arrest. He was coerced into paying the amount by

(8) 28 Ind. Cas. 134; 38 B. 709; 16 Bom. L. R. 586.
 (9) (1829) 9 B. & C. 902; 103 E. R. 335; 4 Man. & Ry. 676; 8 L. J. K. B. (o. s.) 77.
 (10) (1903) A. C. 49; 72 L. J. P. C. 1; 51 W. R. 259; 87; L. T. 457; 19 T. L. R. 56.

the prosecution and by the promise to withdraw it. The decision in *Amjadenessa Bibi v. Rahim Baksh Sikdar* (11) is distinguishable from the present case. It was a compoundable offence and the learned Judges found that the defendant did not use his dominant position to get the money. In effect the finding was that there was no coercion. On the other hand *Atkinson v. Denby* (12) lays down distinctly that if the agreement was to stifle a prosecution money can be recovered. Even if the payment was induced only in part by the agreement, the whole consideration must fail. See section 24 of the Contract Act and *Clark v. Woods* (13). Mr. Rangachariar relied on *Flower v. Sadler* (14). In that case, there was no arrest. The party lawfully bound to pay paid the amount as soon as he was threatened with prosecution. The principle of that case is that there is nothing illegal in a man recovering his just dues by the use of threatening language so long as there is no agreement to stifle a prosecution. The illegality consists not in using questionable means to secure a lawful debt, but in agreeing to defeat public justice. In *In re Mapleback, Ex parte Caldecott* (15) also there was no arrest. In *Smith v. Monteith* (16) it was held that when a man is arrested under a process of law devised for recovering money, he is not entitled to be paid back. This is obvious. Otherwise the provision of our Code for arrest in execution will be rendered nugatory.

I am, therefore, constrained to hold that the plaintiff is entitled to the refund. As the claim of the defendants appears to have been just and reasonable there will be interest at 6 per cent. per annum on the amount of the decree only from the date of the plaint. Each party will bear his own costs throughout.

Appeals Nos. 208 & 178 allowed;

V.R.P. Appeals Nos. 176 & 177 dismissed.

(11) 28 Ind. Cas. 713; 42 C. 286; 19 C. W. N. 383; 21 C. L. J. 642.

(12) (1861) 6 H. & N. 778; 123 R. R. 824; 30 L. J. Ex. 361; 7 Jur. (N. S.) 1205; 4 L. T. (N. S.) 252; 9 W. R. 539.

(13) 1 Ex. 395; 3 New Sess. Cas. 253; 17 L. J. M. C. 189.

(14) 9 Q. B. D. 83; 46 J. P. 503; affirmed, 10 Q. B. D. 572.

(15) 4 Ch. D. 150; 46 L. J. Bk. 14; 35 L. T. 503; 25 W. R. 103; 13 Cox, C. C. 374.

(16) (1844) 13 M. & W. 427; 2 D. & L. 358; 14 L. J. Ex. 22; 9 Jur. 310; 153 E. R. 178; 67 R. R. 654.

GOBIND RANI DASI v. BRINDA RANI DASI.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 290 OF 1915.

August 27, 1915.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice N. R. Chatterjea.

GOBIND RANI DASI—DEFENDANT—
APPELLANT

versus

BRINDA RANI DASI AND OTHERS—
PLAINTIFF AND OTHER—DEFENDANTS
—RESPONDENTS.

*Receiver in a mortgage suit, matters to be considered
by Court in appointing—Protection of mortgagee's
interests.*

Where in a mortgage suit, the mortgagee applies
for the appointment of a Receiver, the primary
question for consideration is, what steps should be
taken to protect the mortgagee.

Where some of the defendants in a mortgage suit,
who as presumptive reversioners to an estate
mortgaged by a Hindu widow joined in the execution
of the mortgage, support the application of the mort-
gagee for the appointment of a Receiver, the Court
should not consider the matter from the point of
view of the reversioners as from that of the mortgagee.

Appeal against the order of the Sub-
ordinate Judge, Dacca, dated the 16th and
17th June 1915.

Babu Surendra Nath Guha, for the Appel-
lant.

Babus Dhirendra Lal Kastgir, Joges Chunder
Bose, Ambicapada Chowdhury and Prokash
Chunder Pakrasi, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed
against an order for the appointment of a
Receiver in a mortgage suit. The application
for the appointment of a Receiver was made
by the mortgagee. That application was sup-
ported by some of the defendants who, at the
instance of the mortgagee, had joined in the
execution of the mortgage, as they were the
presumptive reversioners to the estate, which
was granted by way of security by a Hindu
widow in possession of the properties left
by her husband. These defendants, though
responsible under the mortgage instrument
for repayment of the loan, have thus no
present interest in the mortgaged property.
The Court below was satisfied that the
mortgagor had wasted the property and
appointed a Receiver. The Court, however,
considered the matter, not so much from
the point of view of the mortgagee, as from
that of the reversioners. This clearly was
not the proper standpoint in the investiga-
tion of the case. When the mortgagee

applies in his suit for the appointment of
a Receiver, the primary question for con-
sideration is, what steps should be taken
to protect the mortgagee. Here the rever-
sioners-defendants have taken advantage of
the application by the mortgagee to secure a
benefit to themselves, as if they themselves had
instituted a suit to restrain the widow from
improperly dealing with her husband's estate
and had obtained an order for the appoint-
ment of a Receiver for the protection of their
contingent interest. This much, however, may
be charged against the lady that she did, on
one solitary occasion, fail to pay the Govern-
ment revenue punctually. But an under-
taking has been given in this Court that the
Government revenue will in future be paid at
least seven days in advance of the date fixed
for such payment, and the appellant has also
agreed that in the event of default, the
Receiver will take possession of the mortgag-
ed properties. She has given a further
undertaking that she will not, during the
pendency of the suit, alienate the mortgaged
property without the leave of the Court.
This entirely satisfies the mortgagee. But
the reversioners have vehemently urged that
the Receiver should be retained. We are un-
able to accede to this prayer. The rever-
sioners have resolutely attempted to divert
these proceedings from their true purpose
and to secure an advantage for themselves
by no means within the scope of a mort-
gage suit. In our opinion, the objections
taken by the reversioners are entirely ground-
less.

The result is that this appeal is allowed in
part; while the order appointing the Receiver
is maintained, the order directing the Receiver
to take possession is cancelled. In lieu
thereof we direct that the Receiver do take
possession, only if the appellant fails to
carry out the undertaking to deposit the
Government revenue, instalment by instal-
ment, at least seven days before the date fixed
for the payment thereof.

Let the order be sent down as early as
possible.

Appeal allowed in part

GAUTAM JAYACHAND GUJAR V. MALHARI BAPU BHONG.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 7 OF 1915.

February 16, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

GAUTAM JAYACHAND GU AR—
PLAINTIFF—APPELLANT

versus

MALHARI BAPU BHONG—

DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 3 (y), 10A—Suit by money-lender against agriculturist—Nature of suit, how to be determined.

Illustrations (a) and (c) to section 10A of the Dekkhan Agriculturists' Relief Act show that the intention of the Legislature was to apply the provisions of the section to suits by a money-lender to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage.

Reading clause (y) of section 3 of the Act by the light of section 10A the intention of the Legislature was that the nature of the suit under clause (y) should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage or no mortgage.

Second appeal from the decision of the Assistant Judge, Poona, in Appeal No. 83 of 1913, confirming the decree passed by the Subordinate Judge, at Baramati, in Civil Suit No. 423 of 1911.

Mr. D. A. Khare, for the Appellant.

Mr. K. H. Kelkar, for the Respondent.

JUDGMENT.

SCOTT, C. J.—The plaintiff claims as the owner of the land in suit under a sale-deed executed in his favour by the previous owner Achyut in 1887, and as such owner claims possession of the land from the defendant, who, he alleges, became his tenant under a lease of even date with the sale-deed. The defendant's case is that his father, and not the plaintiff, was the purchaser from Achyut; that the plaintiff was the *saukar* who advanced money, and payment of the interest was secured by the contemporaneous lease. The defendant's case has been substantially held to be established on the facts by concurrent findings of two lower Courts, and we are bound by those findings.

The question of law, however, has been raised whether this is a suit in which the real intention of the parties to the lease can be investigated under section 10A of the Dekkhan Agriculturists' Relief Act as being a suit for possession of mortgaged

property within the meaning of section 3 (y) of that Act. If strictly read it may be fairly argued that that clause (y) should only apply to suits where the plaintiff sues as mortgagee for possession of the mortgaged property. But the Dekkhan Agriculturists' Relief Act must be read as a whole, and as part of the Dekkhan Agriculturists' Relief Act we have section 10A, which says: "Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this Chapter, the Court shall, etc." Now the illustrations to that section, namely, illustrations (a) and (c) show that the intention of the Legislature, when this section was enacted, was to apply the provisions to suits by a money-lender suing to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage. That is exactly the case we have here, and therefore, reading clause (y) of section 3 by the light of section 10A, we must conclude that the intention of the Legislature was that the nature of the suit under clause (y) should not be determined by the frame of the plaint, but by the allegations of the parties which raised the question of mortgage or no mortgage. That being so, we think it cannot be doubted that the question raised upon the lease contemporaneous with the sale-deed of 1887 is a question which must be disposed of under section 10A. It has been so disposed of by the lower Courts, and, therefore, the point of law which has been raised must be decided in favour of the respondent. We affirm the decree and dismiss the appeal with costs.

Decree affirmed; Appeal dismissed.

SUNDARA REDDI v. VARADHARAJA PILLAI.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 28
OF 1915.

March 7, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.SUNDARA REDDI AND ANOTHER—
RESPONDENTS—APPELLANTS

versus

VARADHARAJA PILLAI—PETITIONER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 55 (4), 145 (c)—Civil Procedure Code (Act XIV of 1882), s. 336—Surety bond—Presentation of insolvency petition by judgment-debtor, whether discharges surety—Undertaking to produce judgment-debtor—Issue of notice to judgment-debtor—Waiver of notice—Execution petition, dismissal of, effect of, on surety's liability—Construction of surety bond—Statutory obligations of surety.

Section 145 (c), Civil Procedure Code, is wide in its scope and includes a case where security is given for the production of a judgment-debtor, who is arrested in execution of a decree and who is released on furnishing security and on expressing his intention to apply to be declared an insolvent. The section provides a summary remedy in execution for the realization of the security in execution to the extent to which the surety has made himself personally liable. [p. 408, cols. 1 & 2.]

Under section 55 (4), Civil Procedure Code, the mere filing of an insolvency petition by the judgment-debtor or the dismissal of an execution application does not terminate the surety's liability. [p. 408, col. 2.]

Lalji Sahoy v. Odaya Sunderi Mitra, 14 C. 757, distinguished.

A surety bond under section 55 (4), Civil Procedure Code, should strictly conform to the provisions of the section, and even where the liability is limited in its terms, the extent of the surety's liability is that created by section 145. [p. 408, col. 1.]

Where, under the terms of a surety bond, the sureties agreed to produce the judgment-debtor if the latter failed to appear after notice by Court, but intimated to Court, when asked whether they wanted notice to be sent to the debtor, that it was not possible to produce him as he and the decree-holder were colluding:

Held, that, though the issue of notice to the judgment-debtor was a condition precedent to the sureties' obligation to produce him, the sureties had waived that benefit. [p. 409, col. 1.]

Ashutosh Sikdar v. Behari Lal Kirtania, 35 C. 61 at p. 74; 11 C. W. N. 1011; 6 C. L. J. 320, followed.

Appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 219 of 1914, preferred against the order of the Court of the District Munsif of Villupuram, in Execution Petition No. 679 of 1914, in Original Suit No. 527 of 1912.

Mr. S. Srinivasa Aiyangar, Advocate-General, and Mr. S. Desikachariar, for the Appellants.

Mr. T. R. Venkatarama Sastriar, for Messrs. S. Ramaswamy Aiyangar and T. M. Vedantachariar, for the Respondents.

JUDGMENT.—One Velayudam Pillai was arrested in execution of a decree and produced before the District Munsif of Cuddalore. The judgment-debtor was released under section 55 (4), Civil Procedure Code, on his undertaking to file an insolvency petition and upon the appellants executing a security bond on 23rd January 1914. The judgment-debtor did not appear within 30 days, nor did he file an insolvency petition. The decree was transferred to the Villupuram Munsif's Court, and on the application of the decree-holder the sureties' moveables were attached. The appellants applied for the release of the properties from attachment, and this was ordered on 29th July 1914, the District Munsif being of opinion that the sureties had not undertaken to see that the judgment-debtor would present an insolvency petition within a month of the date of his release but merely to produce him in Court whenever the Court may direct. On 3rd August 1914, a notice was issued to the sureties to produce the judgment-debtor on or before 25th August 1914. They appear to have taken advantage of the presence of the judgment-debtor in Court to point him out on 18th August. The judgment-debtor was, however, allowed to go, in fact, it is said that he "ran away" from the Court. The sureties pleaded that they were absolved from their liability as they had produced the judgment-debtor on 18th August. The District Munsif did not accept the plea which was clearly untenable, but at the same time dismissed the execution application, Execution Petition No. 679 of 1914, on the ground that the sureties' liability under the bond was confined to their producing the judgment-debtor in connection with the insolvency proceedings. The decree-holder then appealed to the District Court. The District Judge reversed the lower Court's order, holding that the sureties were liable for the judgment-debtor's non-appearance within 30 days and also for the non-production of the judgment-debtor between 8th August and 25th August.

The following is a translation of the material portion of the security bond: "The plaintiff has got the defendant in the above suit arrested under a warrant for the decree

SUNDARA REDDI v. VARADHARAJA PILLAI.

amount and produced him in Court. The said defendant states that he is unable to discharge the said decree-debt and that he is putting in an insolvency petition. On whatever dates the Court may direct the defendant to appear (in Court) in connection with the above matter, the said defendant will appear in Court on all such dates. In the event of the defendant failing so to appear, we shall cause him to appear (in Court). In the event of our failing so to make him appear we shall deposit the said decree amount." We agree with the District Judge that it is to be regretted that the District Munsif should have accepted such a loosely worded security bond, which is not in the terms of sub-section (4) of section 55, Civil Procedure Code. Three questions were argued by the learned Advocate-General who appeared for the appellants. He contended (1) that the security bond, not being in accordance with the terms of section 55 (4), Civil Procedure Code, the sureties cannot be held to be liable; (2) that inasmuch as the judgment-debtor was not called upon to appear before the Court, the ancillary obligation which rested upon the sureties to produce him had not yet arisen; (3) that the execution proceedings having been closed, the sureties were no longer liable.

We are of opinion that there is no substance in objections (1) and (3) and that section 145 (c), Civil Procedure Code, which provides that "where any person has become liable as a surety for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon", is applicable. Section 145, Civil Procedure Code, differs in several respects from the corresponding section 253 of the Code of 1882. The present section applies not only to security bonds for the performance of a decree but the suretyship for the restitution of property taken in execution of a decree and also to bonds for the payment of money and for the fulfilment of any condition under an order of the Court. The terms of sub-section (c) are very wide and include, we think, a case where security is given for the production of a judgment-debtor, who is arrested in execution of a decree and who is released on furnishing security and on expressing his

intention to apply to be declared an insolvent. Section 145, Civil Procedure Code, provides a summary remedy in execution for the realisation of the security in execution to the extent to which the surety has made himself personally liable. In support of his contention that the execution proceedings having been closed the liability of the sureties ceased, the Advocate-General relies on the ruling in *Lalji Sahoy v. Odaya Sunderi Mitra* (1).

That was a decision under section 336 of the Code of 1882, and is, we think, no longer law. Under section 336 the security required was, that the judgment-debtor will appear when called upon and that he will within one month apply to be declared an insolvent. The words in sub-section 4 of section 55, Civil Procedure Code, "and that he will appear when called upon in any proceeding upon the application or upon the decree in execution of which he was arrested", seem to make it clear that the surety will not be released by the mere filing by the judgment-debtor of the petition for insolvency or by the dismissal of an execution application. Moreover, though a particular execution petition is terminated by its dismissal or its being struck off, all proceedings upon the decree do not come to an end. In the present case, all such proceedings under the decree were not terminated by the order passed on 29th July directing the release from attachment of the sureties' moveables or by the dismissal of Execution Petition No. 679 of 1914 or by the 'struck off' of the execution petition on which the judgment-debtor was under arrest when the security bond was executed. The present proceedings against the sureties are also proceedings upon the decree.

It remains to consider the argument advanced by the Advocate-General that, owing to the omission on the part of the Court to issue a notice to the judgment-debtor to appear in Court, the obligation of the sureties to produce the judgment-debtor has not yet arisen.

Admittedly no notice was sent to the judgment-debtor directing him to appear. It appears to be clear from the strict wording of the security bond that the undertaking which the appellants gave was that they would see that the judgment-debtor would

(1) 14 C. 757.

GOUR GOPAL SINHA v. GOSTA BEHARI PRAMANICK.

appear in Court whenever he was directed by the Court to do so, and that in the event of the judgment-debtor failing to appear they would produce him, in other words, 'the issue of a notice by the Court was a condition precedent to the sureties undertaking the obligation to produce him.

It appears, however, from the District Munsif's order on Execution Petition No. 679 of 1914 that during the hearing of the petition the sureties were asked to state whether they wanted to be given another chance of producing the debtor and a notice to be sent to the judgment-debtor to appear on a given date, and that their Vakil stated that the decree-holder and judgment-debtor were colluding and that it was no longer possible for them to produce the debtor.

Mr. Venkatarama Sastri contends that this amounted to a waiver on the part of the sureties of their right under the terms of the bond to have a notice sent to the judgment-debtor in the first instance before they could be held to be liable. We think that his contention is correct, and that there was nothing to prevent the appellants from waiving the right which they possessed to insist on a notice being first issued by the Court. The sureties, for whose benefit the clause was inserted, must be deemed to have waived the benefit of that clause and we do not see anything illegal in their so waiving it and sparing the decree-holder the useless expense and delay which would be incurred in sending notice to the judgment-debtor to appear, especially as such expense might ultimately have to be borne by themselves as sureties. Reference may be made to the observations of Mr. Mookerjee, J., in *Ashutosh Sikdar v. Behari Lal Kirtania* (2) cited by the respondents' Vakil. The security bond is not happily worded but we think that it has been rightly construed by the District Judge, and that the sureties were liable for the non-production of the judgment-debtor in pursuance of the Court's order dated 8th August 1914.

We accordingly dismiss the appeal with costs.

V.R.P.

Appeal dismissed.

(2) 35 C. 61 at p. 74; 11 C. W. N. 1011; 6 C. L. J. 320.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 455
OF 1914.

April 28, 1916.

Present:—Mr. Justice Teunon and

Mr. Justice Chowdhuri.

GOUR GOPAL SINHA AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

GOSTA BEHARI PRAMANICK AND

OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 37—Rent share of revenue payable by putnidars to credit and account of their landlords, if is—Apportionment of rent, when could be made.

The putnidars of a share in a revenue-paying estate owned by the plaintiffs and their co-sharers agreed by the document creating the putni to pay into the Collectorate the Government revenue payable in respect of their landlords' share in the zemindari. Subsequently the plaintiffs, opened a separate account in respect of their share under section 10 of Act XI of 1859:

Held, that the sum payable by the putnidars into the Collectorate to the account and credit of the landlords was rent and that the plaintiffs who had opened separate accounts, collected their share of the putni rent separately and made all their co-sharers parties to the suit, were entitled to have the same apportioned and to have an order directing the putnidars to pay into the Collectorate the share of revenue, payable by the plaintiffs to their separate credit and account. [p. 410, col. 1.]

Jotindra Mohun Tagore v. Jarao Kumari, 33 C. 140; 3 C. L. J. 7; 10 C. W. N. 201; 1 M. L. T. 8, distinguished.

Sreenath Chunder Chowdhry v. Mohesh Chunder Bundopadhyaya, 1 C. L. R. 453; and *Rajnarain Mitter v. Ekadasi Bag*, 27 C. 479; 4 C. W. N. 494, referred to.

Appeal against the decree of the District Judge, Murshidabad, dated the 2nd January 1914, confirming that of the Subordinate Judge of that place, dated the 31st January 1913.

Babu Ram Chandra Majumdar and Babu Panchanun Ghose for Babu Chandra Sekhar Banerjee, for the Appellants.

Babu Hemendra Nath Sen, for the Respondents.

JUDGMENT.—In this case it appears that the plaintiffs and their co-sharer defendants (Nos. 8 to 14) are the owners of a 12-anna odd share in a certain revenue-paying estate. The revenue payable on their share is Rs. 462 (*sicca*).

In the year 1242 their predecessors-in-interest created a putni taluk in respect of their share in certain mauzas in favour of the predecessor of the Pramanick defend.

GOUR GOPAL SINHA v. GOSTA BEHARI PRAMANICK

ants. By the document creating the *putni* it was arranged that the *putnidars* should year by year pay into the Collectorate the sum of Rs. 442, to be credited to the Government revenue payable in respect of their landlords' share in the *zemindari*.

In the year 1909, the plaintiffs who are the owners of a 5-anna 6½-ganda share found it expedient to open a separate account in respect of their share under section 10 of Act XI of 1859 and did so with effect from the September *kist* of that year.

The *putnidars* have, however, continued to make their periodical payments in one sum, and to the credit of the general account of the estate. The result has been that the payments have been credited to the residuary share and that the plaintiffs' share has fallen into arrears and has been advertised for sale to the loss and inconvenience of the plaintiffs.

What the plaintiffs seek in their suit then is to have the yearly sum payable by the *putnidars* apportioned between the plaintiffs and their co sharers-defendants and to obtain an order directing the *putnidar* defendants to make a separate payment to the account and credit of the plaintiffs of the amount due in respect of their share.

The *putnidar* respondents contend that the sum that they have to pay is not rent and that in any case the contract contained in their document of title is one and indivisible.

In support of their contention that the yearly sum payable is not rent, they rely on the case decided by their Lordships of the Privy Council and reported as *Jotindra Mohun Tagore v. Jaro Kumari* (1). In that case no doubt on a construction of the document there in question, it was held that the sum payable by the *putnidars* into the Collectorate against the Government revenue payable by their landlords was not rent so as to be recoverable in the manner provided in the *Putni Regulation VIII* of 1819. But the present case, it appears to us, may be distinguished. The yearly sum here payable is payable in consideration of

the *putnidars'* use and occupation of the land and though payable into the hands of the Collector, is agreed to be paid on account and to the credit of the landlords. It is, therefore, rent paid to the landlord, and we can find nothing in the document which takes away its essential character.

The next question then is, whether there is anything in the circumstances of the present case which should prevent the apportionment of this rent between the two sets of landlords. The apprehension of the *putnidar* respondents that the apportionment will in some way impair the value or affect the character of their permanent lease is necessarily groundless and the objection that at each of the four *kists* they will have to write two *challans* instead of one is frivolous. The plaintiffs landlords have in fact found it necessary to collect their share of the rent separately, and in this suit they have made all their co-sharers parties. That in such circumstances they are entitled to have the rent apportioned would appear to follow from the principle underlying section 37 of the Transfer of Property Act, and also from the authority of the cases reported as *Sreenath Chunder Chowdhry v. Mohesh Chunder Bundo-padhya* (2) and *Ishwar Chunder Dutt v. Ram Krishna Dass* (3) and *Rajnarain Mitter v. Ekadasi Bag* (4).

We, therefore, hold that the sum payable by the *putnidar* defendants is rent, and that the plaintiff appellants are entitled to have the same apportioned, and to have an order directing the *putnidars* to pay into the Collectorate the share due to the share of the plaintiffs to their separate credit and account.

We, therefore, set aside the decrees of the lower Courts and remand the case to the first Court in order that the remaining questions arising in the case may be heard and determined. The appellants will have their costs in this Court and in the Court of first appeal.

The costs in the first Court will abide the result.

Appeal allowed; Case remanded.

(1) 33 C. 140; 3 C. L. J. 7; 10 C. W. N. 201; 1 M. L. J. 8.

(2) 1 C. L. R. 453.

(3) 5 C. 902; 6 C. L. R. 421; 3 Shome L. R. 132.

(4) 27 C. 479; 4 C. W. N. 494.

SETHRUCHERLA RAMA CHADDEA v. MAHARAJAH OF JEYPORE.

MADRAS HIGH COURT.

CIVIL APPEAL No. 320 OF 1914.

March 3, 1916.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Srinivasa Aiyangar.

Sri RAJAH SETHRUCHERLA RAMA
CHADURA RAJU BAHADUR GARU AND
OTHERS—DEFENDANTS—APPELLANTS

versus

Sri Sri Sri VIKRAMA DEO MAHARAJU-
LUNGARU, Maharajah of JEYPORE

PLAINTIFF—RESPONDENT.

Document, construction of—Mortgage—Periodical
payment of interest—Right of suit for whole amount on
default of payment of one instalment—Appeal—Appel-
late Court, right of, to entertain matters happening after
suit—Jurisdiction, objection to 'Place of suing'—Civil
Procedure Code (Act I of 1908), s. 21.

Under a mortgage-deed executed by defendant to
plaintiff the principal amount was repayable on 4th
January 1916, the interest was payable regularly
on the 4th January of each year, and, in default of
payment of interest on the due dates, the mortgagee
was entitled to recover 'the said amount then and
there without waiting for the due date, viz., 4th
January 1916'. Default having been made in pay-
ment of interest, the mortgagee filed a suit on 21st
July 1913 for the principal amount as well as for
the arrears of interest due in the Vizagapatam Sub-
Court. The Court decreed the claim. On appeal, it
was contended that the claim for the principal
amount was premature and the Sub-Court of
Vizagapatam had no jurisdiction in respect of a
portion of the mortgaged property situate in the
Agency Tracts, which were not governed by the
Code of Civil Procedure:

Held, (1) that under the mortgage-deed only the
balance of interest was claimable on default of
payment of any one instalment and that, therefore,
an action for the principal was premature; [p. 412,
col. 1.]

(2) that as the time for payment of the principal
had passed when the appeal was heard, the decree
for the entire amount due under the mortgage need
not be disturbed; [p. 413, col. 1.]

(3) that objection to the jurisdiction of the
Vizagapatam Court was an objection to the 'place
of suing' within the meaning of section 21, Civil
Procedure Code, which, not having been raised in the
Trial Court, could not be taken in appeal. [p. 413,
col. 2.]

In all cases where objection is taken that the
Court taking cognizance of the suit is not entitled
to adjudicate on the claim, whether in whole or in
part, for want of jurisdiction, it is an objection to
the place of suing. [p. 413, col. 2.]

An Appellate Court can take cognizance of matters
which may have happened after the institution of
the suit for the purpose of moulding the relief
that a party is entitled to, provided it is not based
on a new title which accrued after the action. [p.
412, col. 2.]

Ram Ratan Sahu v. Mohant Sahu, 6 C. L. J. 74;
11 C. W. N. 732; *Mills v. Green*, 159 U. S. Sup. Court
651; 40 Law. Ed. 293; *Evans v. Bagshaw*, 5 Ch. App.

340; 39 L. J. Ch. 145; 18 W. R. 657; *Govinda v.
Perumdevi*, 12 M. 136; *Tottenham Local Board v. Law
Conservancy*, (1913) 1 Ir. R. 48, 2 T. R. 40; followed.

Appeal against the decree of the Court of
the Temporary Subordinate Judge, Vizaga-
patam, in Original Suit No. 27 of 1913.

Mr. F. Rameam, for the Appellants.

The Hon'ble Mr. E. N. Sarma, for the
Respondent.

JUDGMENT. This is an appeal from the
decree of the Subordinate Judge's Court,
Vizagapatam, in a suit by the mortgagee to
enforce his security. The facts which raise
the questions for determination in this appeal
are not in dispute. Exhibit A and B are two
mortgages executed on the 4th January 1906
and 4th July 1911 by the defendants to the
plaintiff to secure the principal sum of rupees
five lakhs and one lakh twenty thousand res-
pectively; they may, however, be taken as one
mortgage inasmuch as the terms of the one
were incorporated in the other. The mort-
gagors agreed to pay the principal amount
on the 4th of January 1916 and to pay in-
terest in the meantime year by year on the
4th of January each year. If the interest or
the principal was not paid on the due dates,
the mortgagee was entitled to take posses-
sion of the mortgaged properties and out of
the net profits, to pay himself the interest
due, and appropriate the balance, if any, to
the principal. There is a stipulation in Ex-
hibit B on the construction of which depends
one of the points for determination in this
appeal. It is as follows:—"If according to
the terms of this deed, the interest of each
year be not paid on the due date, these terms
will not prevent you (mortgagee) from re-
covering the said amount then and there, if
you should so desire, without waiting for the
due date, namely 4th January 1916." No in-
terest was paid in accordance with the stipu-
lations of the mortgage-bond, and on the 21st
of July 1913 the mortgagee brought the present
action to recover the whole of the mortgage
amount, both principal and interest, by sale
of the mortgaged properties, on the basis
that on the true construction of the clause
above set out, the whole of the mortgage-
money including the principal had become
due. He also asked in the alternative for
possession of the mortgaged properties. Only
one other fact need be mentioned, and that is
that a portion of the mortgaged property is

SETHRUCHERLA RAMA CHANDRA V. MAHARAJAH OF JEYPORE.

situate in the Agency Tracts of Vizagapatam. The learned Subordinate Judge has given the mortgagee a decree for sale. On these facts the appellants, the mortgagors, raised two contentions:—(1) that the mortgagee is not entitled to a decree for sale to realise the whole of the mortgage amount including the principal, but can only recover the amount of interest due, without waiting for the date when the principal amount would become due, and that the non-payment of interest on the due date or dates does not entitle the mortgagee to demand payment of the principal at once; that at the best, he can only recover possession of the mortgaged properties and pay himself the interest and also portions of the principal if the net income is available for that purpose. The learned Subordinate Judge came to the conclusion, and we think rightly, that the mortgage was primarily a simple mortgage, though in certain events it can be converted into a usufructuary mortgage; but he did not consider the question, whether by non-payment of interest on the due dates the principal amount became payable before the 4th of January 1916 so as to entitle the mortgagee to enforce the security by sale of the mortgaged properties and obtain payment also of the principal. We have had the clause read to us in the original and have no doubt that the correct interpretation of the clause is, as contended by the learned Vakil for the appellant, that the mortgagee can recover the interest payable by sale of the mortgaged properties without waiting for the time when the principal amount would become due. As suggested by Mr. Ramesam, it is likely that that clause was specially put in to avoid the contention given effect to in the case of *Kannu v. Natesa* (1), that the mortgagee cannot sue to recover even the interest which had accrued due by the sale of the hypothecated property till after the principal amount had become due. The documents, it may be noted, were drafted by the Pleader for the mortgagee. It is, therefore, clear that on the date when the present action was brought and also on the date on which the first Court passed the decree, viz., 1st May 1914, the sale of the mortgaged property to realise the principal amount of six lakhs and twenty thousand rupees should not have been ordered. The

mortgagee was entitled to recover the interest then due by sale of a sufficient portion of the mortgaged property and also to obtain possession of the same as mortgagee. It is, however, contended for the respondent that in the circumstances of the case we should not disturb the decree of the first Court, inasmuch as the plaintiff would now be entitled to that decree. It is clear that the income of the mortgaged property is insufficient to pay even the interest, that the plaintiff can at once bring a suit for sale and can also take possession of the property immediately, that any delay in the sale of the property could only be disadvantageous to both the parties and that the defendants are not in any way prejudiced by the present decree standing. Mr. Ramesam frankly conceded that driving the plaintiff to another suit would only increase the costs, without in any way benefiting his clients.

It has been held in several cases that the Appellate Court can take cognizance of matters which happened after the institution of the suit for the purpose, at any rate, of moulding the relief which the plaintiff was entitled to. No doubt this will be done only in exceptional cases, where it is necessary to prevent injustice or avoid multiplicity of proceedings. In cases where the plaintiff who had a title to relief at the inception of the suit had subsequently lost it, or was entitled to a discretionary relief such as an injunction which the subsequent events make it unjust to grant, or when a new defence to the claim had accrued to the defendant after the institution of the suit, or when the Court could not grant the relief which the plaintiff was entitled to by events which happened subsequently owing to no fault of the parties, Appellate Courts can, and in some cases may be bound to, take notice of events which happened subsequently. [*Ram Ratan Sahu v. Mohant Sahu* (2) and *Mills v. Green* (3).] A familiar instance in India is a suit for partition. It is, however, doubtful whether even under the very extended powers of amendment conferred by Order VI, rule 17, corresponding to Order XXVIII, rule 12, of the English Rules a Court has power to allow a plaintiff to claim reliefs to which he was not entitled at the time of the action on a new

(1) 14 M. 477.

(2) 6 C. L. J. 74; 11 C. W. N. 732.

(3) 159 U. S. Sup. Court 651; 40 Law. Ed. 293.

SETHRUCHERLA RAMA CHANDRA v. MAHARAJAH OF JEYPORE.

title which accrued after. [*Evans v. Bagshaw* (4) *Govinda v. Perumdevi* (5) *Tottenham Local Board v. Law Conservancy* (6).] In this case the plaintiff when he brought his action had a right to recover even the principal amount, though not by sale of the property. If, for instance, the income from the mortgaged property had been much more than sufficient to pay the interest, or if, by accident, the income had greatly increased, the mortgagors at any rate thought there were valuable mines in their estate (See Exhibit IX), the mortgagee would be entitled to appropriate it towards the principal. That, as a matter of fact, the income was insufficient even to pay the interest does not affect the question. We, therefore, think that this is not a case of an entirely new title or a wholly fresh cause of action which has accrued to the plaintiff since the suit. Though ordinarily we would have given a decree to the plaintiff for possession of the mortgaged properties and a decree for the interest due, with a right to bring a sufficient portion of the mortgaged property to sale for recovering that interest, in the circumstances of this case, we think it unnecessary to interfere with the decree passed by the first Court.

The other point taken by the appellants is this: that the Subordinate Judge's Court, Vizagapatam, had no jurisdiction to grant any relief respecting lands situate in the Agency Tracts, as under Act XXIV of 1839, the operation of the ordinary rules for the administration of civil justice ceased to have effect in those tracts, and a special machinery with special rules for the administration of justice was created. Section 17 of the Code, which gives jurisdiction to a Court to give relief in suits for lands part of which is within its jurisdiction and part within the jurisdiction of another Court, does not apply. It is contended that that section applies only to cases where both the Courts are governed by the Civil Procedure Code. This objection was, however,

not taken in the first Court nor even in appeal at the time when it was filed, but was taken long after ■ a supplemental ground of appeal. Mr. Sarma, for the respondent, contends that this is an objection to the 'place of suing' within the meaning of section 21 of the Code and we are not, therefore, at liberty to give effect to this contention even if it is sound. We agree with Mr. Sarma that we are precluded from allowing this objection. Mr. Ramesam contends that section 21 does not apply to this case, because his objection is not to the 'place of suing' as his contention is, not that the Vizagapatam Court was not the proper Court to entertain the suit, but only that it cannot give relief respecting immovable properties in the Agency Tracts. Section 21 follows sections 15 to 20 which regulate the place of suing, and an examination of those sections shows that a contest might arise as to the place of suing with reference to the cause of action, the residence of the defendant or defendants or the situation of property both moveable and immovable. In all cases where objection is taken that the Court taking cognizance of the suit is not entitled to adjudicate upon the claim, whether in whole or in part, for want of jurisdiction, it is an objection to the place of suing. We are, therefore, of opinion that this contention is not now open to the appellant. We have come to this conclusion the more readily as it is conceded by the learned Pleader for the appellant that his clients had no more defence to an action instituted in the Agency Court than they had to the present suit. The appeal must, therefore, be dismissed with costs. Time for redemption six months from this date.

V.R.P.

Appeal dismissed.

(4) 5 Ch. App. 340; 29 L. J. Ch. 145; 18 W. R. 657.

(5) 12 M. 136.

(6) (1913) 1 Ir. R. 48; 2 T. R. 410.

NARAYAN RAMKRISHNA PANDIT v. VIGNESHWAR GANAP HEGDE.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 277 OF 1913.

January 6, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

NARAYAN RAMKRISHNA PANDIT
AND OTHERS—DEFENDANTS—APPELLANTS

versus

VIGNESHWAR GANAP HEGDE AND
OTHERS—PLAINTIFFS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 58 (c), scope
of—Document, construction of—Sale or mortgage.*

A deed of transfer executed by plaintiffs to defendants in 1904 recited that the amount due to the latter in respect of a pre-existing mortgage on plaintiffs' lands was Rs. 13,000 inclusive of interest, and as excessive interest had to be paid and great loss was caused to the plaintiffs' family, the plaintiffs sold some of the lands to defendants for the said sum to extinguish the debt. The deed reserved to the vendors liberty to re-purchase the lands on payment of the sale consideration at any time within 20 years. By an instrument of even date, the vendees leased the land to the vendors plaintiffs for an annual rent of Rs. 412 which, however, was liable to reduction in proportion to any fractional payment of the sale price. The parties agreed that the costs of repurchase by the plaintiffs were to be borne by them in equal shares. In a suit brought by the plaintiffs in 1911 for redemption:

Held, that the transaction was a sale and not a mortgage. [p. 416, col. 1.]

Kasturchand Lakhmaji v. Jukhia Padia Patil, 31 Ind. Cas. 388; 17 Bom. L. R. 928; 40 B. 74, referred to.

Per Batchelor, J.—Section 58 of the Transfer of Property Act defines what a mortgage is and clause (c) of the section describes one method of effecting a mortgage, *viz.*, the method of mortgaging by conditional sale. But the words of clause (c) are not to be read in an isolated manner, but in reference to the first paragraph of the section, and when they are so read, it is manifest that clause (c) comes into play only when there is a mortgage, as that term has been defined. [p. 414, col. 2.]

First appeal from the decision of the First Class Subordinate Judge, Karwar, in Civil Suit No. 291 of 1911.

Mr. Coyaji (with him Mr. S. S. Patkar),
for the Appellants.

Mr. Bhandarkar (with him Mr. G. P. Murdeshwar), for the Respondents.

JUDGMENT.

BATCHELOR, J.—The only question involved in this appeal is, whether the document Exhibit 25, executed by the plaintiffs in favour of the defendants, is, as on its face it purports to be, a sale, or is in reality a mortgage in the guise of a sale. The plaintiffs' suit was brought to redeem the mortgage which, as the plaintiffs alleged, was effected

by this Exhibit 25, so that admittedly the suit must fail if it should be held that no mortgage is created by this document.

The learned Judge below was of opinion that Exhibit 25 was in reality a mortgage, and the grounds of this opinion are stated by him in the following words. After referring to the terms providing for the condition to re-purchase the property after the lapse of twenty years, the Judge says:—

“But for the addition of these terms the deed (Exhibit 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Exhibit 25 that the sale should become void on payment of Rs. 13000 by instalments or in a lump sum within twenty years [*vide* clause (c), section 58, of the Transfer of Property Act]. Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage.”

But it seems to me clear that the question, whether Exhibit 25 effects a mortgage or a sale, is not to be answered by mere reference to clause (c) of section 58 of the Transfer of Property Act. And, if I am not mistaken, to decide the point upon this view is to assume what is really in dispute. For, section 58 of the Transfer of Property Act defines what a mortgage is, and clause (c) of the section describes one method of effecting a mortgage, *viz.*, the method of mortgaging by conditional sale. But the words of clause (c) are to be read not in an isolated manner, but in reference to the first paragraph of the section, and when they are so read, it will be manifest that clause (c) comes into play only when there is a mortgage, as that term has been defined. Now from the definition itself there is no mortgage, except where there is a transfer of an interest in specific immovable property for the purpose of securing the payment of a debt, and the whole question involved in this debate is, whether the Rs. 13,000 paid for the lands transferred by Exhibit 25 was an out and out price paid for land sold or was a continuing debt secured by a transfer of the immovable property. To decide between those two theories we must look at the intentions of the parties, as those intentions have been disclosed in the

NARAYAN RAMKRISHNA PANDIT v. VIGNESHWAR GANAP HEGDE.

documents executed. As was said by Lord Chancellor Cranworth in *Alderson v. White*(1), "In every such case the question is, what, upon a fair construction, is the meaning of the instruments." Now the material passage in the principal instrument, Exhibit 25, after referring to the execution of prior mortgages, recites that in all Rs. 13,000 are found due to the defendants by the plaintiffs at the date of the document. Then the instrument continues:—

"It was not convenient to pay you this amount for the reasons mentioned above. Moreover excessive interest is to be paid for the said debt, and if, by reason of the inconvenience to pay it from the income of the family lands, the amount remains unpaid, it appeared that great loss might be caused to the family. So all of us who are members of the family considered this matter and decided that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale-deed all the debts incurred by our family up to this time, in full satisfaction of our debts."

Now pausing there, it seems to me difficult to imagine language more clearly and unequivocally expressive of a sale as opposed to a mortgage. There is no ambiguity in the minds of the parties, who themselves refer to the pre-existing mortgage and in contrast with it declare that they now effect a sale for the precise purpose of extinguishing the debt which had been secured by this mortgage. That is the contract which the parties, in the plainest possible language have set their hands to. Is there anything in the rest of the case to indicate that this, the plain meaning of Exhibit 25, is not the meaning which the parties intended and which the Court should now enforce? The sole circumstance to which the respondents-plaintiffs were able to point is the last passage occurring in Exhibit 34, the permanent lease which the defendants gave to the plaintiffs on 6th August 1904. By these words it is provided that "if we (the plaintiffs) pay any amount out of the amount in respect of the said sale-deed, we shall deduct rent in proportion to the amount

paid thus and go on paying the remaining rent." It may be that if there were in the case any substantial consideration in plaintiffs favour, the Court might see its way to draw an inference in their favour from this provision. But when all the circumstances are considered, it appears to me that this provision carries the case no further than it is carried by the condition that it shall be open to the plaintiffs at any time within twenty years to repurchase the land by payment of the price either in a lump sum or in instalments. Clearly, however, the mere giving of an option to the plaintiffs to repurchase the land does not of itself operate to create a mortgage. And when attention is paid to other circumstances appearing on the record, the theory of a mortgage must be set aside. Admittedly when Exhibit 25 was executed, the defendants already had a mortgage on the lands transferred by Exhibit 25. Since that mortgage the debt due to them had increased from Rs. 8,000 to Rs. 13,000. And yet if the plaintiffs' case is right, the creditor is content to take only a further mortgage on the twenty lands transferred by Exhibit 25 and give up the security which under the pre-existing mortgage he already had on seventy-two other lands belonging to the debtors.

Moreover the documents make no provision for the payment of interest. It is said that the Rs. 412 reserved as annual rent under Exhibit 34 may properly be regarded as interest running on the Rs. 13,000. But even that theory does not assist the plaintiffs. For, upon that footing the creditor is content to receive only interest at the unusual and unusually low rate of $3\frac{1}{8}$ per cent. whereas his earlier mortgage gave him interest at 8 per cent. There is no provision in the documents for the taking of any accounts, although the documents provide that the purchasers may spend any sum they like on improving the property. The documents lay down that in the event of repurchase by the plaintiffs, the costs of this repurchase are to be borne half and half between the plaintiffs and the defendants, and it seems to me extremely unlikely that if this transaction were in truth a mortgage, the mortgagee would consent to bear half the expenses of the reconveyance. I notice, lastly, that it is not suggested that the Rs. 13,000, the consideration of Exhibit

(1) (1858) 2 De G. & J. 97 at p. 105; 4 Jur. (N. S.) 125; 11 W. R. 242; 44 E. R. 924; 119 R. R. 38.

SHEO NARAIN SINGH v. BISAI SINGH.

25, is not a fair price for the lands conveyed by the instrument.

On the whole, therefore, though I have not overlooked the general considerations to which I referred in *Kasturchand Lakhmaji v. Jakhia Padia Patil* (2), I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted ■■ being in reality that which in the plainest language both parties declared it to be, *viz.*, a transaction of sale with an option to the plaintiffs to repurchase.

On these grounds, in my opinion, the appeal must be allowed and the plaintiffs' suit must be dismissed with costs throughout.

SHAH, J.—I am of the same opinion.

Appeal allowed.

(2) 31 Ind. Cas. 388; 17 Bom. L. R. 928; 40 B. 74.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 303 OF 1915.

March 3, 1916.

Present:—Mr. Lindsay, J. C.

Thakur SHEO NARAIN SINGH—

PLAINTIFF—APPELLANT

versus

BISAI SINGH *alias* BISHESHAR SINGH
 —DEFENDANT—RESPONDENT.

Adverse possession—Land acquired by being included in land held from before—Encroachment—Rights acquired, nature of.

Where a person in possession of a certain land acquires by adverse possession some other land adjoining it, he gets the same rights in respect of the land thus acquired as he has in respect of the land already in his possession from before. [p. 417, col. 2.]

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 17th May 1915, reversing that of the Munsif, Dalmau, dated the 18th January 1915.

Chaudhri Ram Bharose Lal, for the Appellant.

Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for ejectment. The plaintiff is the *talukdar* of ■ village called Jagatpur Bichkaura in the Rae Bareilly District. The defendant-respondent Bisai Singh is a man who owns certain

plots in this village as an under-proprietor. The case set out in the plaint was to the following effect. It was alleged that the plaintiff had been the owner of a plot of land in this village No. 610 old, which was described as consisting of *usar* land. To the south of the plot in question it was alleged that the defendant Bisai Singh owned a plot No. 608 old, No. 692 new, and it was asserted in the third paragraph of the plaint that in or about June or July 1911 the defendant had wrongfully included in his plot No. 692, 4 *biswas* 5 *biswansis* of the *usar* plot No. 610. In the plaint it was further alleged that the plaintiff had asked the Revenue Court to have the boundary between these plots corrected. The Revenue Court refused to entertain the application and for this reason the present suit was brought. The relief claimed, therefore, was that the plaintiff might be given possession of 4 *biswas* 5 *biswansis*, on the ground that the defendant had unlawfully encroached upon this area which belonged to the plaintiff's plot No. 610.

The first Court decreed the claim in part. The lower Appellate Court dismissed the suit. The Court of first instance had relied principally on a report made by an *amin*. The learned Subordinate Judge, who tried the appeal, declined to accept the report of the *amin* as being reliable evidence in the case. He discussed the evidence at great length, in particular the documentary evidence consisting of settlement maps and *khasras*, and the conclusion at which he arrived was that at the time of the first settlement the plaintiff's plot No. 610 had an area of 5 *biswas* 4 *dhurs*. According to the old settlement map this plot was a long narrow strip of land which ran along the north side of a number of other fields, one of which was the defendant's old No. 608. In the old settlement map, No. 610 had been described ■ ■ *rasta* and the Subordinate Judge found that this strip of land had in part become gradually absorbed in the adjoining fields and had become nothing but a boundary line or *mend*. It was proved that by the time of the new settlement survey which took place in the year 1891, the area of No. 610 had become reduced to 1 *biswa* 18 *dhurs*. So far, therefore, as an encroachment had taken place

CHOKKALINGAM CHETTY v. ANNAMALAI CHETTY.

on the north side of the defendant's plot No. 608, the Subordinate Judge was satisfied that it must have taken place before 1891. In other words, the encroachment was more than 25 years old at the time this suit was brought. In this way he was of opinion that any land which had been so encroached upon by the defendant had become his property by right of adverse possession. He further went on to say that there was nothing on the record to show that the defendant could have encroached on the north side to an extent greater than 13 *dhurs*, for the simple reason that there was nothing more upon which an encroachment could be made. It was, of course, made to appear during the trial that the area of the defendant's plot No. 608 old, No. 692 new, had become larger since the time of the first settlement but, as the Subordinate Judge found, it did not necessarily follow from this that the encroachment was at the expense of the plaintiff. The whole case of the plaintiff has been devoted to impugning the findings of fact arrived at by the lower Appellate Court. In my opinion the appeal cannot succeed, for it is sufficiently clear that the learned Subordinate Judge has not been guilty of any error of law in dealing with the evidence upon the record. The fact seems to be that the plaintiff has been trying to shift his ground and to escape from the case which he set up in the plaint. He came into Court with the allegation that a small area of 4 *biswas* 5 *biswas* had been taken out of his plot No. 610 in or about 1911. That case he failed to prove and consequently I hold that the Court below was right in dismissing his suit.

With regard to an observation in the concluding portion of the Subordinate Judge's judgment in appeal, I note that there is some confusion. The Subordinate Judge at first appears to have thought that the defendant had become an under-proprietor of the 18 *dhurs* which had been taken out of plot No. 610. Later on, it looks as if he had come to another conclusion, for he puts on record that the defendant appears to have no higher rights than those of a mere tenant in respect of this area of 18 *dhurs*. As to this part of the case, it seems to

■ that the position of the defendant is quite clear. It is an admitted fact that plot No. 608 is held by the defendant as an under-proprietor and as his title to the 18 *dhurs* mentioned above has been found to be established on the ground of adverse possession, it seems to me that the character of that possession must be the same as the character of the possession with which plot No. 608 has been held. In other words, the proper conclusion is that the defendant has obtained by virtue of possession under-proprietary rights over this 18 *dhurs* of land.

For the reasons given above I maintain the judgment of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 291 OF 1912.

December 21, 1915.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Srinivasa Aiyangar.

CHOKKALINGAM CHETTY *alias* PERIA
KARUPPAN CHETTY AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

ANNAMALAI CHETTY AND OTHERS—
DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899)—Chit acknowledging liability—Pro-note—Instrument evidencing antecedent debt, if discharges liability on original debt—Part-payment after security has matured, whether payment in respect of such debt—Contemporaneous debt, note given on, effect of—Parol evidence, use of, to prove identity of debt acknowledged in writing—'Ullittor', addition of, to maker's name—Liability of maker.

A *chit* containing a promise to pay is a promissory note if the transaction falls within the definition of a promissory note as given in the Stamp Act. [p. 418, col. 2; p. 420, col. 2.]

The giving of an instrument in writing in recognition of an antecedent debt does not extinguish but merely suspends the cause of action on the original debt, which revives if the security be not discharged at maturity, unless such instrument can be regarded as a mere collateral security, in which case it will not operate even as a suspension of the original debt. [p. 419, col. 1; p. 420, col. 2; p. 421, col. 1.]

Bottomley v. Nattal, (1858) 28 L. J. C. P. 110; 5 C. B. (N. s.) 122; 5 Jur. (N. s.) 315; 141 E. R. 48; 116 R. R. 592; *Saminathan Chetty v. Palaniappan Chetty*, 26 Ind. Cas. 228; 19 C. W. N. 617; 83 L. J. P. C. 131; 17 New Law Reports 53; (1914) A. C. 618; 41 L. A. 142, followed.

When a bill or note is given there is only one debt, though there may be different remedies or causes of action. [p. 421, col. 2.]

CHOKKALINGAM CHETTY V. ANNAMALAI CHETTY.

Wegg Prosser v. Evans, (1895) 1 Q. B. 108; 64 L. J. Q. B. 1; *Saminthan Chetty v. Palaniappa Chetty*, 26 Ind. Cas. 228; 18 C. W. N. 617; 83 L. J. P. C. 131; 17 New Law Reports 56; (1914) A. C. 618; 41 L. A. 142, followed.

Payments, therefore, in discharge of a debt evidenced by an unstamped and, therefore, inadmissible pro-note are payments against or acknowledgments of the original debt and not on account of the pro-note. [p. 419, col. 1; p. 421, col. 2.]

Raman v. Vairavan, 7 M. 392; 8 Ind. Jur. 186; *Clark v. Mundal*, 1 Salk 124; 91 E. R. 116; *Cohen v. Hale*, 3 Q. B. D. 371; 47 L. J. Q. B. 496; 39 L. T. 35; 26 W. R. 680; *Ex parte Bateson*, 1 Mont. D. & D. 269; 4 Jur. 994, followed.

Thus where a suit was brought on 8th August 1910 on a balance of accounts evidenced by an unstamped *chit*, executed on 10th August 1905, payable within two years from that date and containing an endorsement on its back of two part-payments, dated 14th May 1907 and 30th August 1907, respectively:

Held, that on failure to discharge the *chit* on its due date, the original debt revived, that the acknowledgments on the *chit* were equally available as acknowledgments of a reduction of and, therefore, of a liability upon the original debt, and that consequently the suit brought on 8th August 1910 was not barred. [p. 419, cols. 1 & 2; p. 421, cols. 1 & 2.]

Obiter dicta.—If a bill or a note is given for a contemporaneous debt, the bill merely suspends the remedy and does not operate as a discharge. [p. 420, col. 2.]

The identity of a debt acknowledged in writing can be proved by parol evidence [p. 421, col. 2.]

Per Srinivasa Aiyangar, J.—The maker of a pro-note does not cease to be definite merely because the word 'Ullittoor' is added to his name. Whether such addition binds the members of his family or not, the maker does not cease to be personally liable. [p. 420, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 206 of 1910.

Messrs. S. Srinivasa Aiyangar and S. Sundararaja Aiyangar, for the Appellants.

Messrs. L. A. Govindaraghava Aiyar and T. V. Muthukrishna Aiyar, for the Respondents.

JUDGMENT.

COURTS 'TROTTER, J.—The question that arises in this appeal is solely one of law as the facts are admitted. On the 10th August 1905, a pending suit was settled by a compromise between the parties, who for practical purposes may be treated as the present plaintiffs and defendants. The result of the compromise was that a sum of 15,000 dollars was found due from the defendants to the plaintiffs. After that figure had been settled and admitted by the defendants, the 1st defendant

executed and handed over a document, which is Exhibit A in the case, which is called a *chit* and which, whatever else it is, is a promise to pay the plaintiffs a sum of 10,400 dollars with interest. The balance of the 15,000 dollars was accounted for in other ways. On the 14th May 1907, 2,000 dollars were paid off and a further payment of 1,000 dollars was made on the 30th August of the same year. Both these payments were endorsed on the back of the *chit*. On the 8th of August 1910, the present suit was brought and ultimately the only question for determination is, whether or not it is barred by limitation. The plaintiff sues on the *chit* which he describes as a bond and he also sues on the original debt admitted to be existing on the 10th of August 1905. Both these causes of action are statute-barred, unless they can be held to have been kept alive by the acknowledgments endorsed upon the *chit*.

The *chit*, Exhibit A, is unstamped. Accordingly if, on its true construction it is a promissory note, it is inadmissible in evidence and cannot be sued upon. I have never had the slightest doubt that Exhibit A fulfilled the legal requirements of a promissory note and that matter appears to me too clear for argument. That throws back the plaintiff upon the original cause of action, which in my opinion is set out sufficiently in the plaint to be available to him if he can establish it. Two objections are urged against it: *first*, that the original debt was extinguished by the *chit* and *secondly*, that the acknowledgments contained in the endorsements on the *chit* cannot be treated as acknowledgments of the original debt but only of the debt created and evidenced by the *chit*.

I feel no difficulty whatever in deciding the *first* question as to whether the giving of the *chit* operated as a discharge of the original debt. The doctrine of the extinction of one form of liability by the creation of another is a highly artificial legal technicality and any attempt to extend its application is repugnant to common sense and the business spirit in commercial transactions. On the other hand, the law must guard against the possibility of a creditor obtaining payment both on the original debt and on the instrument. I think the law has now

CHOKKALINGAM CHETTY v. ANNAMALAI CHETTY.

been settled for a number of years and I think it expresses the true business meaning of such a transaction. The giving of the security does not extinguish but merely suspends the cause of action on the original debt, which revives if the security be not discharged at maturity. The same proposition may be put in another way by saying that the giving of the instrument is a conditional discharge, which will cease to operate as such on dishonor of the instrument. If the instrument can be regarded as a mere collateral security it will not operate even as a suspension of the original debt. These propositions are fundamental and rudimentary and I do not think it necessary to refer to cases either English or Indian to support them. I, therefore, come to the conclusion that on failure to discharge the *chit* on its due date the original debt revived and it was open to the plaintiff to sue upon it.

The last argument of the respondent was this. The payments relied upon as acknowledgments of limitation were expressed to be payments "for this *chit*," i. e., payments in discharge of the debt evidenced by the inadmissible promissory note. How can payments so described be held to be payments against or acknowledgments of the original debt? This Court in *Raman v. Vairavan* (1) has decided that such payments can be so treated, but it is contended for the respondents that the decision is contrary to principle and I, therefore, desire in the first instance to consider the question of principle apart from authority. The giving of the instrument operated, as I have said, as a conditional discharge of the original debt, which debt would again become enforceable on dishonor of the security. The *chit* was dated 10th August 1905 and was expressed to be repayable in full at the expiration of 24 months. This brings us to the 10th August 1907. The last payment was made on the 30th of August 1907, after the expiry of the date of maturity of the *chit*. I am not at all sure that that does not end the matter; for a payment made after the instrument has ceased to be operative, can, of course, only be referable to the original debt. However, our attention was not drawn to the exact dates which are given in the translated Exhibit by the Tamil month and year and it may

(1) 7 M. 392; 8 Ind. Jur. 186.

be that the fact that the payment is again expressed to be "to this *chit*", operated as an agreement to extend the date of maturity of the *chit*. I, therefore, act on the assumption that the payment is to be taken as having been made during the currency of the *chit*. When the *chit* matured the original debt revived. What date and what amount? Not the original amount but the original amount less 3,000 dollars. If one is asked why was the original debt reduced by 3,000 dollars, the only possible answer is that 3,000 dollars had been paid in discharge of it. I see no escape from this reasoning and it follows necessarily that the acknowledgments on the *chit* are equally available as acknowledgments of a reduction of and, therefore, of liability upon, the original debt. I am, therefore, of opinion that the decision in *Raman v. Vairavan* (1) is right and in accordance with principle. The decree will be altered in accordance with the judgment about to be delivered. The memorandum of objections will be dismissed.

SRINIVASA AIYANGAR, J.—This is an appeal by the plaintiffs from a decree of the Sub-Judge of Ramnad, dismissing their suit to recover a certain sum of money from defendants Nos. 1 to 3. The facts which gave rise to the action are scarcely in dispute. The father of the 1st plaintiff one Ramanathan Chetty had from time to time deposited with defendants Nos. 1 and 3, who are brothers, certain sums of money. They and the 2nd defendant, the son of the 1st, were members of a joint Hindu family and were doing business as bankers in Saigon under their family *vilasam* or style of R. K. A. N. After the death of Ramanathan Chetty, his widow the 5th plaintiff, on behalf of her son the 1st plaintiff, brought an action in Saigon against the firm of defendants Nos. 1 to 3 to recover the moneys deposited by Ramanathan; while that suit was pending the 1st defendant acting for himself and defendants Nos. 2 and 3, the other members of his family, settled with the 1st and 5th plaintiffs, the son and widow of Ramanatha, the amount due to them in the presence of a mediator, and 15,000 dollars and odd was found due. This was on the 10th August 1905. After this settlement was arrived at, but on the same day, the 1st defendant executed what is termed

CHOKKALINGAM CHETTY v. ANNAMALAI CHETTY.

a *chit* for 10,400 dollars out of the 15,000 dollars and add in the name of the 6th plaintiff and the 4th defendant's father, the maternal and paternal uncles of the 1st plaintiff. The 1st defendant signed the *chit* ■ R. K. A. N. Annamalai Chetty Ullittoor. Two payments, one of 2,000 dollars and another of 1,000 dollars, were made in May and August 1907 by the 3rd defendant on account of the *chit* and the payments were endorsed on the *chit* by the 3rd defendant himself. There is no doubt the payments were made by him not only for himself, but also on behalf of the 1st defendant, and it is not disputed that he was authorized so to pay. The balance of the amount due was not paid and this action was brought to recover it. The mother of the plaintiff, who was a party to the settlement, and the persons in whose name the *chit* was executed or their representatives were made *pro forma* parties, but they claim no interest in the sums and nothing more need be said of them. The *chit* was not stamped. Three questions were raised in the first Court and they are raised in the appeal. They are:—1. Whether the *chit* in question was a promissory note as defined in the Stamp Act and was, therefore, inadmissible in evidence for any purpose whatsoever. 2. Whether the plaintiffs had no cause of action other than on the note. 3. If they had, whether their action to recover the original debt had become barred by limitation. The Subordinate Judge found the 1st and 3rd points in favour of the defendants and the 2nd in favour of the plaintiffs and dismissed the suit.

On the 1st question I agree with the Subordinate Judge that the *chit* is a promissory note. It was said that the maker was not a definite person as the addition of the word Ullittoor left the persons liable on the note vague and indefinite. It is reasonably clear that the subscription was made by the 1st defendant in the form he did and in the name of the family, in order to bind also the other members of the family. Whether the other members of the family are personally bound or not, is immaterial. So far as the 1st defendant is concerned, it was a note by him and he was personally liable. The

maker of the note was, therefore, certain. Calling the document a *chit* does not make it any the less a promissory note if the transaction falls within the definition of a promissory note in the Stamp Act; the present document undoubtedly falls within the definition. The *chit*, therefore, is inadmissible in evidence and cannot be looked at for any purpose.

The respondent challenged the finding of the lower Court on the 2nd point. It was not disputed that there are sufficient allegations in the plaint to enable the plaintiffs to recover the debt on their original cause of action, if that was not discharged by the execution of the note. There was some argument in the lower Court that the note was executed in favour of the 6th plaintiff and the 4th defendant's father in discharge of the liability to the 1st plaintiff. The evidence of the 1st and 6th plaintiff is clear to the effect that the note was taken really for the benefit of the 1st plaintiff, and the Subordinate Judge so finds. In appeal there was scarcely any argument on this matter. If the note was a good one and the suit was on the note, it may be that the 1st plaintiff could not sue without an endorsement from the 6th plaintiff and the 4th defendant; for the present purpose his position cannot be worse than if the note was executed in his name.

The learned Pleader for the contesting respondent strenuously contended that the original debt was discharged as soon as the note was executed, and cited a number of cases. As I do not propose to deal with them individually (for the decision depended on the facts proved in each case), I shall state what I understand to be the law; rather what legal presumptions are to be made in the absence of an agreement, express or implied, on the matter. If a bill or a note is given for a contemporaneous debt, there is a difference of opinion, but the better opinion is that even in such a case the bill merely suspends the remedy and does not operate as a discharge. If a bill or note is given for an antecedent debt or liability (and it was in this case), there has never been any doubt in England or in this country that the bill or note, operates only as a conditional payment, or suspension of the remedy; or as stated in an opinion of Justice Field in the Supreme Court of the United States [see

CHOKKALINGAM CHETTY v. ANNAMALAI CHETTY.

Duncan v. Kimball (2)], it only operates to extend until maturity the period for the payment of the debt. [See *Belshaw v. Bush* (3).] So long, therefore, as the bill or note is current, the creditor cannot sue for the debt unless the bill was given merely as collateral security. [See *Peacock v. Purcell* (4) and *Palmer v. Bramley* (5).] When the bill on maturity is not paid, the creditor is entitled to sue on his original cause of action on returning the note or bill or otherwise satisfactorily accounting for it at the trial. [See *Bottomley v. Nuttall* (6).] The decision of the Judicial Committee in *Saminathan Chetty v. Palaniappa Chetty* (7) is, I think, conclusive against the respondent. The conclusion of the learned Subordinate Judge on this point was, therefore, right.

The only other question is whether the suit is barred by limitation. The original cause of action to recover the debt arose on the settlement of the accounts on the 10th August 1905; and unless the payments of 2,000 and 1,000 dollars were payments on account of the debt now sued for, the action would obviously be barred by limitation. There was an argument at the Bar as to whether the payment was on account of the principal or interest or for both. In this case it does not matter, what for the payments were made. The evidence is that the payments were made on account of both interest and principal. The payments were made by the 3rd defendant and the fact of the payments appears in the handwriting of the person making them, viz., the 3rd defendant. The payments, therefore, would be enough to give a fresh period of limitation [see *Soumia Narayana v. Alagirisawmy Iyenger* (8)], provided that the payments were made on account of the debt sued for. The payments, as I have already stated, pur-

port to have been made on account of the *chit*. The *chit*, of course, cannot be looked into for any purpose, and no secondary evidence of its contents could be given. The original indebtedness can be proved *aliunde* [*Brown v. Watts* (9)] and in fact is admitted by the 1st defendant. He says that he owed a sum of 10,400 dollars to plaintiffs Nos. 1 to 5 on the 10th August 1905 on settlement of accounts. It is also proved and in fact admitted that the *chit* was given for it. When it is said that payments were made on account of the *chit*, it means that payments were made on account of the debt evidenced by the note. It is settled law that the identity of the debt acknowledged in writing may be proved by parol evidence. The only question, therefore, is whether the original debt and the debt secured by the *chit* were one debt or two different debts. If they were different debts, acknowledgment of a particular debt, or payment on account of a particular debt, however much the parties may be mistaken in thinking that that particular debt was due, cannot operate as an acknowledgment or part-payment of another debt which may be really due. But when a bill or note is given there is only one debt, though there may be different remedies or causes of action. [See *Wegg Prosser v. Evans* (10) and *Saminathan Chetty v. Palaniappa Chetty* (7), *Drake v. Mitchell* (11).] The payment of the bill or note operates to discharge the original debt, and if only a portion of the amount due on the bill is paid, it *pro tanto* discharges the original debt. [See *Clark v. Mundal* (12) per Holt, C.J.] This was the view taken in *Raman v. Vairavan* (1) which is indistinguishable from this case. There a *hundi* was given for Rs. 3,500, being a portion of the sum then due to the creditor. Rs. 1,140 was paid on account of the *hundi*, but the balance was not paid. The debtor wrote to his agent directing him to pay the balance of the *hundi* which, however, was not paid. The creditor sued for the balance of the original debt and for other sums subsequently lent, and relied on the acknowledgment of the *hundi* as an acknowledgment of the original debt though he did not sue on the *hundi*. It was held that he was so entitled to rely. The decision in

(2) 3 Wallace 37; 70 U. S. XVIII, 50.

(3) (1851) 22 L. J. C. P. 24; 11 C. B. 191; 17 Jur. 67; 138 E. R. 444; 87 R. R. 639.

(4) (1863) 32 L. J. C. P. 266; 14 C. B. (N. S.) 728; 10 Jur. (N. S.) 178; 8 L. T. 636; 11 W. R. 834; 2 N. R. 282; 143 E. R. 630; 135 R. R. 875.

(5) (1895) 2 Q. B. 405; 65 L. J. Q. B. 42; 14 R. 613; 73 L. T. 329.

(6) (1858) 25 L. J. C. P. 110; 5 C. B. (N. S.) 122; 11 Jur. (N. S.) 315; 141 E. R. 48; 116 R. R. 592.

(7) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617 (P. C.); 83 L. J. P. C. 131; 17 New Law Reports 56; (1914) A. C. 618.

(8) 14 Ind. Cas. 580; 11 M. L. T. 429; (1912) M. W. N. 754.

(9) 1 Taunt 353; 1 R. R. 793; 127 E. R. 870.

(10) (1895) 1 Q. B. 108; 64 L. J. Q. B. 1.

(11) 3 East 252; 7 R. R. 449; 102 E. R. 594.

(12) 1 Salk. 124; 91 E. R. 116.

MATA GHULAM V. RAJPAL SINGH.

Cohen v. Hale (13), though not on the Statute of Limitations, is based on the same principle. In *Ex parte Bateson* (14) (in Bankruptcy) there was a composition by a debtor with his creditors. A part of the sum due on the composition was paid, but the balance was not and the composition fell through. The creditor claimed to prove for the whole of the balance of his original debt after giving credit for the amount paid on the composition in the debtor's bankruptcy. The Statute of Limitations was set up as a bar. The payment made on account of the composition was held to be a payment on account of the original debt. It must be remembered that in England a part-payment, to operate as a fresh start, must be made under circumstances leading to an inference that more is due. *A fortiori* under the Indian Act and in this case the payments made give a fresh period and the suit is not barred by limitation.

The plaintiffs and the 3rd defendant have compromised their disputes on the terms that their liability for half of the claim should be taken to have been discharged. There will, therefore, be a decree in favour of the plaintiffs Nos. 1 to 4 against defendants Nos. 1 and 2 for half of the amount sued for. Plaintiffs Nos. 1 to 4 will also get half their costs in this and in the lower Court.

The memorandum of objections is dismissed.

Appeal allowed; Decree modified according

V.R.P.

to compromise.

(13) 3 Q. B. D. 371; 47 L. J. Q. B. 496; 39 L. T. 35; 25 W. R. 680.

(14) 1 Mont. D. & D. 289; 4 Jur. 994.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO 537 OF 1913.

June 24, 1915.

Present:—Mr. Lindsay, J. C.

MATA GHULAM AND OTHERS—DEFENDANTS
— APPELLANTS

versus

RAJPAL SINGH AND OTHERS—PLAINTIFFS
AND ANOTHER DEFENDANT—

RESPONDENTS.

*Lunatic's property—Certificated guardian, sale by—
District Court, previous permission of, not obtained—*

*Sale-money applied in extinguishing previous mortgage by lunatic Recovery of property, suit for, by sons—
Sons bound to pay sale-money—Equity.*

The plaintiffs sued to recover their share of the property belonging to their lunatic father, which had been sold by his certificated guardian without the previous permission of the District Court. It appeared that the sale-money was applied to extinguish a mortgage on the property formerly made by the father.

Held, that the plaintiffs were entitled to recover the share in suit, but were at the same time bound in equity to pay a proportionate share of the sale-money applied to extinguish the previous mortgage. [p. 423, col. 1.]

Appeal from the decree of the District Judge, Rae Bareilly, dated the 8th September 1913, reversing the order of the Munsif, Partabgarh, dated the 25th March 1913.

Mirza Sami Ullah Beg and Syed Ali Mohammad, for the Appellants.

Babu Ram Chandra, for Respondents Nos. 1 and 2.

JUDGMENT. The dispute in this appeal has resolved itself into a very simple matter. The suit was brought by two plaintiffs to recover a 2/5ths share of certain property which had belonged to their father, who was a lunatic. This property had been sold to the defendants by the certificated guardian of the lunatic but without permission previously obtained by the District Court. The Court of first instance dismissed the suit. It gave a decree in the form of a redemption decree ordering the plaintiffs to redeem the entire property and not only the 2/5ths share, and provided that if redemption were not effected the suit was to be dismissed. The plaintiffs appealed to the District Judge and the learned Judge has given them a decree for 2/5ths of the property in suit without providing for any payment to the defendants. The only question in the appeal here is, whether or not these plaintiffs are entitled to recover the 2/5ths share, which belongs to them, without payment, or whether they ought to be made liable to pay a proportion of the sum of Rs. 800 which represents the consideration for the sale which is now complained of. The Court of first instance found that when this sale took place in favour of defendants-appellants, a sum of Rs. 800 out of the sale-money was applied to extinguish a mortgage-deed executed in favour of a

DATTATRAYA SAKHARAM DEVLI v. GOVIND SAMBHAJI KULKARNI.

man named Jarbandhan. This mortgage had been executed by the plaintiffs' father. When the case came before the District Judge this point does not appear to have been discussed. At any rate he says nothing about it in his judgment, for he came to the conclusion that the sale was entirely void and that the plaintiffs were entitled to recover without any payment. I have perused the record of evidence in the case and it seems to me both from the oral evidence and also from a receipt, which is on the file and regarding the genuineness of which there appears to be no question, that the sum of Rs. 800 was paid off to Jarbandhan to extinguish the mortgage affecting this property. The money owing under the mortgage is money which the plaintiffs appear to me to be liable to pay, it being their duty to discharge the debt of their father; and in the present case having brought a suit for the recovery of a share of the property it seems to me that in equity the plaintiffs are bound to pay a proportionate share of the mortgage-money which was paid to clear the property of the mortgage in favour of Jarbandhan. 2/5ths of Rs. 800 comes to Rs. 320. I, therefore, allow the appeal to this extent, namely, that I direct that the plaintiffs be given a decree for the recovery of 2/5ths of the property on payment into Court within three months from this date of the sum of Rs. 320. If the money is not paid within that time the suit of the plaintiffs will stand dismissed. I make no order as to costs.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 899 OF 1913.

February 1, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

DATTATRAYA SAKHARAM DEVLI—
PLAINTIFF—APPELLANT

versus

GOVIND SAMBHAJI KULKARNI—
DEFENDANT—RESPONDENT.

*Hindu Law—Mitakshara—Adoption, effect of, on
rights vested before adoption.*

An adoption under the Mitakshara has the effect
of divesting the adopted son of all rights to the

property of his natural father, even where the property had become exclusively vested in him before the adoption. [p. 424, col. 2; p. 426, col. 2.]

Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row, 29 M. 437 at p. 452; 16 M. L. J. 178, dissented from.

Behari Lal Laha v. Kailas Chunder Laha, 1 C. W. N. 12, distinguished.

Per Shah, J.—There is nothing repugnant to Hindu Law in insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property which may have devolved upon him in the family of his birth. The divesting of vested estates is by no means an uncommon incident of adoption under certain circumstances, and seems to be quite consistent with Hindu Law. [p. 425, col. 1.]

Second appeal from the decision of the Additional First Class Subordinate Judge, Ratnagiri, in Appeal No. 252 of 1912, confirming the decree passed by the Subordinate Judge, Devgad, in Civil Suit No. 535 of 1909.

Messrs. A. G. Desai and S. Y. Abhyankar,
for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.

SHAH, J.—The facts, which have given rise to this second appeal, are briefly these. One Mahadev and his brother Shambhaji were divided in interest. Mahadev died more than twenty years ago, leaving a widow Parvatibai, a son Ramchandra, and daughters. After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior. The properties in suit, which were originally assigned to the share of Mahadev and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption. Dattatraya filed the present suit in the Court of the second class Subordinate Judge at Devgad to enforce his mortgage, to recover possession and to obtain an injunction. It was filed against Shambhaji's sons, who were defendants Nos. 1 and 2, and Parvatibai represented by her heir and daughter as defendant No. 3. Defendants Nos. 1 and 2 contested the plaintiff's claim, and urged, among other things, that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Parvatibai had no right to mortgage the property, as Ramchandra was alive.

The Trial Court as well as the lower Appellate Court have allowed this contention,

DATTATRAYA SAKHARAM DEVLII V. GOVIND SAMBEHAJI KULKARNI.

with the result that the plaintiff's suit is dismissed with costs.

Mr. Desai for the appellant (plaintiff) has questioned the correctness of this view, and has urged in support of the appeal that on Ramchandra's adoption, all his rights to the property of his natural father which devolved on him on his father's death, came to an end, that his connection with the family of his birth ceased, and that Parvatibai inherited the property as the next heir of Ramchandra or Mahadev, when Ramchandra was given away in adoption. The question of law that arises is, whether or not according to Hindu Law a boy given in adoption loses after adoption all his rights which he may have acquired to the property of his natural father before the date of the adoption. The parties are governed by the Mitakshara; and it is conceded, indeed it seems to me to be indisputable, that if a boy is given in adoption during his father's lifetime, he would lose all the rights to the property of his natural father, even though he may have, as under the Mitakshara Law he would have, ■ vested interest in that property from the date of his birth. That is, in the present case, if Ramachandra had been given in adoption during Mahadev's lifetime he would have lost all vested interest in the property in dispute, and it would have devolved on Parvatibai on Mahadev's death. The point is, therefore, limited to a case in which the property has become exclusively vested in the boy before the date of his adoption.

This is apparently a point of first impression so far as this Presidency is concerned; and apart from certain decisions of other High Courts to which I shall refer later, the point does not appear to me to present any difficulty. The text of Manu (*Adhyaya* IX, verse 142) bearing on this point is clear. It is translated in Volume XXV of the "Sacred Books of the East" at page 355 as follows:—"An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned.)"

There are two readings of this verse; in the one which is adopted in the different modern editions of the Manusmriti (such as

the Nirnaya Sagar Press edition and the Manava Dharma Sastra edited by Mr. Mandlik, the words *haret* (* *) and *kvachit* (* ■ *) are used, whereas in the other, which is adopted by Vijnyaneswara and Nilkantha in quoting the verse in the Mitakshara and the Vyavahara Mayukha, the words used instead are *bhajer* (* *) and *sutah* (* *) respectively.

In my opinion it makes no difference in the result, whichever reading be adopted. Mr. Shingne has, however, relied upon the second reading as favouring his contention. If it were necessary to make ■ choice between the two readings, I should certainly prefer the reading adopted in all the modern editions of the Manusmriti to that adopted by Vijnyaneswara and Nilkantha in quoting the verse.

The meaning of the verse is clear. The ■■■ given in adoption is not to take the *gotra* or the *riktha* of his natural father. His dissociation from the family (*gotra*) as well as the estate is insisted upon in unequivocal terms. There is no room for the distinction sought to be made by Mr. Shingne that the prohibition against taking is confined to the inheritance after the adoption, and does not extend to what is already inherited before the adoption. The text generally prohibits the taking by the adopted son and does not restrict the taking to that which would devolve on him after the adoption. It lays down that the adopted son shall never take or claim the estate of his natural father. The words are wide enough to include the estate vested in him at the time of adoption, provided it is the estate of his natural father. In my opinion the text should be so read as to give effect to the fundamental idea underlying an adoption, viz., that the boy given in adoption gives up the natural family and everything connected with the family and takes his place in the adoptive family, as if he had been born there, as far as possible.

It was urged by Mr. Shingne that there was no provision in the text ■ to divesting an estate once vested in a person, and that the person leaving the family of his birth cannot be divested of property exclusively vested in him before adoption. But this argument ignores the essential idea of an adoption. There is ■ change in the position of the boy, and this divesting of the estate of the natural father is an incident, and, in my opinion

DATTATRAYA SAKHARAM DEVLII v. GOVIND SAMBHAJI KULKARNI.

a necessary incident, of that change. The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father, if the adoption takes place in his father's lifetime. To that extent the rights vested in him are divested after adoption. If the divesting of ■ vested interest so far is to be allowed, I do not see any difficulty in holding that, even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption. It seems to me that there is nothing repugnant to Hindu Law in thus insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property, which may have devolved upon him in the family of his birth. The divesting of vested estates is by no means an uncommon incident of adoption under certain circumstances, and seems to me to be quite consistent with the Hindu Law.

It has been urged by Mr. Shingne that if the adopted boy can take his self-acquired property with him and is under no obligation to leave it in the family of his birth, there is no reason why he should be treated differently with reference to the property which has vested in him exclusively on the death of his father before the adoption. But this argument ignores the difference between his self-acquired property and the estate which has become vested in him exclusively on his father's death. In one case the property is his own, and in the other it is the property of his natural father. The text of Manu refers to the estate of the natural father, and the mere fact that he is dead at the time of adoption and that it has become the property of his son at the time, does not change the character of the property for the purposes of the rule laid down by the text, and it cannot be treated as his self-acquired property.

This conclusion is in consonance with the Mitakshara and the Vyavahara Mayukha, wherein the text of Manu is referred to with approval: see Mitakshara, Chapter I, section XI, para. 32, in Stokes' Hindu Law Books, at pages 422-423, and Mandlik's Hindu Law, page 59. I quite recognise, as pointed out by Mr. Shingne, that in neither of these works is the case, such

as we have here, specifically provided for. But neither the Smriti writers nor the commentators contemplated the case of an only son being given in adoption after his father's death, and naturally did not advert to such a case. But a general rule is laid down, which is comprehensive enough to include the present case.

I do not desire to place any great reliance upon the Dattaka Mimansa and the Dattaka Chandrika; but my conclusion is consistent with the view taken of Manu's verse in both these works: see Stokes' Hindu Law Books, at pages 599 and 640.

It is necessary to note briefly the decisions in which ■ contrary view is taken, and which have enabled Mr. Shingne to raise the various contentions already dealt with. The case of *Behari Lal Laha v. Kailas Chunder Laha* (1) is a decision under the Dayabhaga Law, and the text of Manu has not been referred to in the judgment. Besides a different view is taken by at least one of the learned Judges who decided the case of *Birbhadra Rath v. Kalpataru Panda* (2). I am unable, therefore, to accept this decision as a guide in deciding the present case under the Mitakshara. I desire to point out with reference to the passage quoted by Ameer Ali, J., in *Behari Lal's* case (1) from the well-known case of *Musammatt Bhoobun Moyie Debia v. Ram Kishore Acharj Chowdhry* (3) that it has no bearing on the present question. Their Lordships of the Privy Council point out that by the mere gift of a power of adoption to ■ widow, the estate of the heir of a deceased son vested in possession cannot be defeated and divested. But here we are concerned with the effect of adoption on the property vested in the boy given in adoption at the time, and which originally formed part of the estate of his natural father. With reference to it we have a text of Manu, which has been referred to in the Mitakshara and the Vyavahara Mayukha and which has to be construed, and an intelligible principle underlying it, which has to be considered and applied. I feel quite clear

(1) 1 C. W. N. 121.

(2) 1 C. L. J. 388 at p. 400.

(3) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

TIKA v. SHEO NARAIN.

that the observations in *Bhoobun Moyee's* case (3) do not touch the present point.

The decision of the Madras High Court in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (4) is directly in point and undoubtedly conflicts with the view I take of the Hindu Law on this point. I have already stated some of the reasons for not adopting the view, which has found favour with the Madras High Court, in dealing with Mr. Shingne's contentions. I need hardly add that I have considered the judgment with care and respect, to which it is undoubtedly entitled, but unfortunately I am unable to agree with it, and it is plainly my duty to give effect to my view, as the decision is not binding upon this Court. It is clear from the judgment that the learned Judges were influenced by the decision in *Behari Lal Laha's* case (1) and that they did not consider the texts to be explicit enough to require them to dissent from that view. As regards the observations of the Privy Council quoted and relied upon at page 450 of the report, I do not think that they bear upon the present point. The general rule stated by their Lordships of the Privy Council must be taken with reference to the point which had to be considered and decided in the case: see *Moniram Kolita v. Keri Kolutani* (5). Its application in the Madras case seems to me to be far-fetched. Here we have to consider the case of an adoption, and a particular text bearing upon the point arising in the case.

On all these grounds it seems to me that the lower Courts are wrong in holding that the property in suit is still vested in Ramchandra. On his adoption, the property went to the next heir in the family of his birth and, therefore, Parvatibai was competent to mortgage it. In this case it is not necessary to consider whether on Ramchandra's adoption the property would go to his heirs or to his father's heirs, as in any view of the matter Parvatibai would be the next heir.

It is satisfactory to find that this decision

avoids the obvious anomaly of allowing defendants Nos. 1 and 2, who belong to the natural family of Ramchandra and who are more distant relations than Parvatibai, to hold the property to the exclusion of the next heir (Parvatibai) on the footing that the property still belongs to Ramchandra, who has left their family.

The result, therefore, is that the decree of the lower Appellate Court is set aside, and the suit remanded to the Trial Court for disposal on the merits. All costs up to date to be costs in the suit.

BATCHELOR, J.—I am of the same opinion.

With great respect to the learned Judges who decided the case in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (4), I am unable to doubt that the texts are in favour of the appellant's contention; and on the question of principle, apart from the texts, I see no difficulty in holding that property which vested in A as being the son of B becomes divested when A ceases to bear that character.

Decree set aside; Suit remanded.

— — — ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 314 OF 1915.

March 23, 1916.

Present:—Mr. Stuart, A. J. C.

TIKA—DEFENDANT—APPELLANT

versus

SHEO NARAIN—PLAINTIFF—

RESPONDENT.

Ouddh Rent Act (XXII of 1886)—Ordinary tenant—Rights not transferable.

(4) 29 M. 437 at p. 452; 16 M. L. J. 178.

(5) 7 I. A. 115 at p. 153; 5 C. 776 at p. 788; 6 C. L. R. 322; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198.

TIKA v. ■■■ NARAIN.

The rights of ■ ordinary tenant in Oudh are not transferable. [p. 427, col. 2.]

Indal Sah v. Bhabhuti Singh, 25 Ind. Cas. 6, referred to.

The rights and liabilities of ■ ordinary tenant in Oudh are the creation of Act XXII of 1886 and they can only be ascertained from a study of that Act itself. [p. 427, col. 2.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 21st June 1915, upholding the order of the Munsif, Bahraich, dated the 21st December 1914.

Babu Bisheshwar Nath Srivastava, for the Appellant.

Syed Nabi Ullah, for the Respondent.

JUDGMENT.—The facts of the suit against the decree in which this appeal has arisen are as follows:—

Tika defendant is an ordinary tenant who cultivates ■ holding in the village of Dekauli. The village in question is owned and possessed by the Maharaja of Kapurthala. Tika resided in a house in the inhabited site of Dekauli with the rights of a tenant in the said house. On 12th March 1913 Tika sold his rights in the house and a *khandhal*, his rights as an ordinary tenant in his holding, and the *rabi* crop of 1320 *Fasli* to Sheo Narain plaintiff for Rs. 450 by ■ registered deed of sale. The plaintiff after contest has obtained possession of the house and the *khandhal* and apparently received the *rabi* crop, as he makes no claim in respect thereof. The plaintiff also obtained on the 7th January 1914 a lease from the Maharaja of Kapurthala in respect of the holding. The defendant having refused to deliver possession of the holding, the plaintiff instituted on 26th June 1914 a suit for possession of the same in the Court of the Munsif of Bahraich. The defendant contested the claim on the main ground that the transfer of the rights of an ordinary tenant in Oudh is void *ab initio* and unenforceable. Both the Courts below have decided this point against him. This second appeal is preferred.

The two points for consideration in this appeal are, *firstly*, whether rights of this nature are capable of transfer, and *secondly*, whether even if they are incapable of transfer the defendant, in view of the fact that he received good consideration for the execution of the transfer in question, is not estopped from setting up the plea which he raises in appeal.

The learned Counsel for the appellant puts his case as follows. He says that if the

transfer is absolutely void no question of estoppel arises. He concedes that if it be decided against his client that the transfer is not absolutely void his client must fail, inasmuch ■ the transfer would then be voidable only at the instance of the landholder and ■ the landholder has admittedly accepted the transfer. He argues that the transfer is absolutely void. His argument is this. The Oudh Rent Act (XXII of 1886) recognizes three classes of persons who are liable to pay rent. The first class is that of under-proprietors as defined in section 3 (8), who possess ■ heritable and transferable right of occupation. The second class is that of occupancy tenants as defined in section 3 (8) and section 5, who possess a heritable but not a transferable right of occupation. The third class is that of ordinary tenants as defined in section 3 (8). The Rent Act does not state whether they do or do not possess ■ heritable or transferable right. It does not state that they do possess such rights and it does not state that they do not possess them. It is silent on the subject. The learned Counsel for the respondent relies in the main on the silence of the Act upon this point, and the view of the lower Court is the same. But there is an obvious flaw in the argument. If it be admitted that the right is transferable because the Act nowhere says that it is not transferable, it should be held on the same reasoning that the right is hereditary because the Act nowhere says that it is not hereditary. It could hardly be seriously suggested that the right is hereditary. In the case of *Indal Sah v. Bhabhuti Singh* (1) the parties agreed before me that the rights of such ■ tenant are not transferable and at the time it did not strike me that it was impossible to hold another view.

The rights and liabilities of an ordinary tenant in Oudh are the creation of Act XXII of 1886 and they can only be ascertained from a study of that Act itself. No analogy can be drawn from the inherent power of transfer possessed by a proprietor, and from the Act itself I am of the opinion that the rights are not transferable. The point is one of importance and may eventually have

(1) 25 Ind. Cas. 6.

MOOTHEETUTH KANARI v. HARI SHENOY.

to be decided by ■ Bench. I do not propose, however, to refer the decision to a Bench for the following reason. Supposing that his rights as ■ tenant were non-transferable (which is the view that I take), even then the appeal of Tika must fail. He agreed impliedly with Sheo Narain for good consideration that, if Sheo Narain could obtain ■ lease of the holding from the Maharaja, he (Tika) would abandon the holding in Sheo Narain's favour. No other construction can be placed on the terms of the transfer. The Maharaja has granted the lease to Sheo Narain. In the circumstances Tika cannot contest the finding that he must leave the holding.

I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 706 OF 1914.

February 21, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

MOOTHEETUTH KANARI—PLAINTIFF—
APPELLANT

versus

HARI SHENOY AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 463—Lunatic—No guardian ad litem appointed—Decree passed—Sale of lunatic's property in execution of such decree—Sale, validity of—Lunatic's right to resist purchaser's suit for possession—Lunacy Act (XXXV of 1858).

The provisions of section 463 of the old Civil Procedure Code, 1882, apply to lunatics, whether adjudged or not under Act XXXV of 1858. [p. 429, col. 1; p. 430, col. 1.]

Uma Sundari Dasi v. Ramji Haldar, 7 C. 242; 9 C. L. R. 13; *Tukaram Anant Joshi v. Vithal Joshi*, 13 B. 656 and *Kudala Reddi v. Narisi*, 24 M. 504, followed.

A lunatic stands in the same position ■ a minor. Therefore, ■ sale of a lunatic's properties in execution of ■ decree against him passed in a suit in which he was not properly represented by ■ guardian ad litem is a nullity, and the lunatic can resist an action for possession without seeking to set aside the sale. [p. 430, col. 1; p. 431, col. 1.]

Khiarajmal v. Daim, 32 C. 296; 1 C. L. J. 584; ■ A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23 (P. C.); *Rashid-un-nissa v. Muhammad Ismail Khan*, 3 Ind. Cas. 864; 36 I. A. 168; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M.L.T. 279 (P. C.); *Pasumarti Payidanna v. Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 28 M. L. J. 525; 38 M. 1076, followed.

Malkarjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.), distinguished.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 556 of 1911, preferred against that of the District Munsif, Tellicherry, in Original Suit No. 488 of 1910.

FACTS of the case appear from the judgment. Both the lower Courts held that the procedure in the Code applied to the lunatic, though not so adjudged under the Lunacy Act.

Mr. K. Ramanath Shenai, for the Appellant.—In this case, the man was not found to be a lunatic on inquisition. Chapter XXXI, Code of Civil Procedure, 1882, will apply only when he is found to be so on inquisition.

No guardian was appointed to the lunatic and the sale is merely voidable. Here in this case there was no inquisition and the man was not declared to be ■ lunatic.

The sale is merely voidable and unless he took step to set aside the sale in execution proceeding, it is not open to him in a suit for partition to raise this plea. *Uma Sundari Dasi v. Ramji Haldar* (1); *Tukaram Anant Joshi v. Vithal Joshi* (2); *Khiarajmal v. Daim* (3); *Malkarjun v. Narhari* (4).

(1) 7 C. 242; 9 C. L. R. 13.

(2) 13 B. 656.

(3) 32 C. 296; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 20; 7 Bom. L. R. 1; 32 I. A. 23 (P. C.).

(4) 25 B. 337 (P. C.); 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216.

MOOTHETUTH KANARI v. HARI SHENOY.

Mr. C. V. Anantha Krishna Aiyar, for the Respondents.—No inquisition is necessary. Pope on Lunacy. In Danial's Chancery Practice, pages 136, 137, it is said that even persons not found to be lunatics may come in and claim to have guardians appointed, if they ■■■ in fact so. Bullen and Leake's Precedents and Pleadings, page 244.

Mr. K. Ramanath Shenai in reply.—There is no finding that my client is insane. Notices were sent one after another and there was no return. After the execution, the sale is not void. In *Khiarajmal v. Daim* (3) the initial step was itself bad. See also *Seshagiri Rao v. Tangaturi Jagannadham* (5).

JUDGMENT.

COTTS TROTTER, J.—In this case the suit was brought for partition, the plaintiff being a person who had bought the 2nd defendant's share in some property at a Court-sale in 1905. The 2nd defendant is stated in the plaint in terms to have been insane at the date of those proceedings, and it is found by the learned Judge on the evidence that he was insane at the time of the sale in 1905. It is argued, therefore, on behalf of the defendants that, that being so, the Court-sale in 1905 was ■ nullity and passed no property to the purchaser. For the purchaser it is argued that it is at the most voidable and can only be set aside in proceedings specially instituted for that purpose and if not set aside by proceedings under section 311 of the old Code, corresponding to Order XXI, rule 90, of the new Code, it cannot be set aside by ■ side wind by way of defence to a separate suit. When the sale took place, the old Code was in force. By section 463 of that Code it was enacted: "The provisions contained in sections 440 to 462" (those are provisions relating to infants whether plaintiffs or defendants) "shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act XXXV of 1858, or under any other law for the time being in force." So that apparently it was confined in terms to the case of persons of unsound mind adjudged to be so by proceedings in a Court of Law. But the extreme inconvenience of that very soon became manifest and accordingly the Calcutta High Court in *Uma Sundari Dasi v. Ramji Halder* (1) proceeded to extend it

by drawing analogies from the English Law and Procedure; they proceeded to state that they must regard the principle of guardians *ad litem* being appointed for an infant as applying also to ■ lunatic even though not so adjudged. From that time similar decisions have been given in Bombay [See *Tukaram Anant Joshi v. Vithal Joshi* (2)] and the Allahabad High Court and this Court also followed suit in the same direction. That being so, the position is this: that the position of a lunatic under this provision of the Civil Procedure Code must be regarded as being substantially that of ■ minor, whether he is a lunatic so found by proceedings in ■ Court of Law or merely one established to be in fact such. By the law of India, it is quite clear that the contracts of persons of unsound mind, like the contracts entered into by minors, are not voidable merely but are void. This, of course, is not a case of contract, it is a case of execution proceedings. But it seems to me that the respondent has an absolutely complete chain of argument. The way he puts it is this. In *Khiarajmal v. Daim* (3), it was held that where a minor was sued without ■ guardian *ad litem* being appointed, the decree and the Court-sale that took place in execution of the decree were absolutely null and void, because in the absence of the proper representative of the minor the Court had no jurisdiction at all. That case distinguished the case of *Malkarjun v. Narhari* (4), which is relied upon by the other side. The distinction, I think, is very clear and unmistakable, because all that happened in *Malkarjun v. Narhari* (4) was this; the Court which had to decide the matter brought on somebody as the legal representative of a deceased person, who, it was proposed subsequently to say, was not the legal representative. The Privy Council held that that was one of the preliminary matters which the Court had to decide to give it jurisdiction and it did not deprive itself of the jurisdiction because it happened to make ■ mistake. On the other hand the case of *Khiarajmal v. Daim* (3) was not ■ case of appointing as guardian ■ person who ought not to have been appointed ■ guardian. Had such ■ person been appointed, the fact that the Court made ■ mistake as to the right person to be appointed would not prevent the usual consequences following. But there was no guardian appointed at all, and, therefore

(5) 32 Ind. Cas. 591; 19 M. L. T. 93.

MOOTHETUTH KANARI v. HARI SHENOY.

to all intents and purposes the minor was not really a party to the suit and that being so, their Lordships held that the Court had no jurisdiction. It is sought to distinguish that case by saying: "Oh well here in this case there is no evidence that the man was insane at the time of the decree and we are entitled to assume he was sane, and if the decree is all right, the matter will not be made any the worse by the fact that subsequently when the sale came on he happened to be insane." That is completely answered by *Rashid-un-nissa v. Muhammad Ismail Khan* (6). In that case the suit was brought to declare the nullity of a sale in execution. There they agreed that there was a perfectly good judgment against the deceased person during his lifetime but the proper parties were not added before the sale. It seems to me that completes the chain in the case of the respondent. I need only add this, that the view that I am taking as to the effect of the decisions of the Privy Council in *Malkarjun v. Narhari* (4), *Khiarajmal v. Daim* (3) and *Rashid-un-nissa v. Muhammad Ismail Khan* (6) seems to accord with that taken by the present Chief Justice in *Pasumarti Payidanna v. Ganti Lakshminarasamma* (7) in which the learned Chief Justice examines all these cases and comes to a conclusion with which I believe this judgment is in complete accordance. I think, therefore, the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—I entirely agree. It is now settled law that the provisions of the old Code of Civil Procedure apply to persons adjudged to be of unsound mind under Act XXXV of 1858 as well as to those who are not so adjudged. See *Kadala Reddi v. Narisi* (8) and the cases cited therein. Consequently the provisions of Chapter XXXI of Act XIV of 1882 apply to the case of a person who is a lunatic, although he has not been so found on enquiry and although no committee has been appointed for him. An attempt was made to draw a distinction between suits in which a lunatic has been impleaded and to whom no guardian was appoint-

ed, and proceedings in execution where a similar thing has happened. I am unable to see reason for any distinction between these two classes of cases. Chapter XXXI applies to suits as well to execution proceedings. So also does Order XXXII of the present Code. Therefore, if a decree passed against a lunatic who has not been properly represented is a nullity, I fail to see how a sale effected against a lunatic who has not been properly represented can stand in a different position. The decision in *Malkarjun v. Narhari* (4) was very much relied on by Mr. Shenai. My learned brother has pointed out how that case has been distinguished by the Judicial Committee in subsequent cases. It seems to me that that case was altogether different from the one we have to deal with. In that case the Court came to a conclusion after contest that a particular person was the legal representative of the deceased judgment-debtor. The Judicial Committee pointed out that persons who have been parties to the decision of a Court ought not to be heard to say in subsequent proceedings that all that followed upon that pronouncement by the Court was without jurisdiction, that is to say, that proceedings taken in consequence of this pronouncement by the Court that a particular individual was the legal representative were legal and were within the competency of the Court. But that has no bearing upon a case where a party is put forward as the legal representative who is not really the legal representative, or where the parties do not choose to appoint a proper guardian for a minor or a lunatic. In the case of a minor it is now settled that if no guardian has been appointed for him, the sale in execution should be regarded as a nullity. The latest case on this point is *Pasumarti Payidanna v. Ganti Lakshminarasamma* (7). The observations of Subramania Aiyar, J., in *Narayana Kothan v. Kaliasundaram Pillai* (9) were relied upon by the appellant. The learned Judge seems to have observed that a sale against a lunatic who has not been properly represented by a guardian would only be voidable. The learned Judge's view was to a certain extent in accordance with the view taken in England that a transaction by

(6) 3 Ind. Cas. 864; 36 I. A. 168; 31 A. 572; 13 C. W. N. 1182 (P. C.); 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279.

(7) 29 Ind. Cas. 314; 25 M. L. J. 525; 38 M. 1076.

(8) 24 M. 504.

(9) 10 M. 219.

AIYASAMI CHETTY v. CHINNIA NAINAR.

■ lunatic is voidable and not void. But in this country the same principle applies to ■ lunatic as to ■ infant under section 11 of the Indian Contract Act; and as pointed out in *Machaima v. Usman Beari* (10) and *Lakhya Dasya v. Umakanto* (11) transactions by lunatics are absolutely void. Therefore, ■ lunatic stands in the ■ position as a minor and applying the analogy of cases in which sales against minors without their being properly represented have been held to be void, I hold that sales against lunatics who have not been properly represented are void, and that there is no necessity for setting aside the sales; it is open to the defendant to plead that as the sale was void no property passed to the plaintiff and that he is not entitled to recover possession. I, therefore, agree that the second appeal should be dismissed with costs.

V. R. P.

Appeal dismissed.

(10) 17 M. L. J. 78.

(11) 2 Ind. Cas. 818; 14 C. W. N. 256.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 50 OF 1915.

February 24, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

AIYASAMI CHETTY AND ANOTHER—
DEFENDANTS NOS. 1 AND 3—APPELLANTS
versus

CHINNIA NAINAR AND OTHERS—
PLAINTIFFS AND DEFENDANT NO. 4—
RESPONDENTS.

Accounts—Mutual dealings—Oral settlement of
accounts—Cause of action.

In cases of mutual dealings even an oral settlement of accounts may give rise to a substantive cause of action.

Marimuthu v. Saminatha Pillai, 21 M. 366, followed.
Amuthu v. Muthayya, 16 M. 339, not followed.

Appeal against the decree of the District Court of South Arcot, dated the 11th January 1915, in Appeal Suit No. 217 of 1914, preferred against that of the District Munsif of Tirukoilur, in Original Suit No. 58 of 1914.

Mr. G. S. Ramachandra Aiyar, for the Appellants.

Mr. B. Narasimha Rau, for the Respondents.

JUDGMENT.—The District Judge's order is, no doubt, too brief and consequently ■ little obscure. Though in *Amuthu v. Muthayya* (1) there is a very general observation that "An account stated is only a substantive cause of suit in itself when it is in writing signed by the defendant or his agent," it was distinguished in *Marimuthu v. Saminatha Pillai* (2), on the ground that the former case did "not appear to be a case of mutual dealings." In other words, where it is a case of "mutual dealings," even an oral settlement of accounts might give rise to a substantive cause of action. [See also *Hirada Karibasappah v. Gadigi Muddappa* (3), *Sheikh Akbar v. Sheikh Khan* (4) and *Dukhi Sahu v. Mahomed Bikhu* (5).]

We shall, therefore, not interfere with the order of remand passed by the District Judge, but shall supplement it by a direction to the District Munsif to order the plaintiffs to file ■ written statement giving details as to the nature of the dealings and to produce their accounts, and also to order the defendants to give a further written statement as advised and to raise any further necessary issues before disposing of the suit.

The costs will abide the result.

Order modified.

(1) 16 M. 339.

(2) 21 M. 366.

(3) 6 M. H. C. R. 197.

(4) 7 C. 256; 8 C. L. R. 528.

(5) 10 C. 284 at p. 296; 13 C. L. R. 445.

GOPPAMMAL v. SRINIVASA AIYANGAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 296 OF 1914.

March 9, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

GOPPAMMAL—RESPONDENT

No. 1—APPELLANT

versus

V. SRINIVASA AIYANGAR AND ANOTHER

—PETITIONERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 1, 34, 38, 45, 47, 50—Appointment of guardian of property on furnishing security—Confirmation of order after security is furnished—Appeal against latter order, whether lies—High Court Rules under s. 50—Muffasil Courts, practice of.

An appeal lies only against the order appointing a person guardian of the property of a minor, and not against an order approving of the security furnished by him and ratifying the original appointment, inasmuch as such order is not appealable under section 47 of the Act. [p. 433, col. 2; p. 435, col. 1.]

Gopammal v. Sreenivasa Iyengar, 27 Ind. Cas. 921; 28 M. L. J. 96, followed.

Per Sadasiva Aiyar, J.—The Guardians and Wards Act, 1890, does not provide for two orders *viz.*, an interim order of approval and a 'final order' of appointment of the guardian of property, nor does it postpone the appointment till security is furnished. On the other hand, the appointment has to precede the requisition for and the furnishing of security. [p. 433, col. 1.]

Rules and forms made by the High Court under section 50 of the Act requiring the appointment to be postponed to the furnishing and approval of security are *ultra vires*. [p. 433, col. 1.]

Per Moore, J.—The rules framed by the High Court under section 50 of the Act are *intra vires* and the procedure prevailing in the Muffasil Courts of first making the appointment conditional on security being furnished and of confirming the same later on being satisfied with the security or treating the petition as pending till proper security is furnished, is correct. [p. 434, col. 2.]

Appeal against the order of the District Court of Ramnad at Madura in Original Petition No. 437 of 1912.

Messrs. J. L. Rozario and A. Swaminatha Aiyar, for the Appellant.

Messrs. C. S. Venkatachariar and P. S. Vythinatha Aiyar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The first respondent in the lower Court is the appellant before us. She is the widowed mother of a minor boy. On the application of the minor's father's 1st cousin, one V. Srinivasa Aiyangar has been appointed as guardian

of the minor's property, superseding her in the interests of the minor, so far as the guardianship of his properties is concerned.

The order appointing Srinivasa Aiyangar as guardian was passed on the 19th day of January 1914, under section 7 of the Guardians and Wards Act. Section 34 of the Act provides that "where a guardian of the property of a ward has been appointed, he shall, (a) if so required by the Court, give a bond to the Judge of the Court engaging duly to account for what he may receive in respect of the property of the ward." It seems to me clear that it is only after the appointment that the person appointed can be required under the Act to give security under section 34 (a). If he contumaciously fails to give security, section 39, clause (e), empowers the Court to remove him from the guardianship.

Section 50 of the Act empowers the High Court to make rules (among other things) "as to the security to be required from the guardian" (clause b) and as to the circumstances in "which such requisitions as are mentioned in clauses (a) to (d) of section 34 should be made." [Clause (d) of section 50.] The rules should, however, be "consistent with the Act" (that is, the Guardians and Wards Act). I think it would be inconsistent with the Act to impose a duty on the District Court to require such security before the appointment of a guardian. The following are portions of three of the rules framed by the High Court under the Act:—Rule 240 "unless the Court for reasons to be recorded in writing otherwise orders, a person appointed guardian of the property of the minor shall give security, etc."

Rule 241. "When security is to be given, the Court shall determine the actual amount thereof and may examine the proposed sureties as to their property and liabilities and adjourn the further hearing of the application to a fixed day as in Form No. 92."

Rule 242. "The proposed guardian and his sureties shall execute a security bond, etc." "At the adjourned hearing, the Judge shall pass an order in Form No. 94, etc."

GOPPAMMAL V. SRINIVASA AIYANGAR.

Form No. 92 mentioned in Rule 241 is headed "Interim order on application for guardianship of the property." It says (in part) ".....the Judge having approved of C. D. as a proper person to be appointed guardian of.....the property of E. F., the minor" "It is ordered that the said C. D. do.....bring into Court a bond..... and the further hearing.....is adjourned to....."

Form No. 94 referred to in Rule No. 242 is headed "Final order appointing a guardian of person and property." It says (in part) ".....the Judge having approved of C. D. as a proper person to be appointed guardian of the.....property of E. F., the minor, and the said C. D. having given security which has been approved by the Judge and filed in Court, it is ordered as follows :—

"1. That the said C. D. be appointed guardian of.....the property of the said minor, etc."

The Act does not provide for two orders, namely, an "Interim order" of "approval" and a "Final order" of "appointment" of the guardian of property, nor does it postpone the appointment till security is furnished. On the other hand, the appointment has to precede the requisition for and the furnishing of security. So far as the Rules and Forms quoted by me above require the appointment to be postponed to the furnishing and approval of the security (that is, require the security to be furnished and approved of before the appointment is made), they seem to be *ultra vires*.

In the present case, an order of appointment of guardian of property was made (as I said before) by a judgment of the 19th January 1914, the language of the judgment being "I appoint him" (Srinivasa Aiyangar) "accordingly as guardian of the property of the minor on a security of Rs. 30,000." This judgment of January 1914 was treated by the present appellant (the minor's mother) as an order of appointment made under section 7 and she appealed against it to the High Court (Appeal Against Order No. 59 of 1914). That Appeal No. 59 was dismissed by the High Court on 16th December 1914.

Meanwhile, the District Court seems to have treated its judgment of January 1914 as only an *interim* order approving of Srinivasa Aiyangar as guardian under the Rules and the Forms I have already referred to and treated Srinivasa Aiyangar even after that judgment as a "proposed" guardian and not as an "appointed" guardian and called on him to furnish security as such proposed guardian. He furnished sureties accordingly at the end of January 1914 and a direction was given on 4th February 1914 to the Nazir of the Court to have the security tested. The securities having stood the test and having been approved by the District Judge, an order was passed on 26th September 1914, the material portion of which is

"That the said V. Srinivasa Aiyangar has been appointed guardian of the property of the said minor, etc."

Thus, though there was an appointment order in January 1914 of the same Srinivasa Aiyangar as guardian and though that order was under appeal (and was eventually confirmed in December 1914), a sort of final order of appointment was passed in September 1914. The mother of the minor has taken advantage of the passing of the said second order of September 1914 to present the present Appeal No. 296 of 1914 against it, on the ground that sufficient security has not been given by the guardian and hence the appointment of September 1914 should not have been made.

I am clear, in the first place, that the order of January 1914 is the order of appointment which was legally passed under section 7 of the Guardians and Wards Act and is itself a final order of appointment and that the so-called final appointment of September 1914 is not provided for by law and cannot be appealed against as an independent order. In the second place, it has been held in the judgment in the former Appeal Against Order No. 59 of 1914 between these same parties that no appeal lies under section 47 of the Act against acts done by the Court under section 34 of the Act and as questions relating to the furnishing of security come under section 34, clause (a), this appeal is unsustainable. Without prejudice, therefore, to

GOPPAMMAL T. SRINIVASA AIYANGAR.

any steps which the appellant may be entitled to take or has taken under the Act in the District Court itself in respect of the alleged inadequacy of the security, I would dismiss the appeal with costs.

MOORE, J.—I agree that no appeal lies in this case, but desire to add a few words.

On January 19th, 1914, 1st respondent V. Srinivasa Aiyangar was appointed guardian of the property of the minor on a security of Rs. 30,000.

The present appellant, the mother of the minor, appealed against this order to the High Court and the appeal was dismissed on 16th December 1914.

While the appeal was pending the District Judge, following the practice which obtains in the mofussil and which is in accordance with the rules framed by the High Court, called upon the guardian to furnish security which was tested in the usual way by the Nazir.

The security having been found to be sufficient was accepted by the District Judge, and the following order was passed on 26th September 1914: "The Judge having approved of V. Srinivasa Aiyangar, son of Venkatarama Aiyangar, of Pandalgudi as a proper person to be appointed guardian of the property of minor Gopala Krishna Naick and the said V. Srinivasa Aiyangar having given security by entering into a bond with his surety, dated 9th day of September 1914, which has been approved by the Judge and filed in Court it is ordered as follows:—

"1. That the said V. Srinivasa Aiyangar be appointed guardian of the property of the said minor..."

With all deference to my learned brother I do not think that the rules framed by the High Court to which he refers can be regarded as *ultra vires*.

It is true that it is under section 7 of the Guardians and Wards Act that the appointment order is made. This section, which appears at the beginning of Chapter II of the Act and is followed by other sections which lay down the procedure to be followed when an application is made to a Court to appoint a guardian, the matters which the Court has to consider

when appointing a guardian and so on, provides that the Court may make an order appointing a guardian if it is satisfied that it is for the welfare of a minor that an order should be made. The section, is silent as to the furnishing of security. Section 34, which occurs in Chapter III dealing with the rights, liabilities and duties of guardians, provides that when a guardian of the property of a ward has been appointed or declared he shall, if required by the Court, furnish security.

Rule 240 says that unless the Court for reasons to be recorded in writing otherwise orders a person appointed guardian of the property shall give security.

The practice in the mofussil is this: When a guardian, of the property is appointed a time is fixed for his furnishing security. The appointment is made conditional on security being furnished. If the guardian fails to do so, or if the security tendered is insufficient the petition is dismissed. The formal order of appointment is not signed and the petition is treated as pending until the guardian has furnished the required security. This procedure appears to be correct and does not, I think, contravene any express provisions in the Act. As pointed out by my learned brother, the Act does not provide for *interim* or final orders for the appointment of a guardian, and does not appear to contemplate the postponing of the appointment order till security is furnished. But suppose a guardian fails to furnish security or gives insufficient security. There does not seem to be any provision in the Act which authorises that Court to cancel the appointment order in such a case. It is only in cases where the guardian fails to deliver the statement required under clause (b) of section 34 or to exhibit accounts as required by Court that he can be prevented from continuing under section 45 of the Act. Section 39 provides that a guardian may be removed for certain causes. Sub-clause (e) refers to the contumacious disregard of any provision of the Act or any order of the Court, but a guardian who fails to furnish security perhaps for unavoidable reasons or is unable to furnish sufficient security can hardly, I think, be said to be acting in con-

MADDALI VENKATASWAMY v. VELAMPALLI SUBBARAYUDU. LAKHI PRIYA DASSI v. RAI KISSORI DASSI.

tumacious disregard of the order of the Court.

However this may be, it is clear, I think, that the present appeal, which is directed against the order of the District Court, dated 26th September 1914, under section 34 (a) of the Act accepting the security furnished by Srinivasa Aiyangar, is incompetent. No appeal lies under section 47 (a) of the Act against such an order. See *Gopammal v. Sreenivasa Iyengar* (1). I agree that the appeal should be dismissed with costs without prejudice to any steps which the appellant may be entitled to take in the District Court in respect of the alleged inadequacy of the security offered by the 1st respondent.

V. R. P.

Appeal dismissed.

(1) 27 Ind. Cas. 921; 28 M. L. J. 96.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 122 OF 1915.

March 7, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

MADDALI VENKATASWAMY—

RESPONDENT—APPELLANT

versus

VELAMPALLI SUBBARAYUDU, MINOR,

BY MOTHER AND NEXT FRIEND SUBBAMMA—

PETITIONER—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50 (5)—Inaccurate inventory, submission of—Revocation of Probate.

The power of revocation conferred by section 50 of Act V of 1881 being a discretionary one, a Court is not bound to revoke a Probate on the ground of an inaccurate inventory, especially where the value of assets left by a testator is almost a matter of conjecture and perfect accuracy can hardly be expected.

Appeal against the order of the District Court of Guntur, in Original Petition No. 730 of 1914 (Original Suit No. 2 of 1905 on the file of the District Court of Guntur).

Mr. K. V. L. Narasimham, for the Appellant.

Mr. P. Chenchiah, for Mr. T. Prakasam, for the Respondent.

JUDGMENT.—The District Judge's order cannot be supported. The District Judge seems to have thought that if the inventory submitted by the executors was untrue in a material respect he had no option but to revoke the Probate. Section 50 (5) of the Probate and Administration Act says that the grant "may" be revoked on account of a material falsehood in the inventory submitted by the executor. The value of large assets (about a lac of rupees) left by a trader-testator is almost a matter of conjecture and perfect accuracy can hardly be expected.

We do not think that it was a proper exercise by the Court of its discretion under section 50 (5) of the Probate and Administration Act to revoke in 1914 a Probate granted in 1907, merely on the ground that the inventory submitted in 1907 estimated the testator's assets as worth about 70,000 instead of about 95,000 rupees.

We, therefore, set aside the order of the lower Court and direct that the petition for revocation of Probate be dismissed. The parties will bear their respective costs in both Courts.

Appeal allowed; Order set aside.

V. R. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 61 OF 1915.

February 2, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

In re GOBARDHAN SEAL, AN INSOLVENT.

Srimati LAKHI PRIYA DASSI—

APPELLANT

versus

Srimati RAI KISSORI DASSI AND ANOTHER—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 57

LAKSHI PRIYA DASSI v. RAI KISSORI DASSI.

—Bona fide purchaser for value from benamidar of owner adjudicated insolvent, rights of—Official assignee—Equitable estoppel.

A person purchasing property from a benamidar of the owner, subsequent to his adjudication in insolvency under Act III of 1909, does not acquire any title to the property as against the Official Assignee, even though the purchase was made *bona fide* for value and without notice [p 437, col. 2; p. 439, col. 2; p. 441, col. 1.]

In re Vansittart, Ex parte Brown (1893) 2 Q. B. 377; 62 L. J. Q. B. 279; *In re Brall, Ex parte Norton* (1893) 2 Q. B. 381; 5 B. 410; 69 L. T. 323; 41 W. R. 623; 10 Morrell, 166; *In re Carter and Kenderdine's Contract*, (1893) 1 Ch. 776; 66 L. J. Ch. 40; 76 L. T. 476; 45 W. R. 484; 4 Manson 34; *In re Slobodinsky, Ex parte Moore* (1904) 2 K. B. 117; 7 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 0 Manson 34; 1 L. T. R. 616; *In re Hart, Ex parte Green* (1912) 3 K. B. 6; 81 L. J. K. B. 1213; 107 L. T. 364; 56 S. J. 615; 28 L. L. R. 452 and *In re Brunson, Ex parte Moore*, (1914) 3 K. B. 1086, 83 L. J. K. B. 1673; 30 T. L. R. 604, distinguished.

Per Mookerjee, J.—Such a purchaser may establish a good title by estoppel against the owner, but he cannot do so against the Official Assignee unless the conduct of the Official Assignee himself was such as would have made the equitable doctrine of estoppel applicable against him. [p. 440, col. 2.]

Appeal against the order of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 16th March 1915.

Messrs. Langford James and N. C. Sarkar, for the Appellant.

Messrs. B. K. Lahiri and K. N. Majumdar, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This was a petition by Sreemutty Rai Kissori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.

The petitioner was the mother-in-law of the insolvent, and the transfers in question were, first of all, a conveyance by the insolvent to his wife which was dated the 9th of November 1911, and, secondly, a conveyance from the insolvent's wife dated the 1st of October 1912 to the appellant, who is the sister-in-law of the insolvent, she being the wife of the insolvent's brother.

Now, apparently the mother-in-law, the petitioner, filed a suit against the insolvent in the Small Cause Court for Rs. 1,94. on the 7th of September 1911. The proceedings in that suit occupied a considerable time, as far as I understand, and the judgment was not in fact obtained until the 23rd of February 1912. On

the 27th of February 1912, the insolvent against whom the judgment was obtained filed his petition, and he was adjudicated an insolvent on the same date. In the meantime the insolvent had, as I have already stated, on the 9th of November 1911 purported to convey his share in the property in question to his wife.

Now, the learned Judge who heard this petition, after hearing the evidence, came to the conclusion that that conveyance was a fictitious one, to use his own words (at page 94, he says), "Taking all the evidence into consideration, I am of opinion that the sale by the insolvent to the wife was a fictitious sale." I understand him to mean by that, that the transaction was intended to be nothing more than a blind, that the insolvent never intended to pass the property to his wife, that he intended to retain the property and through his wife to retain control over it, and in that sense it was a fictitious transaction. On the face of it, it was a conveyance to the wife, but in fact it was no conveyance at all.

On the evidence, I think the learned Judge was quite justified in coming to that conclusion. I am not going through the evidence; it is unnecessary for me to do that; it was read fully yesterday by the learned Counsel for the appellant, and commented upon by him and also by the learned Counsel for the respondent. Therefore, the position was this: that on the 27th of February, immediately before the adjudication, the property in his share of the premises in question remained in him, because, as I have already said, this so-called sale was entirely a fictitious transaction. The result was that the property vested in the Official Assignee as soon as the adjudication took place.

What happened afterwards is that on the 12th of October 1912, the insolvent's wife purported to sell the one-third share in the premises to the appellant, the sister-in-law of the insolvent. Now, the learned Judge has held that that transaction also was a fictitious transaction. I am not prepared to go as far as that upon the evidence. I think there are certain

LAKHI PRIYA DASSI v. KISSORI DASSI.

elements which make me hesitate in finding that that transaction was a fictitious one, as for instance, there is the fact that somewhere near Rs. 3,000 had to be found by the person who was put forward as the purchaser, namely, the appellant. There is no doubt whatever, as far as I can see, that there was a mortgage upon the premises, that the mortgagee was in no way connected with the insolvent or his wife or the purchaser—he was a total stranger—and that upon the sale by the insolvent's wife to the appellant that mortgage was paid off to the extent of Rs. 1,150. In addition to that, within two or three days after this transaction, a house was bought for Rs. 1,700 in the name of the insolvent's wife, and the vendor of that property was a man, whose name was Babu Kali Kumar Pyne; and, there again, I cannot find any trace that Babu Kali Kumar Pyne was in any way connected with the insolvent, his wife or the purchaser. Therefore, it must be taken that the vendor of that property and the mortgagee, who were total strangers to these parties, were paid the sum of Rs. 2,850, and it is difficult for me on those facts to come to the conclusion that this second transaction was a fictitious transaction. Therefore, if it were necessary for me to come to a definite conclusion, I should be inclined to say that this transaction has not been proved to be a fictitious transaction. However, for the purpose of my judgment I will assume that it was not a fictitious transaction and that it was a *bona fide* purchase by the appellant. But even assuming that conveyance to be a *bona fide* conveyance and assuming that the purchaser had no notice—I am only assuming that in her favour—I am bound to say that I think there are facts which would give rise to very serious consideration as to whether the appellant, the purchaser, who was the sister-in-law of the insolvent, did not know all about the circumstances under which the first transaction took place—I say even upon the above-mentioned assumption I still think that the conveyance of 12th October 1912 cannot be upheld as against the Official Assignee, and for this reason: Inasmuch as the first transaction, namely, that of the 9th of November 1911, has been rightly held

to be a fictitious transaction and nothing more than a fictitious transaction, the property vested in the Official Assignee. Section 57 of the Presidency Towns Insolvency Act provides:—

“Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency (a) any payment by the insolvent to any of his creditors; (b) any payment or delivery to the insolvent; (c) any transfer by the insolvent for valuable consideration; or (d) any contract or dealing by or with the insolvent for valuable consideration:

“Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.”

Therefore, in order to make any of the above-mentioned transactions with the insolvent, which takes place after the presentation of an insolvency petition by or against the debtor, valid, two things are necessary: (1) The transaction must take place before the date of the order of adjudication, and (2) the person with whom the transaction takes place must have no notice of the petition.

Now, I will assume that the lady in question had no notice, but it is quite clear that the transaction in this case, namely, of the 12th of October 1912 took place after the order of adjudication: and, therefore, in my opinion, it cannot be held to be a valid conveyance as against the Official Assignee, because it must be taken in this case that the transaction of the 12th October 1912 was in effect a transaction between the insolvent himself and the appellant. Now, the cases which Mr. James has quoted do not seem to me to be really relevant to this question; provided that it is once recognized that the first transaction, namely, of the 9th of November 1911, was nothing more than a fictitious transaction, and the second transaction must be regarded as between the insolvent himself and the appellant on the other.

LAKHI PRIYA DASSI v. KISSORI DASSI.

The case upon which Mr. James has placed the greatest reliance is *In re Slobodinsky, Ex parte Moore* (1) and the judgment of Mr. Justice Wright at page 524. The conveyance in that case was by Slobodinsky to a Company. Mr. Justice Wright in the first instance had to consider the effect of that conveyance, just as we have to consider the effect of the conveyance to the wife. The learned Judge in this case has held that the transaction was a fictitious transaction, and I agree with him. Now, what Mr. Justice Wright held in that case was that the conveyance to the Company was a fraudulent conveyance liable to be set aside on certain events happening; still, it was a conveyance by which it was intended by the debtor to pass the property, and a conveyance which would pass property to the Company until the conveyance was set aside. He says: "This having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand? One case which the trustee might make might be that the Company was an entirely sham Company, that it was really the debtor himself, and that the conveyance to the Company ought not to stand inasmuch as it was in substance a conveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham Company. It seems to me that Millinsky's business was a genuine one, and the *bona fide* transfer of his business to the Company and his presence on the board are elements that go some way to show that there was an independent Company. There are also some *bona fide* shareholders who hold some 665 shares. I think there was some prospect of the success of the Company, and that it was *not a mere fiction*." If he had held that it was a mere fiction, I gather from his judgment that it would not be necessary for him to consider the other points which he did in that case. It has been held in the present case that the conveyance which purported to be made by the insolvent to his wife was a mere fiction, and, therefore, that distinguishes the present case from

Slobodinsky's case (1), on which so much reliance has been placed.

Another case, *In re Hart; Ex parte Green* (2), that was cited raises a different question. The facts, broadly speaking, were these: A certain gentleman Mr. Hart, who was a Director of a Company, transferred, as far as we know perfectly *bona fide*, some shares of the Company to his daughter Miss Hart, on the 14th of October 1909. On the 13th of April 1910, his daughter sold these shares to Miss Lomas for good consideration, and Miss Lomas had no notice of the act of bankruptcy committed by Mr. Hart. But in the meantime Mr. Hart had on the 31st of March 1910 committed an act of bankruptcy, and there was a receiving order on the 22nd April 1910.

I draw attention to that date because that date was not only after the voluntary settlement by Hart to his daughter, but it was after the sale by the daughter to the appellant. There was a great distinction between that case and the present. In *Hart's* case (2) there was a voluntary settlement which passed the property or was intended to pass the property to his daughter, and the transaction which passed the property to the claimant Miss Lomas was between Miss Lomas on the one hand and Miss Hart on the other. In the present case the transaction must be taken to have been between the claimant, Mr. James' client, on the one hand, and the insolvent on the other hand, because the conveyance of the 9th of November 1911 was nothing more than a fictitious transaction, the property remaining in the insolvent until the adjudication.

For these reasons, I do not think this case is covered by those two decisions. I think it is clear that inasmuch as the conveyance of the 12th of October 1912 was not made until after the adjudication of insolvency, which took place on the 27th of February 1912, that transfer ought to be set aside, as against the Official Assignee.

I have only one word to add and that is this: Mr. James says that it is very hard upon the purchaser. It may be; but on the other hand, one has to remember that this estate is in insolvency, and there are creditors,

(1) (1903) 2 K. B. 517; 72 L. J. K. B. 883; 89 L. J. 190; 19 T. L. R. 616; 52 W. R. 156; 10 Manson 341.

(2) (1912) 3 K. B. 6; 81 L. J. K. B. 1213; 107 L. T. 368; 56 S. J. 615; 28 T. L. R. 482.

LAKHI PRIYA DASSI v. KISSORI DASSI.

and the rights of the creditors have to be considered just as much as the rights of the purchaser of this particular property: and it seems to me that if we were to hold contrary to the above conclusion we might as well have no insolvency laws at all, because all that would be necessary for the insolvent to do would be to imitate the conduct of the insolvent in this case, and he would then be able to defeat the claims of any creditor or creditors whom he wished to damage.

For these reasons, I think this appeal should be dismissed with costs.

WOODROFFE, J.—The conveyance by the insolvent to his wife was clearly a *benami*. It may be a question whether the judgment under appeal can be supported in as far as it holds that the sale to Srimati Lakhi Priya was fictitious in the sense of *benami*. There are grounds for thinking that it was an arrangement made in pursuance of the original *benami* with a view to defeat and delay the creditor, the respondent. It is not necessary, however, to determine this question, as the second conveyance which was really that of the insolvent, having taken place after the adjudication, cannot stand. It was sought to be effected after the title to the insolvent's property had vested in the Official Assignee. I am myself not disposed to think that the party who took under this conveyance was unaware either of the previous *benami* or of the insolvency, for it is to be observed that the parties are all related to one another and not strangers. There is, therefore, in my opinion, no hard case here as alleged. But in any case the conveyance is not protected, having been made after the adjudication.

I agree, therefore, that the appeal should be dismissed with costs.

MOOKERJEE, J.—This is an appeal from a determination by Mr. Justice Chaudhuri that the title claimed by the appellant cannot prevail as against the Official Assignee. The disputed property is the share of the insolvent in his dwelling-house. On the 9th November 1911 he executed a conveyance in favour of his wife in respect of this share: On the 12th October 1912 the wife executed a conveyance in respect of the same property to the present appellant. In

the interval, there had been dealings with the property by the wife who on the 16th May 1912 executed a mortgage, and on the 7th June following executed a deed of further charge thereon; these incumbrances were discharged on the 12th October 1912. The adjudication in insolvency was made on the 27th February 1912.

The case for the appellant is that she acquired a good title to the property, because she acquired it in good faith and for consideration from the wife of the original owner, who had effectively divested himself of all interest therein before his adjudication as an insolvent. Mr. Justice Chaudhuri has found upon the evidence that the conveyances of the 9th November 1911 and the 12th October 1912 were both fictitious transactions. The correctness of the finding as to the true nature of the first of these deeds is, I think, unimpeachable. No consideration passed from the wife to the husband at the time when the conveyance was executed and registered. The deed was, besides, executed at a time when the transferor was in a state of considerable pecuniary embarrassment. Indeed, a suit had already been instituted against him on the 7th September 1911 by his mother-in-law in the Calcutta Small Cause Court for recovery of a large sum of money; she subsequently obtained a decree against him on the 25th February 1912, and now impeaches the title of the appellant as a nominal transferee. As regards the conveyance of the 12th October 1912, however, I am not prepared, upon the record as it stands, to adopt the conclusion of the Trial Judge. The evidence makes it plain that some consideration was paid by the purchaser to the vendor on the basis of this conveyance, and the money was apparently applied, partly in discharge of the debt due to the encumbrancer Norendra Krishna Mitra, and partly in payment to one Kali Kumar Pyne, who sold a house to the wife of the insolvent on the 14th October 1912. There is nothing to indicate that the transactions with Norendra Krishna Mitra and Kali Kumar Pyne were not perfectly genuine. The question consequently arises, in what way is the position of the appellant affected by the fact that the lady who transferred the disputed property to her was the holder of a nominal conveyance from her husband.

LAKHI PRIYA DASSI v. KESSORI DASSI.

Mr. Langford James has contended that the position of the wife under the nominal conveyance of the 9th November 1911 is analogous to that of a person who accepts a voluntary settlement under the law of England. In my opinion, this view cannot possibly be sustained. It is well settled that when there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mask of the real ownership. In this case, notwithstanding the execution of the conveyance by the insolvent in favour of his wife, he continued to be the owner of the property; he never intended to divest, and, consequently, never did, in fact or in law, divest himself of the ownership thereof. There is ample authority for the position that a *benamidar* is in no sense an owner of the property. For instance, the Judicial Committee observed in the case of *Musammatt Thukrain Sookraj Koowar v. Government* (3) that the real owner may sue the ostensible owner to establish his title and to recover possession. This view can be maintained only on the hypothesis that the title has never passed from the real owner under the conveyance executed by him. Conversely, it was held by the Judicial Committee in the case of *Ramanugra Narain v. Mahasundur Kunwar* (4) that if the holder of the deed attempts to enforce his apparent title against the real owner, the latter may establish the real nature of the transaction and thus successfully defend himself against an unfounded claim. It has further been ruled by the Judicial Committee that the creditors of the real owner may seize the property in satisfaction of their claim against him on the assumption that he has never divested himself of his title thereto: *Musadee Mahomed Cazum Sherazec v. Meerza Ally Mahomed Shoosty* (5) and *Abdul Hye v. Mir Mohammed Mozaffer Hossein* (6). Conversely, it has been ruled that if the creditor of the nominal owner attempts to seize the property as his, the real owner is competent to intervene and stop the execution: (3) 14 M. L. A. 112; 2 Sar. P. C. J. 705; 20 E. R. 728.
(4) 12 B. L. R. 433; 3 Sar. P. C. J. 277, 3 Supp. Vol. 149.
(5) 6 M. L. A. 27; 8 Moo. P. C. 90; 1 Sar. P. C. J. 489; 19 E. R. 11; 14 E. R. 35; 97 R. R. 3.
(6) 11 L. A. 10; 10 C. 616; 8 Ind. Jur. 157; 4 Sar. P. C. J. 500.

Tara Soonduree Debee v. Oojul Monee Dossee (7). The true position, thus, is that notwithstanding the execution of the conveyance of the 9th November 1911, the husband still continued to be in fact the owner of the property. What then was the legal effect of the adjudication order passed on the 27th February 1912? The property, by operation of law, vested in the Official Assignee. Consequently, when we turn to the conveyance of the 12th October 1912, executed by the wife in favour of the appellant, the inference becomes irresistible that she did not acquire any title, as she took her conveyance from a person who herself had no title whatsoever. It may be conceded, as repeatedly ruled by the Judicial Committee [*Ram Coomar Koondoo v. John* (8), *Mahomed Mozaffer Hossein v. Kishori Mohun Roy* (9) and *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* (10)], that if the property had still continued with the husband, the appellant might have established a good title by estoppel against him on proof that she was a *bona fide* purchaser for value without notice of his secret title. It is not suggested that there was anything in the conduct of the Official Assignee himself which would make the equitable doctrine of estoppel applicable against him; consequently, there is no room for application of the class of cases of the type of *Troughton v. Gitley* (11), *In re Rawbone's Trust* (12) *Tucker v. Hernaman* (13), *Engleback v. Nixon* (14), *Wadling v. Oliphant* (15), *Ex parte Bolland*, *In re Dysart* (6), and *Ex parte Cooper*, *In re Green* (17). Consequently, the only question we are called upon to consider is, whether the title by estoppel which might have been claimable against the owner by reason of his con-

(7) 14 W. R. 111.
(8) 11 B. L. R. 46 (P. C.); 18 W. R. 166; 1 A. Sup. Vol. 40.
(9) 22 L. A. 129; 22 C. 909.
(10) 19 W. R. 292.
(11) (1766) Ambler 629 at p. 630; 27 E. R. 408.
(12) (1857) 3 K. & J. 476; 112 R. R. 243; 69 E. R. 1197; 26 L. J. Ch. 588; 3 Jur. (N. S.) 837.
(13) (1853) 4 De G. M. & G. 395; 102 R. R. 186; 22 L. J. Ch. 791; 17 Jur. 723; 1 Sm. & G. 394; 43 E. R. 561.
(14) (1875) 10 C. P. 645; 44 L. J. C. P. 396; 32 L. T. 841.
(15) (1875) 1 Q. B. D. 145; 45 L. J. Q. B. 173; 33 L. T. (N. S.) 837; 24 W. R. 246.
(16) (1878) 9 Ch. D. 312; 47 L. J. Bk. 74; 38 L. T. 693; 26 W. R. 807.
(17) (1878) 39 L. T. 260.

BHAIRON PRASAD v. SAMARPURI.

duct may, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order. In my opinion the answer must be in the negative. If the contention of the appellant were to prevail, the fundamental policy of the bankruptcy laws would be defeated. The policy is that as soon as an adjudication order has been made, the entire estate of the insolvent should vest in the Official Assignee for the benefit of his creditors. In a limited sense, the Official Assignee may be deemed the representative of the insolvent; but he cannot, for all purposes, be regarded as his successor-in-interest; for the property is vested in him with a view to paralyse the hand of the insolvent, who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. If the appellant were to succeed in her contention, the result would follow that although the insolvent himself could not possibly convey a good title to her after the adjudication order, yet it was open to him, through the medium of his nominal transferee, to effectuate the same fraudulent purpose. It would be lamentable if the beneficent object of the bankruptcy laws were permitted to be circumvented by so transparent a device.

The contention of the appellant is, I may add, in no way assisted by the cases discussed in the course of argument, namely, *In re Vansittart*, *Ex parte Brown* (18), *In re Brall*, *Ex parte Norton* (19), *In re Carter and Kenderdine's Contract* (20), *In re Slobodinsky*, *Ex parte Moore* (1), *In re Hart*, *Ex parte Green* (2), and *In re Branson*, *Ex parte Moore* (21). These decisions are distinguishable on two obvious grounds. In the first place, the persons who claimed protection there as against the trustee in bankruptcy derived their title from a person who had acquired a real title from the insolvent under a voluntary settlement. In the case before us, the person from whom the appellant claims title was at no time, in law or in fact, the owner of the disputed property. In

the second place, the title of the persons, who were afforded protection, had accrued before the receiving order was made. In the case before us, the title of the appellant accrued after the adjudication order had been made, and was in essence a title derived from the insolvent himself.

Finally section 57 of the Presidency Towns Insolvency Act, to which reference has been made, does not avail the appellant, in the absence of both the elements requisite to make that provision applicable. In the first place, the title of the appellant was not acquired before the order of adjudication was made. In the second place, it is not shown that the title was acquired without notice. It is reasonably plain, in all the circumstances disclosed in the evidence, that the appellant was aware of the circumstances of the insolvent and cannot be deemed a purchaser without notice; and there can be no question that unless she is a purchaser in good faith, she cannot be afforded protection in insolvency proceedings [*Ex parte Rabbidge*, *In re Pooley* (22), *In re Radham*, *Ex parte Palmer* (23), *Shears v. Goddard* (24), *In re Jukes*, *Ex parte Official Receiver* (25) and *In re Dunkley & Son*, *Ex parte Waller* (26)].

On these grounds I hold that the order made by Mr. Justice Chaudhuri must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(22) (1876) 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646.

(23) (1893) 10 Morrell 252; 69 L. T. 356; 5 R. 521.

(24) (1896) 1 Q. B. 406; 65 L. J. Q. B. 344; 74 L. T. 128; 44 W. R. 402; 3 Manson 24.

(25) (1902) 2 K. B. 58; 71 L. J. K. B. 710; 50 W. R. 560; 86 L. T. 456; 9 Manson 249.

(26) (1905) 2 K. B. 683; 74 L. J. K. B. 963; 93 L. T. 248; 21 T. L. R. 707; 54 W. R. 171; 12 Manson 364.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1806 of 1914.
April 7, 1916.

Present:—Mr. Justice Walsh.

BHAIRON PRASAD AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Mahant SAMARPURI—PLAINTIFF—
RESPONDENT.

Agra Tenancy Act (II of 1901), s. 41 (a), (b)—*United Provinces Land Revenue Act* (III of 1901), s. 36—

(18) (1893) 2 Q. B. 377; 62 L. J. Q. B. 279.

(19) (1893) 1 Q. B. 381; 5 R. 440; 69 L. T. 323; 41 W. R. 623; 10 Morrell 166.

(20) (1897) 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484; 4 Manson 34.

(21) (1914) 1 K. B. 1086; 83 L. J. K. B. 1673; 80 T. L. R. 604.

BHAIRON PRASAD v. SAMARPURI.

Rent fixed by Collector—Enhancement of rent by agreement, validity of.

Where on the 26th of April the Collector fixed the rent of an ex-proprietary tenant under section 36 of the Land Revenue Act at Rs. 50 and on the 10th of July of the same year the defendants executed an agreement undertaking to pay Rs. 72-6-0 as rent:

Held, that the agreement was valid. [p. 443, col. 1.]

The right of free contract cannot be disregarded by Courts of law without an express statutory prohibition. [p. 442, col. 2.]

Where the rent has not abated or been enhanced within ten years it is open to the parties to adopt the alternative provisions, either by a registered agreement or by an application under section 41 (b) of the Agra Tenancy Act. [p. 443, col. 2.]

Bhola v. Mohammad Habibul Rahman Khan, 10 Ind. Cas. 465, followed.

Pirag v. Sital Prashad, 22 Ind. Cas. 965; 36 A. 155; 12 A. L. J. 136, distinguished.

Second appeal from the decision of the District Judge, Allahabad, dated the 29th August 1914.

Messrs. *Haribans Sahai* and *Kanhya Lal*, for the Appellants.

The Hon'ble Dr. *Sundar Lal* and Mr. *S. D. Sinha*, for the Respondent.

JUDGMENT.—This is an action brought upon an agreement against ex-proprietary tenants. The facts were that the rate of rent having been fixed by the Collector under section 36 of the Land Revenue Act at Rs. 50 on the 26th of April, the defendants on the 10th of July of the same year executed an agreement undertaking to pay Rs. 72-6 for the same interests. The first Court has found that the plaintiff's conduct in the matter had been perfectly honest and that the transaction was unimpeachable as a matter of fact. The defendants attempted to dispute the agreement on the merits. That attempt wholly failed. A further attempt was made by the defendants to dispute the agreement on the ground that two of them were minors. That was found against them as a fact in the first Court and the point was abandoned in the lower Appellate Court. It is raised here in the seventh paragraph of the memorandum of appeal, but the fact that it was abandoned in the Court below is sufficient ground for me to disregard it and I do so. The substantial point taken in the lower Appellate Court and before me is that this agreement is not binding. It is said, as I understand it, that it is illegal because the Agra Tenancy Act prohibits contracting out.

In the first place, it is to be observed that there is not a word in the Act itself against contracting out. The prohibition against contracting out of rights given by an Act of Parliament is not unknown in England and is to be found (speaking from recollection) in such instances as agreements by tenants not to keep down rabbits in the interests of the sporting proclivities of landlords, agreements to avoid the Truck Acts, and agreements by workmen to contract out of their rights to compensation for accidents. I know of no case where contracting out is prohibited by the English Law without some express enactment or some language in the section of an Act of Parliament declaring the rights of the parties to be such and such, "notwithstanding any contract to the contrary." My own view is that in a free country the right of free contract cannot be disregarded by Courts of Law without an express statutory prohibition. In this particular Act so far from there being any prohibition there is an express permission, as I propose to show in a moment. But it was further said that it was the policy of the Act (I think that was the expression used) not to allow an ex-proprietary tenant to make any agreement inconsistent with the rights given to him by the Statute. If by policy is meant something which is to be looked at outside an Act, such as the views of the authors of the Act and the various views of the advocates and opponents of the Act, to my mind such a method of interpretation of a Statute is altogether illegitimate. If it is something inside the Act which is to be looked at, it can only be gathered from the language of the Act itself. I think my duty is to confine myself in considering this question to the language of the Act itself. In section 10 of the Agra Tenancy Act certain conditions are prescribed under which a proprietor shall become a tenant with a right of occupancy in *sir* land. It is also provided that he shall be entitled to hold the land at a favourable rent to be ascertained as provided afterwards by the section itself. The first of those two provisions is an enactment as to status. It creates a peculiar kind of estate in the land on the part of an individual and the language used is mandatory, "shall become." The second provision deals with the peculiar privilege or right which is conferred upon him as a consequence of that status. He

BHAIRON PRASAD v. SAMARPURI.

shall be entitled, says the Act to hold the ~~land~~ at a rent which shall be four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality. I think that means what it says, that he has a right, if he chooses to exercise it, to hold the land at that rate of rent. Sub-section (5) indicates how the rent referred to in the earlier part of the section is to be fixed. It says that the rent referred to in sub-section (1) shall be fixed by the Collector under section 36 of the Land Revenue Act. I, therefore, turn to section 35 of that Act, which provides amongst other things in sub-section (2) that the rent so fixed shall not be liable to enhancement or abatement for a period of ten years except by order of a Settlement Officer with however this provision, "Save as provided by section 41 of the Agra Tenancy Act of 1901." Reading it without any assistance, I think it is perfectly plain that that provision is an exception or modification of the enactment in the general body of the sub-section. One has, therefore, to read section 36, sub-section (2), of the Land Revenue Act with section 41 of the Agra Tenancy Act of 1901 as one and the same enactment. Section 41 of the latter Act provides that the rent of an ex-proprietary tenant shall be liable to enhancement only (a) by registered agreement, (b) by decree or order of a Revenue Court. In this case there is an agreement made some three months afterwards honestly and voluntarily by both parties in the form prescribed by the Act providing for enhancement of rent, an agreement within the precise terms of the section. I am asked to hold that it is invalid. All I can say is that it seems to me within the express provisions of the Act. I was referred to a passage in Mr. Agarwala's Commentary on the Land Revenue Act at page 61, where the construction of section 36 of the Revenue Act is discussed at some length. At the invitation of the appellants I have studied that passage with considerable care. I am unable to follow the reasoning of that passage. Mr. Agarwala seems to think that the meaning of the words "save as provided by section 41 of the Agra Tenancy Act of 1901" is not clear and he selects a construction inconsistent with the view

I take. I think the provision is perfectly clear, I see no ambiguity about it at all. The expression "save as provided" is the usual and unambiguous way of preventing the general application of the words of a section; in this particular case, the general application of the enactment contained in sub-section (2) of section 36 of the Land Revenue Act, which might otherwise have been held to exclude the express enactment contained in section 41, sub-sections (a) and (b), of the Agra Tenancy Act of 1901. It is perfectly clear that when the rent has not been enhanced or abated within ten years it is open to the parties to adopt the alternative provisions, either by a registered agreement or by an application mentioned in sub-section (b) of section 41 of the Tenancy Act. Under these circumstances I am compelled to agree with the decision of the lower Appellate Court. I think it took the right view and I am confirmed in my decision by a ruling of this Court in *Bhola v. Mohammad Habibul Rahman Khan* (1). Mr. Justice Griffin discussing this matter took the view that an agreement to pay enhanced rent is perfectly legal, unless there has been an actual enhancement within ten years of the agreement. I was referred to a decision of this Court in *Pirag v. Sital Pershad* (2). That case did not relate to a registered agreement for enhancement of rent. No reference was made in it either to section 41 of the Tenancy Act or to Mr. Justice Griffin's decision. It is distinguishable from the present case.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 10 Ind. Cas. 465.

(2) 22 Ind. Cas. 965; 36 A. 155; 12 A. L. J. 136.

ZAMINDAR OF SANIVARAPPET v. ZAMINDAR OF SOUTH VALLURU.

HIRA LAL v. GIRIBALA DEBI.

MADRAS HIGH COURT.

CIVIL APPEAL No. 174 OF 1914.

November 2, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.

RAJA PARTHASARADHI APPA RAO
SAVAI ASWA RAO BAHADUR,
ZAMINDAR OF SANIVARAPPET, AND
OTHERS—DEFENDANTS—APPELLANTS

versus

RAJA BOMMADEVARA SATYANARA-
YANA VARA PRASADA RAO
NAIDU BAHADUR, ZAMINDAR OF
SOUTH VALLURU,

BEING MINOR, BY THE MANAGER

UNDER THE COURT OF WARDS—PLAINTIFF
—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 6 (6), Expl., 8 (1), scope of—Government land in occupation of zemindar in exchange for zemindari land acquired under Land Acquisition Act—Whether held as ryot or as landholder.

The general provisions of section 8 (1) of the Madras Estates Land Act must yield to the special provisions of the explanation to clause (6) of section 6 of the Act, on the principle *generalia specialibus non derogant*.

Where, therefore, a zemindar, who as a Government ryot had a right of occupancy in the suit, lands got those lands in exchange for his own zemindari lands acquired by the Government under the Land Acquisition Act:

Held, that he did not lose his occupancy right by becoming interested in the lands as a land holder.

Appeal against the decree of the District Court of Kistna at Masulipatam, in Original Suit No. 109 of 1912, (Original Suit No. 30 of 1911 on the file of the Court of the Subordinate Judge of Ellore).

Mr. T. Prakasam, for the Appellants.

Mr. A. Krishnaswami Aiyar, for Mr. S. Srinivasa Aiyangar, for the Respondent.

JUDGMENT.—Assuming without deciding that the effect of the arrangement between the plaintiff and the Government was that the suit lands were substituted as a part of his zemindari for the *zemin* lands which are acquired under the Land Acquisition Act, it must be borne in mind that prior to the exchange the zemindar as regards the suit lands was in the position of a Government ryot and owner of the *kudivaram* right. He had, therefore, in our opinion, a right of occupancy in the lands within the meaning of the explanation of sub-section 6 of section 6 of the Madras Estates Land Act and, therefore, he did not

by the terms of the explanation lose such occupancy right by becoming interested in the land as landholder, that is, by the lands becoming part of his estate.

It is then said that this is opposed to the plain provisions of section 8 (1), which provides that in such a case the owner shall hold the lands as a landowner and not as a ryot. The language of section 8 (1) is no doubt wide enough to cover such a case, but the rest of the section rather indicates that in framing it the Legislature was thinking of the acquisition of occupancy rights by landholders and not of the acquisition of landholders' rights by ryots. But, however this may be, the general provisions of section 8 (1) must, we think, yield to the special provisions of the explanation as to this particular, on the principle *generalia specialibus non derogant*. For this reason, we think that the appeal fails and must be dismissed with costs.

Appeal dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2471
OF 1914.

July 22, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

HIRA LAL CHATTERJEE AND OTHERS—
DEFENDANTS—APPELLANTS

versus

GIRIBALA DEBI—PLAINTIFF—
RESPONDENT.

Pleadings and proof, variance between, effect of—Relief, grant of, on a case not set out in plaint.

Though the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, every variance between pleading and proof is not fatal. [p. 445, col. 2.]

The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant, distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. [p. 445, col. 2.]

Where in a suit for recovery of possession of land on declaration of title to a certain share in property, the plaintiff failed to make out the precise title set up in the plaint, but the Court came to

HISA LAL v. GIRIBALA DEBI.

the conclusion upon the entire evidence that the plaintiff was entitled only to one-half of what she claimed and gave her a decree accordingly:

Held, that, as the defendants were not taken by surprise and as the allegations made in the plaint with respect to the shares were not essential for the purposes of the pleadings, the objection of the defendants, that relief must be refused to the plaintiff because she had not made out the precise title set up by her in the plaint, should not be given effect to. [p. 446, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 29th July 1914, affirming that of the Munsif Munshigonj, dated the 29th September 1913.

Babu Rajendra Chunder Guha (for Babu Brojendra Nath Chuckerbutty), for the Appellants.

Babu Chandra Sekhar Sen, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The plaintiff claims one third share in the disputed property by right of inheritance from her husband. The Courts below have found that she is entitled only to one-half of what she claims and have made a decree accordingly. The defendants contend that there is a variance between pleading and proof and that the plaintiff should not be allowed to succeed on a case different from what she made in her plaint. To appreciate the force of this objection, it is necessary to bear in mind that although in the Court of first instance, the plaintiff claimed only one-third share, and it was consequently unnecessary for her to deal with the devolution of the other shares, yet she went on to state that another one-third share belonged to Durga Charan and the remaining one third share to Kalinath. The defendants did not dispute these latter allegations; in fact, they claim to have purchased the share of Durga Charan. Consequently, the contest in the Trial Court upon the pleadings was, whether Mahesh, the husband of the plaintiff, or Kalikumar, the father of the defendants, was entitled to one-third share of the property. The Court found that Kalinath was entitled to one-third share; upon this point both parties were agreed. The Court also found that Kalikumar, the father of the defendants, was entitled to another one-third share. As

regards the remaining one third share, the Court held that it was jointly owned by Durga Charan and Mahesh. On this basis, the Court made a decree for one sixth share in favour of the plaintiff. This decree was challenged before the lower Appellate Court, on the ground, amongst others, that the plaintiff had been allowed to succeed on a case different from what she had set out in her plaint. This objection was overruled by the Subordinate Judge, who held on the merits that the view taken by the Trial Court was supported by the evidence on the record. On the present appeal, the contention has been reiterated that the suit should be dismissed, because the decree is contrary to the allegations in the plaint.

It may be conceded, as was stated by Lord Westbury in the case of *Eshenchunder Singh v. Shamachurn Bhutto* (1) and by Sir Barnes Peacock in *Mylapore Iyasawmy Vyapary Moodliar v. Yeokay* (2), that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. This principle was recently confirmed by the Judicial Committee in the case of *Shivabasa v. Sangappa* (3). But in the application of this doctrine, we must bear in mind the reasons whereon it is founded. As explained in *Nabawipendra Mookerjee v. Madhu Sudan Mondal* (4), the rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. We cannot consequently hold that every variance between pleading and proof is fatal; we must carefully consider, whether, in the words of the Judicial Committee in the case of *Radha Mohun Mondal v. Jadoomonee Dossee* (5), the objection is one of form or of

(1) 11 M. I. A. 7; 6 W. R. (P. C.) 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 10 E. R. 3.

(2) 14 C. 801; 14 I. A. 168; 11 Jur. 397; 5 Sar. P. C. J. 50.

(3) 8 C. W. N. 865; 29 B. 1; 1 A. L. J. 637; 6 Bom. L. R. 770.

(4) 16 Ind. Cas. 741; 18 C. W. N. 473.

(5) 23 W. R. 369.

PALAVALASA APPALASWAMY v. DANTALURI NARAYANA.

substance. In that case, the Court of first instance dismissed the suit for possession of property, on the ground that the Hindu widow who had instituted it had established a title different from what she had alleged in the plaint. This Court on appeal reversed the decision and the view of this Court was ultimately approved by the Judicial Committee. In the case before us, it was essential for the plaintiff to state that her husband was entitled to a share in the disputed property and that she had succeeded to that share by inheritance. It was not necessary for her to deal with the devolution of the other shares. Consequently, the allegations made in the plaint with respect to those shares were not essential for the purposes of the pleadings. It is further clear that the defendants were not taken by surprise. Evidence was adduced by both the parties in support of their respective cases, to show how the title to the different shares had devolved from time to time. The Court came to the conclusion upon the entire evidence, that the allegations of the plaintiff as also of the defendants were incorrect, and, as happens not infrequently, the truth lay midway; the plaintiff was entitled only to one-half of what she claimed. It is further clear that, as the Trial Court stated, the evidence incontestably proves that the husband of the plaintiff had a share in the disputed property. In these circumstances, we are of opinion that we should not give effect to the objection taken by the appellants, namely, that relief must be refused to the plaintiff because she has not made out the precise title set up by her in the plaint in respect of the shares wherewith she had no concern. The view we take is in accord with two Full Bench decisions of the Allahabad High Court: *Balmakund v. Dalu* (6); *Abdul Ghani v. Musammat Babni* (7).

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(6) 25 A. 498; A. W. N. (1903) 112.

(7) 25 A. 256; A. W. N. (1903) 18.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1526 OF 1914.

February 15, 1916.

Present:—Mr. Justice Bakewell and
Mr. Justice Napier.

PALAVALASA APPALASWAMY AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri DANTALURI NARAYANA GAJA-
PATHIRAJU AND OTHERS

—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (2) (v)—Compromise of suit embodying an agreement to exchange lands, whether compulsorily registrable—Suit framed on title—Plaintiff, whether can amend plaint by asking for specific performance.

Where a suit for possession of lands was based on a compromise filed in a previous suit and it appeared that the compromise was neither registered nor embodied in the decree but merely remained among the records of the Court:

Held, (1) that the compromise was in effect merely an agreement for the exchange of lands and the parties contemplated that it would be effectuated by a decree of the Court and that, therefore, it was admissible in evidence without registration; [p. 446, col. 2.]

(2) that though the suit had been framed upon title and not for specific performance, the Court could allow the plaintiff to amend the plaint by asking for specific performance of the agreement filed in the previous suit, subject to any objection as to limitation. [p. 447, col. 1.]

Second appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 182 of 1913, preferred against that of the Court of the District Munsif, Vizagapatam, in Original Suit No. 759 of 1911.

Mr. M. O. Parthasarathi Aiyangar, for the Appellants.

Mr. V. Ramesam, for the Respondents.

JUDGMENT.—The suit is upon a compromise filed in a former suit, which has not been registered. The decree in that suit has not been produced, but it clearly appears from the judgment that the compromise was not embodied in the decree, but merely remained among the records of the Court.

The compromise is in effect an agreement for the exchange of lands, and the parties contemplated that it would be carried into effect by a decree of the Court, but this was not done, and the agreement still remains to be effectuated by a document of transfer of the property.

The compromise being an agreement did not require registration and it is not neces-

MURARI LAL v. JALIPA SAHAI.

sary to consider the conflicting decisions ■ to registration of records of the Court, such as those in *Ravula Parti Chellamanna v. Rama Row* (1) and *Natesan Ohetti v. Vengu Nachiar* (2). The suit has been framed upon title and not for specific performance, and ■ set aside the decrees in both Courts and give leave to amend the plaint by asking for the specific performance of the agreement (Exhibit A) in Original Suit No. 610 of 1906, subject to any objection as to limitation. Costs in all Courts will abide the result. The suit is remanded to the District Munsif.

Appeal allowed; Case remanded.

(1) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. J. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265.

(2) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 513; 20 M. L. J. 20.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 97 OF 1913.

November 6, 1914.

*Present:—*Mr. Lindsay, J. C.

MURARI LAL, MINOR, UNDER THE GUARDIANSHIP OF HAZARI LAL—PLAINTIFF—
APPELLANT

versus

JALIPA SAHAI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Joint family property—Alienation, invalid—Member born after alienation, when competent to attack it—Ratification by sons in existence, when binding on after-born son.

The alienation of joint family property, which the Hindu Law declares to be binding upon a member of the family born after the date of the alienation is a valid and not an invalid alienation. A member of a joint Hindu family is, therefore, entitled to attack an alienation of the joint family property made before his birth, if invalid. [p. 449, col. 2.]

Ratification of such alienation by the members in existence at its date will not bind the after-born member, if made after his birth. [p. 449, col. 2.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 9th June 1913.

Mr. Mumtaz Husain and Babu Puttoo Lal, for the Appellant.

The Government Pleader, for Respondent No. 3.

Babu Salig Ram, for Respondent No. 4.

JUDGMENT.—The facts of this case are ■ follows:—On the 14th of March 1891 one

Gaya Pershad mortgaged certain property to the Raja of Mahewa to secure a loan of Rs. 1,300. On the 23rd of January 1893 he executed ■ deed of further charge in favour of the same mortgagee to secure ■ further advance of Rs. 500. This deed of further charge hypothecated not only the items of property which were mortgaged in the first deed but also certain other items which are now in dispute. A third document was executed by him on the 27th of September 1893 by which he mortgaged the whole of the property now in suit to secure ■ further loan of Rs. 650. At the time these two mortgage-deeds were executed by Gaya Pershad, his two sons Jalipa and Ujagar were alive. Jalipa from the evidence on the record appears to have been about six years of age in the year 1891 while Ujagar at that time was an infant. Murari Lal, the son of Jalipa, who is the plaintiff in the present case, was not in existence at the time when any of these deeds were executed. When the plaint was filed in the year 1912 Murari Lal's age was said to be about five years, that is to say, he must have been born in or about the year 1907. Under the three deeds above mentioned the date fixed for payment of all the sums which were advanced was the 14th of March 1896. In October 1898 the Raja brought ■ suit on the first mortgage of the 14th of March 1891 and got a decree for sale of the property. He died after obtaining this decree and in August 1910 two sons of his brought a suit on the other two deeds of January and September 1893 respectively. The defendants in this suit were the two sons of Gaya Pershad, namely, Jalipa and Ujagar. A decree for sale was passed against these two defendants on the 17th of May 1911. The present suit has been brought by the minor Murari Lal for ■ declaration that the decree of the 17th of May 1911 is not binding upon him and that the joint ancestral property directed to be sold by that decree cannot be put to sale. In paragraphs 2 and 3 of the plaint it was said that the whole of the property hypothecated by these defendants was the joint property belonging to Gaya Pershad and his sons. Paragraph 2 referred to certain items of

MURARI LAL V. JALIPA SAHAI.

the property which were described as being the ancestral property of Gaya Pershad. Paragraph 3 sets out particulars of other portions of the mortgaged property which were said to have been acquired by Gaya Pershad out of joint family funds. In paragraph 5 of the plaint it was asserted that the sums which were borrowed under the deeds of 23rd of January 1893 and the 27th of September 1893 were not borrowed for any legal necessity. In paragraph 8 it was also asserted that the debts contracted by Gaya Pershad under these deeds of mortgage were his personal debts recovery of which had become time-barred on the 14th of March 1902. It was claimed, therefore, that in the suit brought in August 1910 no decree could be passed for the recovery of this money. It was also pleaded that the plaintiff was not bound by this decree to which he was no party. The cause of action alleged in paragraph 12 was the passing of the decree of the 17th of May 1911 and the declaration which was prayed for in paragraph 14 was as above stated, namely, that it might be declared that the decree, dated the 17th of May 1911, is not binding upon the plaintiff and that under this decree the joint and ancestral property specified in paragraphs 2 and 3 of the plaint cannot be put to sale. The principal defence in the case was raised by the defendants Nos. 3 and 4, who were plaintiffs in the suit which was brought against Jalipa and Ujagar in the year 1910. It was denied that the property in suit was ancestral property belonging to Gaya Pershad. It was alleged that the moneys borrowed under the two deeds of 1893 were borrowed for family necessity. It was admitted in paragraph 16 of the written statement that Gaya Pershad was the head and manager of the joint family and that he took these sums in the capacity of managing member. In the last paragraph of the written statement it was pleaded that the suit was collusive. Seven issues were raised before the Subordinate Judge. The *first* issue was whether or not the property specified in paragraph 2 of the plaint was ancestral. The finding on this issue was in the affirmative. The *second* issue related to the properties specified in paragraph 3 of the plaint.

The Subordinate Judge held that this property had not been acquired by Gaya Pershad out of joint family funds. The *third* issue was ■ to whether the mortgages had been executed for legal necessity. The Subordinate Judge found that it was not proved that they were. The *fourth* issue related to the *locus standi* of the plaintiff to challenge the validity of these mortgages. It was held that the plaintiff was not in a position to do so. The three remaining issues were as follows:—

“(5) Is the decree of the 17th of May 1911 not binding on the plaintiff because the debt was not then legally recoverable?”

“(6) Was the former suit (that is, the suit of 1910) brought against Jalipa as manager of the family?”

“(7) If so, is the plaintiff bound by the decree?”

The learned Subordinate Judge recorded no finding on these issues, being of opinion that the case was disposed of by his finding upon issue No. 4. The plaintiff appeals to this Court and the *first* ground with which I will deal is that contained in paragraph 1 of the memorandum of appeal. It is said that the lower Court was in error in finding that the property set out in paragraph 3 of the plaint was the self-acquired property of Gaya Pershad. As regards this point the evidence upon the record was of a very meagre description, and after perusing this evidence and the judgment of the lower Court upon the issue I have come to the conclusion that the lower Court's finding is wrong. We start with the admitted fact that Gaya Pershad and his sons constituted ■ joint Hindu family. We also have it proved, according to the judgment of the learned Subordinate Judge, that the property specified in paragraph 2 of the plaint was joint ancestral property. It appears from the record that the other items of property referred to in paragraph 3 of the plaint were bought by Gaya Pershad in his own name. In the circumstances just referred to the presumption, I think, would be that these purchases made by Gaya Pershad accreted to the joint property which already belonged to the family. There is no direct evidence on the record to show where actually the money which was applied in purchasing these properties came from. But on the strength of the testimony given by one of the defend-

MURARI LAL v. JALIPA SAHAI.

ants' witnesses the Subordinate Judge came to the conclusion that these properties must have been bought out of money which Gaya Pershad earned ■ ■ *patwari*, and as ■ *karinda* of the Raja. He says that there is no direct evidence to prove the purchase of this property from ancestral income. He goes on to say that the income of the ancestral property did not amount to more than Rs. 30 ■ year, that Gaya Pershad could hardly keep himself, much less his family, on such ■ small income and that, therefore, it was impossible that he should have acquired any immovable property out of the savings from that income. The learned Subordinate Judge, therefore, concluded that he must have bought the property out of the money which he earned in service. But I am not prepared to hold with the Subordinate Judge that this money was necessarily to be treated ■ separate money belonging to Gaya Pershad or that property purchased out of it should be treated as separate family property. Having regard to the fact that the family was joint, I think the proper inference is that the money which Gaya Pershad earned to keep himself and his family on must be taken to have been joint family income. It follows, therefore, in my opinion that the property specified in paragraph 3 of the plaint was joint family property. The issue should, I think, have been found in the plaintiff's favour. We come now to the *second* ground taken in appeal. It is that the lower Court was wrong in holding that the plaintiff Murari Lal could not challenge the validity of the mortgages of 1893. The learned Subordinate Judge came to the conclusion that it was not competent to the plaintiff to challenge the validity of these mortgages, because it was proved that he was not in existence at the time the mortgages were made. He states in his judgment as follows:—"It is ■ rule, the correctness of which is not disputed, that ■ member of a joint Hindu family born after an alienation of the family property cannot question the validity of that alienation." This is not ■ correct statement of the rule of Hindu Law. The law is laid down in paragraph 242 of Mayne's Hindu Law, 7th edition, in the following words:—"Therefore ■ son cannot object to alienations *validly* made by his father before he was born or

begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor. Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction..... On the other hand, if the alienation ~~was~~ made by a father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him." This statement of the law has been followed in numerous cases and there can be no doubt that it is correct. The alienation which the Hindu law declares to be binding upon ■ son who is born after the date of alienation is a valid alienation. The contention in this case was that the alienation was not a valid one. What are the facts? I have already mentioned that in the year 1893 Gaya Pershad had two sons Jalipa and Ujagar in existence. At that time Jalipa was ■ minor or about eight years old while Ujagar's age was about two years. There can be no question, therefore, of any consent on the part of these sons to the alienations which their father made in the year 1893. The manager of a joint Hindu family has power to sell or mortgage joint family property so ■ to bind the interests of adult as well as minor co-parceners provided, *first*, in the case of adult members the sale or mortgage is made with their consent, expressed or implied, and, *secondly*, that in the case of minor members the sale or mortgage is made for the necessities of the family or in order to pay the debts of the family business. Where the manager is the father, as in this case, he has certain special powers, one of which is to sell or mortgage ancestral property for the payment of antecedent debts, that is to say, debts contracted before the date of the sale or mortgage and not incurred for immoral or illegal purposes. There ■ no question of any antecedent debt contracted before the dates of these mortgages and the only question, therefore, to be considered is whether or not the

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

moneys which were borrowed by Gaya Pershad were borrowed for necessities of the family. As to this there is a clear finding of the Subordinate Judge himself, which shows that there is no proof that these mortgages were effected for legal necessity. It follows, therefore, that the alienations effected by Gaya Pershad by these mortgages were not valid alienations so as to bind the minor Murari Lal, who has come into existence since the time they were made. It has been urged on behalf of the respondents that although Jalipa and Ujagar did not and could not consent to these alienations at the time they were made, they have nevertheless ratified them since. It is pointed out that when Jalipa and Ujagar were sued in the year 1910 they raised various pleas in order to resist the claim of the representatives of the mortgagee. They nowhere, however, took the ground that the alienation was invalid because of want of consent on their part or because the debts had not been incurred for family necessity. It has been suggested that their failure to raise defence on these grounds amounts to ratification of the alienation which was made by their father during their minority. Even if it could be assumed that the conduct of Jalipa and Ujagar in their defence to the suit which was brought against them in 1910 amounts to ratification, the fact remains that the plaintiff here, Murari Lal, was born three years before that suit was brought. It follows, therefore, from what has been said in paragraph 342 of Mayne's Hindu Law that any ratification made by Ujagar and Jalipa after the birth of Murari Lal would not be binding upon Murari Lal. It must, therefore, I think be taken that there was no valid alienation made by Gaya Pershad, the effect of which was to bind the minor plaintiff Murari Lal, and I think the Subordinate Judge was wrong in holding that Murari Lal was not entitled to attack the mortgages with respect to which the declaration is sought.

There remain the three issues Nos. 5, 6 and 7 with regard to which the Subordinate Judge has given no findings in view of his decision, now found to be erroneous, that the plaintiff was not competent to question the validity of the alienations made by Gaya Pershad.

As the determination of these issues is essential to the right decision of the suit upon the merits, I direct under Order XLI, rule 25, that the case be sent back to the Subordinate Judge so that these issues may be tried out. No further evidence will be received in the case. The findings of the lower Court will be returned to this Court within two months from the date of receipt of this order of remand and ten days, to count from the date of the findings of the lower Court, will be allowed to the parties to file the objections, if any, to the findings.

Cause remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1652
OF 1915.

April 19, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

SITAL CHANDRA CHAUDHURY AND
OTHERS—DEFENDANTS—APPELLANTS

versus

MRS. ALLEN J. DELANNEY AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 6 (c), 54, 123—Easement—Right of way—Landlord and tenant—Acquisition of right on landlord's other lands—Prescription—Grant—Writing, whether necessary to create easement—Registration—'Immoveable property', whether includes right of way—Interpretation of Statutes—Preamble of an Act, reference to, in interpreting enactment—Document, construction of—Extrinsic evidence, admissibility of—Second appeal, question of law, whether can be raised for first time in—Easements Act (V of 1882), ss. 15, 17, 26, Ch. VI—Specific Relief Act (I of 1877), s. 9—General Clauses Act (X of 1897), s. 3 (25)—Registration Act (III of 1877), s. 2 (6).

The provisions of the Transfer of Property Act have no application to the creation of easements and the Act was not intended to deal with that topic. [p. 455, col. 1.]

The Indian Easements Act is a complete and self-contained Code on the subject of easements. In places where the Act is not in force, Courts should draw upon English sources for their substantive law, on the principle that English Law on the subject is in accordance with justice, equity and good conscience. [p. 455, col. 2.]

The definition of the term 'immoveable property' in the General Clauses Act, 1897, may be wide enough to include a right of way. But such right is not

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

always or necessarily included. It is not excluded by section ■ of the Transfer of Property Act. [p. 454, col. 2.]

Under the terms, however, of section ■ of the Specific Relief Act, rights classified as incorporeal rights are taken out of its operation. [p. 454, col. 2.]

Fadu Jhala v. Gour Mohun Jhala, 19 C. 544, referred to.

In England, ■ right of way is said to be in deed and not in livery. Sections 54 and 123 of the Transfer of Property Act were not intended to change, and did not change, the pre-existing law so ■ to require ■ writing for their creation or imposition, when no writing ■ previously necessary. [p. 454, col. 2; p. 456, col. 1.]

The creation or imposition, therefore, of a right of way, whether as a gift or for consideration, need not be in writing under section 123 or section 54 of the Transfer of Property Act. [p. 456, col. 1.]

Where, however, a right of way is created in writing, the writing may require registration under the provisions of the Registration Act, which expressly include 'rights to way' within the definition of 'immoveable property' in section 2 (6), but not if the value of the right is less than one hundred rupees. [p. 456, col. 2.]

A right of way cannot be acquired by a tenant over the lands of the landlord not in his occupation by prescription under section 26 of the Easements Act. It can, however, be created by grant. [p. 455, col. 1.]

Madan Mohan Chakravarty v. Sashi Bhusan Mukherji, 31 Ind. Cas. 549; 19 C. W. N. 1211 at p. 1214, referred to.

A tenant relying on the grant of a right of way by the landlord must prove the grant. It is not sufficient for him to show that he used the way by the leave and license of the landlord. Mere leave and license will not invest him with anything in the nature of a right which he can enforce by suit. [p. 453, col. 2.]

Section 6 (c) of the Transfer of Property Act does no more than express the rule that there cannot be an easement in gross. The right which the landlord assigns is not, in his hands, an easement, because he cannot have an easement over his own property. The right becomes an easement in the hands of the grantee and the clause merely says that the grantee cannot transfer his easement apart from the dominant heritage, to which by the nature of the right it is attached. [p. 455, col. 1.]

Bhagwan Sahai v. Nursingh Sahai, 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871, referred to.

Extrinsic evidence is admissible to show how the language of a document is related to existing facts or to facts which existed when the document was written. [p. 453, col. 2.]

The preamble of an Act does not control the enactment which follows, but it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved. [p. 455, col. 2.]

The point whether, in the absence of a written and registered document, creating a right of way in plaintiff's favour, his suit for a declaration of a right of way by grant must fail for want of legally sufficient evidence to prove the grant can be opened

by the defendants in second appeal though it was not taken in the Courts below. [p. 454, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Tipperah, modifying that of the Munsif, 1st Class, Comilla, dated the 12th November 1913.

FACTS of the case appear from the judgment.

Babu Jogesh Chandra Roy (with him Dr. Sarat Chandra Basak and Babu Bepin Chander Ghosh), for the Appellants.—The finding of the Sub-Judge is against the pleadings; the plaintiff did not set up a case of grant in express terms nor of the manner in which the grant was made.

Easement of way is an interest in immoveable property. See *Bejoy Chandra Nag v. Banku Behari Mazumdar* (1).

Grant of a right of way without any consideration is really a gift, hence if the grant was made after the Transfer of Property Act came into force it must be made by ■ registered instrument: *vide* section 123 of the Transfer of Property Act.

And if the grant is made for consideration, then it is a sale and it must be made by a registered instrument: *vide* section 54, Transfer of Property Act.

The Munsif found that the site of path No. 2 is the defendants' *uthan*, and there cannot be right of way over a man's *uthan*: *vide* *Meser Mullick v. Hafiz-ud-din Mullick* (2); *Shaikh Khoda Buksh v. Shaikh Taj-ud-din* (3).

The Subordinate Judge has not dealt with that question in his judgment.

Babu Dwaraka Nath Chakravarty (with him Babu Tarak Chandra Chakravarty), for the Respondents.—The question whether there can be a grant without any registered document or not was not raised in either of the Courts below, and the appellants are not entitled to raise the question in second appeal. In the plaint the plaintiff alleged her right of way by grant.

No registered deed is necessary in granting a right of way. See *Bhagwan Sahai v. Nursingh Sahai* (4).

Dr. Sarat Chandra Basak, in reply.—The question is a pure question of law and can be raised in second appeal. As the

(1) 4 Ind. Cas. 116; 13 C. W. N. 451; 9 C. L. J. 336.

(2) 9 Ind. Cas. 965; 13 C. L. J. 316.

(3) 8 C. W. N. 359.

(4) 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871.

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

plaintiff did not specifically state in the plaint the manner in which the grant was made, the defendants did not raise the question in the Courts below.

Right of easement of way is in a real hereditament and is immoveable property: *Maharana Futtehsangji Jaswantsangji v. Dessai Kullianraji Hekoomutraji* (5); *Mohunt Deo Surun Poory v. Moonshee Mahomed Ismail* (6); *Bejoy Chandra Nag v. Banku Behari Mazumdar* (1).

Refers to the definition of immoveable property in the General Clauses Act, and also in the Registration Act.

Creation of an easement is transfer of an interest in immoveable property, hence if made without any consideration, it is a gift and a registered instrument is necessary. See section 123, Transfer of Property Act.

See also Michell on Easements, 4th Edition, page 24.

Easement of way is a profit arising out of land, hence it is an interest in immoveable property. Reads definition in the General Clauses Act.

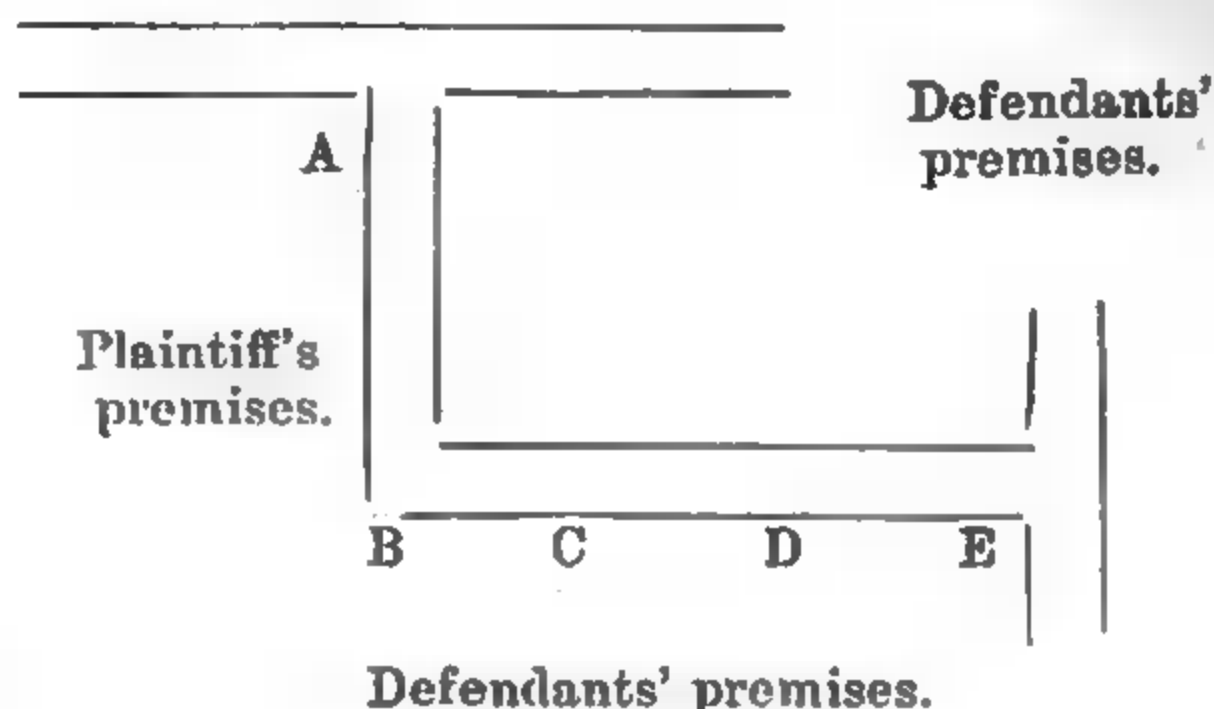
Cites *Surendra Narain Singh v. Bhai Lal Thakur* (7); *Shibu Halidar v. Gupi Sundhari Dasya* (8); *Golam Mohiuddin Hossein v. Parbati* (9); *Mangal Das v. Jewan Ram* (10); *Ram Gopal Bysack v. Nurumuddin* (11); *Krishna v. Akilanda* (12).

Right of way is one of the bundle of rights in immoveable property possessed by the owner.

Refers to *Kristodhone Mitter v. Nandarani Dassee* (13).

JUDGMENT.—This second appeal arises out of a dispute as to a right of way. The parties are the tenants of the same landlords, the Ujjir Babus, and the way claimed by the plaintiff lies as to part of it between lands which they respectively occupy as

lessees. The whole way takes the form of a rightangle as in the following rough plan:—



In this plan the way claimed runs south from the point A to the point B and then turns east terminating at the point C. The portions AB and BC have been separately considered in the Courts below. The land leased to the plaintiff extends on the north-east to the southern part of AB. The defendants are tenants of land to the south of BC and more recently land to the north of BC and east of AB was also leased to them. The way BC, therefore, runs between their older premises on the south and their newer premises on the north. Their premises on the south extend to the point C and the land between C and E is occupied by other tenants of the Ujjir Babus. The defendant's land on the north extends to a point opposite the point D. The importance of this will appear later.

It is conceded that from the point A access can be obtained by a road or path to a public highway on the west. It is further conceded that from the point C there is a way to a point E further east and that from the point E access can be obtained to a public highway on the south. The way CE is used by the defendants and the tenants of the lands between D and E. The plaintiff's contention is that the way CE is merely a continuation of the way ABC and that the defendants are obstructing the way in order for their own convenience to join up their land on the north with their land on the south. The defendants' answer is that the plaintiff is trying to force a way through land leased to and occupied by them. It is apparent that the real bone of contention is the portion BC.

Another point may be mentioned. The land in the angle ABE, including the defendants' land there, was reclaimed from a

(5) 21 W. R. 178.

(6) 24 W. R. 300.

(7) 22 C. 752; 2 C. W. N. 169.

(8) 24 C. 449.

(9) 1 Ind. Cas. 520; 36 C. 665; 13 C. W. N. 596.

(10) 23 B. 673.

(11) 20 C. 446.

(12) 13 M. 54.

(13) 12 C. W. N. 969; 35 C. 889.

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

larger ~~area~~ known as Ujjir's Tank. The reclamation was carried out by the landlords in or about the year 1904. The defendants' lease is dated *Sravan* 1315 (1908) but they were in possession for a year or two before the lease was executed.

As to the pleadings, in the plaint the plaintiff claimed the way by grant, by user as of right for more than twenty years, as a way of necessity, as a customary way and "under a general right of way of all sorts of user." The defendants, apart from formal pleas with which we are not now concerned, denied the existence of any way and asserted that AB and BC were included in the reclaimed land leased to them by the landlords.

Both the Courts below agreed in thinking that the plaintiff had failed to establish any right based on immemorial user or the Limitation Act or necessity or custom. That conclusion is not open to review by us as it depends on the facts found and not upon consideration of law, and in saying that we do not suggest that any other conclusion was possible in the circumstances. So far, therefore, as the claim is founded on these grounds the plaintiff fails. The Trial Court, however, found that she had a right by grant from the landlords to the way AB while the lower Appellate Court found that she had a right by grant not only to the way AB but also to the way BC.

The difference of opinion between the two Courts in regard to the way BC arose chiefly out of the different views which they took as to the precise boundaries of the reclaimed land leased to the defendants. Both Courts held that the alleged way AB was excluded from the area leased and this finding is not now disputed. As to the alleged way BC, the first Court held that the lease included this land while the lower Appellate Court came to the conclusion that this land was also excluded. The question turns on the description of the southern boundary of the land in the schedule of the lease. The description runs "pathway on the old south bank of Ujjir Dighi and Sital Choudhury's (i.e., the defendant's) old *basha*." The learned Subordinate Judge in the lower Appellate Court considered this description in the light of the evidence on the record and found that the pathway mentioned extended not only from the point D to the point C but also from the

point C to the point B. Before us an attempt was made to argue the question whether the Subordinate Judge was right or not as a question of pure law relating to the construction of a document. It was said that the description was satisfied by confining the reference to a pathway to the admitted pathway CD and the remainder of the description to the defendants' old premises. That may be so. But the description is also capable of the meaning which the Subordinate Judge put upon it and the question is not a mere question of grammar or law. Evidence is always admissible to show how the language of a document is related to existing facts or to facts which existed when the document was written. In construing the words used the extent of the pathway is a factor which cannot be neglected or left out of account. The Subordinate Judge was entitled, therefore, to consider the evidence on the point and it cannot be said that the construction adopted by him, according to which the whole way claimed is outside the area leased to the defendants, is bad in law.

But so to construe the lease is not sufficient to dispose of the case. The fact that the land was not leased to the defendants does not prove that the plaintiff has a right of way over it, though the fact that the land was used or described as a way at the time of the lease may be of some assistance to her.

That brings us to a question which was raised for the first time in this Court. As things stand, at any rate the plaintiff is not in any sense in possession of the right of way. In order to succeed she must prove her title to it. The other grounds on which she put her case being found to be untenable, the title on which she relies is a grant from the landlords. She must, therefore, prove a right by way of grant which she would be in a position to assert as against the latter. It is not sufficient for her to show that she used the way by the leave and license of the landlords. That is not her case, and it is at the least extremely doubtful whether the mere leave and license of the landlords would invest her with anything in the nature of a right which she could enforce by suit. She might have good reason for complaining to the landlords without herself having any

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

further or legal remedies. It would then be for the landlords to take such legal action as they might think fit.

The plaintiff then has to prove a grant. In finding a grant of a part or the whole of the way the Courts below have depended entirely on parol evidence. The alleged grant is not supported by any document on which the plaintiff can rely as a title-deed. The defendants' lease is plainly not such a document. The Courts below inferred the grant from the facts and circumstances of the case, including the terms of the defendants' lease. The question is, whether they were at liberty to do so or whether, in the absence of a written and registered document creating a right of way in the plaintiff's favour, the suit must fail. In other words, is the evidence legally sufficient for the purpose of proving a grant? The point is one open to the defendants, the appellants before us, in second appeal, though it was not taken below and we have to deal with it.

The argument was to the following effect. A right of way is immovable property and the grant of a right of way is a transaction governed by the Transfer of Property Act. The transaction in the present case must have been either a sale or a gift. If it was a sale, it was the sale of intangible immovable property, or of an intangible thing, within the meaning and scope of section 54 of the Transfer of Property Act. If it was not a sale (as the plaintiff has never suggested that any consideration moved from her), it was a gift of immovable property within the meaning of section 123. In either case a written and registered instrument was necessary irrespective of the value of the right claimed. In reference to this argument, what the plaintiff founds upon seems to be a reservation of the way by the landlords for the use of the plaintiff and other tenants whose premises abut upon it. The way being a private way and not a public or village way [*Chuni Lall v. Ram Krishan Sahu* (14)], the transaction by which it was created may perhaps be plausibly represented as possessing the elements of a gift. "Dedication" cannot be predicated of a private way. But before the argument is accepted a closer examination of it is necessary.

In England, no doubt, a right of way is said to lie in deed and not in livery. The reasoning seems to be that incorporeal or intangible rights require a deed to support them because it is difficult or impossible to deliver actual possession of such rights. The rule, that is to say, is one of evidence or archaic form rather than of substance or principle. What there may be of substance in it is illustrated by the commonly accepted view that section 9 of the Specific Relief Act does not extend to incorporeal rights, because they are not rights of which "possession can be taken and delivered to a claimant" [section 5 (a); *Fadu Jhala v. Gour Mohun Jhala* (15)]. However that may be, what has to be considered is the Indian Law and not the English Law. Before the Transfer of Property Act was passed no writing was necessary for the creation or grant of a right of way and it is not suggested that if a writing is not required by the Transfer of Property Act, there is anything else in Indian Law which requires a writing. The question, therefore, is how the Transfer of Property Act deals with the matter.

As to the term "immovable property," the definition in the General Clauses Act of 1897, which is identical with the definition in the earlier Act of 1868, may be wide enough to include a right of way. But the case just cited shows that such a right is not always or necessarily included. The term is not defined in the Specific Relief Act (1877) and the definition in the General Clauses Act was, therefore, *prima facie* applicable to the words as they are used in section 9 of that Act. It was held, nevertheless, that the context was sufficient to take rights classified as incorporeal rights out of the operation of that section.

In the interpretation section of the Transfer of Property Act, section 3, all that is said is that "immovable property" does not include "standing timber, growing crops or grass." That proposition is consistent with the term being used so as to include other things included by the General Clauses Act. It does not exclude, at any rate it does not expressly exclude, rights of way. Assuming that rights of way are included, the argument for the defendants proceeds on the lines indicated.

The learned Pleader for the plaintiff on the (15) 19 C. 544.

SITAL CHANDRA CHAUDHURY v. ALLEN J. DELANNEY.

other hand referred to the case of *Bhagwan Sahai v. Narsingh Sahai* (4) decided by the Allahabad High Court and laid stress on clause (c) of section 6 of the Transfer of Property Act. The clause lays down that "an easement cannot be transferred apart from the dominant heritage". It is said that the clause shows that an easement does not come within the scope of the Act, until it is created and that the Act does not regard the creation of ■■ easement ■■ ■ transfer of property.

Now, no doubt the right claimed by the plaintiff is a right in the nature of an easement. It is true that the right is claimed over other lands of the landlords and it may be that such a right cannot be acquired by prescription under section 26 of the Easements Act [*Madan Mohan Chakravarty v. Sashi Bhusan Mukherji* (16)]. It can, however, be created by grant.

But has clause (c) of section 6 the effect contended for? Does it do more than express the rule that there cannot be an easement in gross? The right which the landlord assigns is not in his hands an easement, because he cannot have an easement over his own property. The right becomes an easement in the hands of the grantee, and the clause merely says that the grantee cannot transfer his easement apart from the dominant heritage to which by the nature of the right it is attached. There still remains the question whether the act of the landlord in creating the easement is governed by the Act.

It is perhaps unnecessary to consider whether a right of way is included in the words 'in the case of ■ reversion or other intangible thing' in section 54 of the Act, because on the materials on the record it would be impossible to say that the transaction amounted to ■ sale. The real question is whether the transaction amounted to a gift of immoveable property within the meaning of section 123 of the Act. What we are about to say, however, is as applicable to section 54 as to section 123.

In our opinion the provisions of the Transfer of Property Act have no application to the creation of easements, for the simple reason that the Act was not intended to deal with that topic.

(16) 31 Ind. Cas. 549, 19 C. W. N. 1211 at p. 1214.

In the first place, the preamble of the Act, which was passed as Act IV of 1882, shows that the Act was not intended to be exhaustive. Its object was to "define and amend certain parts of the law relating to the transfer of property by act of parties." No doubt the preamble does not control any plain enactment which follows it, but it may be a most useful guide when a question of doubt arises upon construction of ■ particular provision and considerations relating to the scope of the Act are involved. Now, not only is the preamble of the Transfer of Property Act in the terms stated, but the next Act passed by the Indian Legislature was the Indian Easements Act (Act V of 1882), which purports "to define and amend the law relating to easements and licenses" or, in other words, to be ■ complete and self-contained Code on those subjects. It is true that the Act was not applied to the whole of India. It originally extended to Madras, the Central Provinces and Coorg. It has since been applied to other Provinces but not to Bengal. The fact, however, that the Easements Act was not and is not universal in its operation does not affect the scope of the Transfer of Property Act. It still remains that the Supreme Legislature dealt with some parts of the law relating to the transfer of property in one Act and with easements in another Act and that there are Provinces in which both Acts are in force. In those Provinces to which the Easements Act ■■■ not applied, the Courts were left to follow the course which they had previously pursued of drawing upon English sources for their substantive law, on the principle that the English Law on the subject is in accordance with justice, equity and good conscience. Where legislation has stepped in, it has done so by express enactment. In Bengal, for instance, there were and still are in force the provisions relating to the acquisition of easements by prescription in the Limitation Act, and stray legislative provisions regarding easements may also be found elsewhere, as in section 6 of the Transfer of Property Act. These observations on the scope of the Transfer of Property Act ■■■ and the relation of that Act to the Law of Easements may be somewhat general, but their bearing on the particular question we have to decide is

GARIYA RANGASWAMY PATRUDU v. MAJJI APPALASWAMY.

apparent. That question is one of form only and as we have already indicated, neither the English Law nor the dictates of justice, equity and good conscience can be of any assistance. The answer depends in this Province at any rate entirely on the provisions of the Transfer of Property Act and the effect of those provisions on the law as it previously stood, under which, it must be borne in mind, no writing was necessary for the creation or imposition of an easement. In our opinion, the course which legislation has taken, the existence of scattered provisions which directly and expressly refer to easements, the fact that the Transfer of Property Act was immediately followed by the Easements Act, all indicate that great caution should be used before applying to easements general provisions such as those contained in sections 54 and 123 of the Transfer of Property Act, in which easements are not expressly referred to. There is the further consideration that if the Legislature ever contemplated making a writing necessary for the purpose of creating an easement, the natural place for such a provision would be in Chapter II of the Easements Act, which is headed "The Imposition, Acquisition and Transfer of Easements." The Allahabad High Court, however, has pointed out in the case above referred to, citing Dr. Whitley Stokes (Anglo-Indian Codes, Vol. 1, page 882), that the Easements Act does not require the imposition of an easement to be in writing. The language used in sections 54 and 123 of the Transfer of Property Act is certainly not such as to compel us to include the creation or imposition of easements within this scope. On the contrary, the language is scarcely adapted for that purpose. The conclusion at which we arrive (in argument so far as section 54 is concerned with the conclusion reached by the learned Judges at the Allahabad High Court) is that those sections were not intended to change, and did not change, the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary. The Courts below, therefore, were at liberty to determine the question between the parties as a question of fact on the materials on the record.

It may be added that section 2 (6) of

the Registration Act defines "immovable property" which for the purpose of that Act expressly includes "rights to way." Where, therefore, a right of way is created in writing, the writing may require registration, but not if the value of the right is less than one hundred rupees.

In the result the objections taken before us to the decision of the Court below all fail and the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2168 OF 1914.

February 24, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

GARIYA RANGASWAMY PATRUDU—
PLAINTIFF—APPELLANT

versus

MAJJI APPALASWAMY—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expt. 1V
— Wilfully restraining from urging all grounds of suit or
attack, effect of—Suit in ejectment, dismissal of—Claim
based on ancestral right—Subsequent suit for same
relief against same party—Claim based on succession as
heir—Subsequent suit, whether barred.

If a defendant has two grounds of attack to a claim made by the plaintiff and wilfully chooses to keep back one of the grounds of attack, he is not entitled to put forward the omitted ground in a later suit. This principle enunciated with regard to a defendant equally applies to the case of a plaintiff. [p. 458, col. 1.]

If, however, the claims are mutually destructive, or if there will be embarrassment in joining the rights, the two titles can be separately litigated. [p. 458, col. 2.]

Where, therefore, the plaintiff sued to eject a trespasser basing his claim on an ancestral right, and failing therein brought another ejectment suit against the same defendant claiming to be the heir of a certain person:

Held, that the title as heir could and ought to have been made a ground of attack in the former suit, and this not having been done the present suit was barred by the rule of *res judicata*. [p. 457, col. 2; p. 458, col. 1.]

Masilamania Pillai v. Thiruvengadam Pillai, 31 M. 385; *Woomatara Deba v. Unnopoorna Dassce*, 11 B. L. R. 158 (P. C.); 18 W. R. 163, followed.

In *Ramaswami Ayyar v. Vythinatha Ayyar*, 26 M. 760; 13 M. L. J. 448, dissented from.

Appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 392 of 1913, preferred against that of the

GARIYA RANGASWAMY PATRUDU v. MAJJI APPALASWAMY.

District Munsiff, Vizagapatam, in Original Suit No. 203 of 1913.

FACTS of the case appear from the following copy of the plaint :—

‘Plaint under Order VII, rules 1—3, Civil Procedure Code.

1. Plaintiff: — Garia Rangaswamy Pathrudu, father's name Guruppa Pathrudu, age 66 years, caste Nagara, profession Medical Practitioner, residing at Vizagapatam.

Address for service of notice is Vizagapatam.

2. Defendant: Majji Appalaswamy, father's name Somauna, age 30 years, caste Nagara, Agriculturist, residing at Malkapuram.

3. (1) There is a hillock called Sringa Maniparvata, at the end of the Pogarakatota Street, Fortward in Vizagapatam. Upon that hillock there is the temple of Sree Venkateswaraswamy along with Goddess Aliveli Mangamma.

(2) The said hill and the land surrounding it belonged to the ancestors of the plaintiff at first and later on it was under the management of the plaintiff and his ancestors on behalf of the Swamy. And on 13th March 1908 the defendant committed trespass upon the house site of the plaintiff, the house being built by his ancestors. The plaintiff sued the defendant in Original Suit No. 193 of 1908 on the file of this Court. In that suit the defendant contended that the property belonged to the late Garia Yellamma (*alias*) Bukka Yellamma and that he was her heir.

(3) The Court of first instance opined that the plaintiff failed to prove that for the 12 years preceding the suit the house site was in his possession and dismissed the suit. In appeal in the Temporary Subordinate Court of Vizagapatam in Appeal Suit No. 293 of 1909 the Court adjudged that the plaintiff, and not the defendant, is the heir to the late Yellamma and gave the decree in plaintiff's favour.

(4) When the defendant appealed to the High Court of Madras in Suit Appeal No. 2004 of 1910, the judgment of the lower Court was confirmed on the ground that the plaintiff did not base his claim as heir to Yellamma, that the defendant had no opportunity to raise the defence

he had in his favour, and that there was no scope for the decision of that point in that suit.

(5) The late Yellamma was the wife of Appadu, the younger brother of the plaintiff's father. She was living in the plaintiff property with the consent of the plaintiff and his father. She died childless 6 or 7 years ago. She has no other heirs except this plaintiff.

(6) Even if the Court opines that the said Yellamma acquired the suit land by adverse possession, the defendant is in no way related to her. Since as said above there is no other nearer *gnati* (relation) the plaintiff has full rights to take possession of the suit land.

(7) After the death of Yellamma, the defendant in 1908 entered the house in which the said Yellamma was living and erected two thatched rooms in the open space beyond the path leading to the temple.

(8) The suit immoveable properties have been placed in possession of the plaintiff on 14th February 1911 in pursuance of the decree of the Subordinate Court. Ever since they are in possession of the plaintiff.”

Mr. P. Narayana Murthi, for the Appellant.

Mr. V. Ramesam, for the Respondent.

JUDGMENT.

COURTS TROTTER, J.—Without any disrespect to Mr. Narayana Murthi's arguments, to my mind, his case is absolutely unarguable. I do not so much rely upon the decisions cited, which are not wholly reconcilable, although *Masilamania Pillai v. Thiruvengadam Pillai* (1) is an authority of this Court which is dead against him. To my mind we have only to look at the facts of the case and the words of the Civil Procedure Code to see that the result arrived at by the lower Court, which is obviously in accordance with common sense, is also in accordance with the words of the Code. I think the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—I have great sympathy with Mr. Narayana Murthi's client.

(1) 31 M. 385.

LACHMAN v. KALYA.

He had a decision in his favour by the Subordinate Judge in the previous suit, which was reversed by the High Court on a technical ground; this Court might have given him leave to amend his plaint but that was not done. Nonetheless I am convinced that upon section 11 of the Civil Procedure Code and upon the authorities the appellant has no case. In *Masilamania Pillai v. Thiruvengadam Pillai* (1) the present Chief Justice held under similar circumstances that the plaintiff could not be allowed to litigate his title over again. No doubt there is a reservation made in that case that if the claims should be mutually destructive, or if there will be any embarrassment in joining the rights, the two titles can be separately litigated. I do not think that in the present case it can be said either that the titles are mutually destructive or there will be any embarrassment in joining them. To accede to the appellant's contention would encourage slackness in the pleadings and want of definiteness and care in adducing evidence. The plaintiff did not set up this title which he could have brought forward as an alternative basis of his claim on the last occasion; he cannot, therefore, litigate it now. This case is, I think, practically concluded by the decision of the Privy Council in *Woomatara Debea v. Unnopoorna Dasse* (2). In that case the Judicial Committee quote with approval the observations of Lord Westbury in a previous case. The learned Lord in the latter case pointed out that if a defendant has two grounds of attack to a claim made by the plaintiff and wilfully chooses to keep back one of the grounds of attack, he is not entitled to put forward the omitted ground in a later suit. The Judicial Committee applied that principle enunciated with regard to a defendant to the case of a plaintiff. On that authority this case must be regarded as having been rightly decreed by the Court below. The observations of the learned Judges of this Court in *Ramaswami Ayyar v. Vythinatha Ayyar* (3), where they seem to say that a prior suit as a reversioner would not conclude a subsequent suit as owner, seems to me to be opposed to the decision of the Judi-

cial Committee in *Woomatara Debea v. Unnopoorna Dasse* (2). Moreover it was an *obiter dictum* which was not necessary for the decision of the case. I, therefore, agree that the Courts below are right in the conclusion that the suit is barred by *res judicata*. The appeal should be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 606 OF 1914.

January 27, 1916.

Present:—Mr. Batten, A. J. C.

LACHMAN AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

KALYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 12 (2)—Central Provinces Courts Act (II of 1904), s. 8 (1) (c), rule 26 under—Appeal—Limitation, computation of time for—Copyists' rules—Time requisite for obtaining copies—Requisition for appearance to take steps to secure copies—Default, deduction of day of.

The 'time requisite for obtaining a copy of the decree' in section 12 (2) of the Limitation Act does not include the day or days on which, under the rules regulating the grant of copies, the applicant is required to appear but fails to appear to take steps to secure the copy, and such days cannot be excluded in computing the period of limitation for an appeal. [p. 459, col. 2.]

Appeal against the decree of the District Judge, Nimar, dated the 12th May 1914, confirming that of the Second Munsif, Khandwa, dated the 20th February 1914.

Mr. S. R. Pandit, for the Appellants.

Mr. S. Y. Deshmukh, for the Respondent.

JUDGMENT.—The preliminary question for consideration in this appeal, which was admitted provisionally, is whether the appeal is in time. The judgment and decree of the lower Appellate Court were dated the 12th May 1914. The appeal was filed on the 4th September. The 3rd September was a holiday, so the appellant is in as good a position as if the appeal had been filed on the 3rd September, and in the calculations the 3rd September will be taken as the date of the presentation of the appeal. The appeal was thus presented on the 114th day, and to bring it within time the appellant seeks to deduct 24 days as "time requisite

(2) 11 B. L. R. 158; 18 W. R. 163.

(3) 26 M. 760; 13 M. L. J. 448.

LACHMAN U. KALYA.

for obtaining a copy of the decree," within the meaning of sub-section (2) of section 12 of the Limitation Act, 1908. The relevant dates ■■■ set out in the following table:—

Copy applied for ■■■	...	...	17-6-14
Applicant told to appear on	...	{	24-6-14 1-7-14 10-7-14
Applicant appeared on	...	{	24-6-14 2-7-14 10-7-14
Copy stopped for want of funds on	...		27-6-14
Subsequent advance paid on	...		2-7-14
Copy ready on	...		7-7-14
Copy delivered on	...		10-7-14

The appellant wants the whole period of 24 days from 17th June 1914 to 10th July 1914 inclusive to be counted as the time requisite for obtaining the copy of the decree. That is to say, he wants to be given credit for both the 1st July on which he was told to appear, but did not appear, and the 2nd July on which he did appear, a day late, and paid the money necessary for completing the copy.

Rule 26 of the rules regulating the grant of copies, made under section 8 (1) (c) of the Central Provinces Courts Act, 1904, runs ■■■ follows:—

"On receiving an application presented by hand, the Head Copyist shall forthwith fix and intimate to the applicant a date, within seven days of the presentation, on which he should attend to ascertain whether the copy is ready or whether any further advance is required. Should the copy not be complete on the date so fixed, the applicant shall be directed to attend on another date, within seven days of the first: and so on. The successive dates on which the applicant is told to attend and on which he attends shall be entered in both foils of the Duplicate Receipt Book and the Register of Applications."

It is to be noted that in this case the applicant was told to appear on the 10th July instead of the 9th, as the 9th was ■■■ holiday.

The learned Counsel for the appellant argues that ■■■ he was in effect informed by the Head Copyist that the 1st July would be counted as one of the days taken in obtaining the copy, he is entitled to exclude it from the period of limitation. This argument appears to me to be fallacious. The copying staff have nothing to do with questions of limitation, their duty is to carry out the copying rules. The applicant for copy is similarly bound by the rules, and must use proper diligence in obtaining his copy in the manner prescribed in the rules. For the days from the 25th June to 30th June inclusive he was instructed that he need do nothing. His instructions as regards the 1st July were that on that day he should attend to ascertain whether the copy was ready or whether any further advance was required. He did not so attend, he did not on that day take any steps towards obtaining the copy, though he had received distinct instructions as to what steps he should take on that day. He had a duty to perform on that day, and he did nothing. In these circumstances it cannot, in my opinion, be said that on that day he was taking any steps to obtain a copy, or that the day can be deducted from the limitation period as time requisite for obtaining the copy.

The learned Counsel for the appellant suggests that copying work may have been going on until the evening of the 1st July, and his appearance on the morning of the 2nd (supposing that he did attend in the morning) was as good ■■■ an appearance on the evening of the 1st. It is sufficient to say that the law of limitation does not take into account portions of days; and the fact remains that he was instructed under the rules to take on the 1st July a definite step towards obtaining his copy and he did not take it.

I am thus of opinion that the appellant cannot deduct the 1st July ■■■ time requisite for obtaining the copy of the decree; he is entitled to deduct 23 days at the most. The appeal is dismissed with costs ■■■ time-barred.

Appeal dismissed.

ANDI THEVAN *v.* zemindar OF SIVAGIRI.

COURT OF THE BOARD OF REVENUE,
MADRAS.

SECOND CIVIL APPEALS NOS. 2 TO 44 OF 1915.

January 10, 1916.

Present:—Mr. Clegg, F. M.

ANDI THEVAN AND OTHERS—APPELLANTS
versus

Rani GNANAMANI NECHIYAR,
Zemindarni OF SIVAGIRI, AND ANOTHER—
RESPONDENTS.

Madras Estates Land Act (Mad. I of 1908), ss. 189 (2), 205—Civil Procedure Code (Act V of 1908), s. 2 (2)—Commutation of rent, proceedings for—Collector's note expressing opinion as to commutation—Appeal—Board of Revenue, powers of.

A mere expression of opinion in a Collector's note that the question of commutation of rent need not be considered as it was already settled, is not an order under section 40 appealable under section 189 (2) of the Madras Estates Lands Act.

Where, however, the District Collector wrongly entertains an appeal, it is open to the Board of Revenue, even in the absence of a second appeal, to pass appropriate orders under section 205 of the Act.

Second appeals against the decree of the Collector, Tinnevely, in Appeal Suits Nos. 41, 45, 46, 48, 49, 53 to 55, 57, 59 to 62, 65 to 68, 70, 71, 72, 77 to 81, 83, 87, 92, 93, 95, 96, 102, 104, 108, 109, 113, 114, 116, 117, 120, 121, 125 and 127 of 1914.

Mr. M. D. Devadoss, for the Appellants.

Mr. A. Suryanarayana Aiyar, for the Respondents.

JUDGMENT.—With the permission of the Sub-Judge of Tuticorin the Zemindarni of Sivagiri has been brought on the record as respondent in her capacity as Receiver of the Estate (Civil Miscellaneous Petition No. 496 of 1915, dated 30th August 1915, Sub-Judge, Tuticorin).

This purports to be a second appeal, under section 190 (1) of the Estates Land Act, against the appellate judgment and decree of the Collector of Tinnevely, dated 21st December 1914, remanding the suit in question for a finding on a preliminary issue and disposal according to law. It is contended here that the Deputy Collector's order, which is dated 13th October 1914 and which is apparently the order appealed against, though the Collector's appellate decree gives the date 2nd July 1914, is not an order under section 40 which can be appealed against to the District Collector under section 189 (2) and Schedule A; it would

be subject to appeal only if it amounted to a decree allowing commutation. There is no written order on record allowing the particular parties to the suits to commute, but it would appear that some verbal order was passed, the nature of which is not ascertainable from the record. The order under appeal is an expression of opinion that the question whether commutation should be allowed, could not be considered again at that stage of the case as it had already been settled in the affirmative. The original order, whatever it was, was not formally recorded, but it was evidently the Deputy Collector's intention to embody all preliminary orders in the final decree after all the issues were decided. I do not consider that the Deputy Collector's order can be held to be a decree within the meaning of the definition in the Civil Procedure Code. There is no decision on the point whether the plaintiffs were occupancy *ryots* in respect of the particular land for which they sought an order allowing commutation. This was essential before there could be an adjudication conclusively determining the rights of the parties to commute.

The Collector's order and decree on appeal were therefore, I hold, passed without jurisdiction. This being the case, there can be no second appeal.

Under section 205 the Board, however, can pass such orders as seem fit. The District Collector's order and decree will accordingly be cancelled and the Deputy Collector directed to proceed with the trial of the suits and pass a decree according to law. No order as to costs in either the Court of the District Collector or in this Court, as the question of jurisdiction was not raised before the former.

Appeal allowed; Case remanded.

SHARDAPRASAD v. SIKANDAR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 38 OF 1914.

September 28, 1915.

Present:—Mr. Batten, A. J. C.

SHARDAPRASAD AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

SIKANDAR AND OTHERS—DEFENDANTS—

RESPONDENTS.

Contract Act (IX of 1872), s. 32—Contingent contract—Performance dependent on will of third person—Contract becoming impossible of performance—Specific performance, suit for—Alternative relief—Partial performance on abatement of price or for full stipulated consideration, whether can be decreed—Specific Relief Act (I of 1877), ss. 14, 15.

Where parties enter into a contingent contract dependent for its performance on a future event, if the future event provided for becomes impossible, the contract falls through. [p. 463, col. 1.]

Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus perform an impossibility. [p. 463, cols. 1 & 2.]

Mansingh v. Rampiare, 8 Ind. Cas. 1184; 6 N. L. R. 185, relied on.

In such a case, specific performance will not be decreed for partial performance of so much of the contract as is possible on abatement of price or even for the full stipulated consideration under section 14 or section 15 of the Specific Relief Act. [p. 463, col. 2.]

Sections 14 and 15 of the Specific Relief Act refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. They have no application where the obstacle to the full performance of the contract is known to the parties and no provision is made to meet the eventuality. [p. 463, col. 1.]

Castle v. Wilkinson, (1870) 5 Ch. 534; 39 L. J. Ch. 843; 18 W. R. 586, referred to.

Poole v. Middleton, (1861) 7 Jur. (N. S.) 1262; 4 L. T. 634; 9 W. R. 758, distinguished.

Defendant agreed to sell his 4-annas share in a village without reservation of occupancy rights to plaintiff for Rs. 4,500 after obtaining the requisite sanction under section 45 of the Central Provinces Tenancy Act. The defendant applied for sanction as aforesaid, but sanction to sell with occupancy rights was refused. Plaintiff sued defendant for specific performance of the agreement, or, in the alternative, for conveyance without cultivating rights on an abatement of Rs. 1,000. The District Judge refused both the reliefs, the latter, on the ground that the value of the cultivating rights did not bear only a small proportion to the value of the whole property within the meaning of section 14 of the Specific Relief Act. On appeal, the plaintiff offered to submit to a decree for specific performance without occupancy rights on payment of the full consideration of Rs. 4,500.

Held, (1) that the contract between the parties

could not be enforced for want of sanction and that there was no alternative contract to meet the event of its being refused. [p. 463, col. 2.]

(2) that no partial performance could be decreed under section 14 or 15 of the Specific Relief Act which did not apply to this contract. [p. 463, cols. 1 & 2.]

First appeal against the decree of the District Judge, Raipur, dated the 10th February 1914.

Messrs. J. Mittra and J. C. Ghosh, for the Appellants.

Rao Bahadur V. R. Pandit, Sir Bipin Krishna Bose and Mr. Rangnathrao, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to enforce specific performance of a contract to sell to the plaintiffs a 4-anna share in a village together with cultivating rights in *sir*. By the terms of the contract the first defendant undertook to apply under section 45 of the Central Provinces Tenancy Act for sanction to transfer his *sir* land without reservation of the right of occupancy; the contract provided for various reliefs for the benefit of the proposed vendees in case after obtaining sanction the proposed vendor refused to sell the property as agreed. The first defendant did apply for sanction; sanction was refused, and thereupon he sold the property, without cultivating rights in *sir*, to the 2nd and 3rd defendants. The plaintiffs asked for several reliefs in the alternative. The first was that the 1st defendant should be made to execute a sale-deed for the property, including cultivating rights in *sir*. The terms of the prayer as regards the next alternative relief may be translated as follows:—

"If the Court holds that *sir* land with cultivating rights cannot be included in the sale-deed, the 1st defendant may be directed to execute in favour of the plaintiffs a sale-deed in respect of the 4-anna share with the reservation of cultivating rights in *sir*, to get it registered and to deliver possession over the 4-anna share. In these circumstances Rs. 1,000, the value of the cultivating rights in *sir*, may be deducted from the agreed price of Rs. 4,500, and the balance paid to defendant."

With the other alternative prayers we are not now concerned.

The learned District Judge, following

SHARDAPRASAD v. SIKANDAR.

Mansingh v. Rampiare (1), held that the first relief asked for could not be granted, because sanction for the transfer of cultivating rights in *sir* had been refused and the 1st defendant could not be compelled again to apply for sanction.

The second alternative prayer, set out above, was taken to be made with reference to the provisions of section 14 of the Specific Relief Act. Section 14 was held not to apply, as it was found that the value of the cultivating rights in *sir* did not bear only a small proportion to the value of the whole property, within the meaning of the section.

In appeal the claim for specific performance including cultivating rights in *sir* is given up by the plaintiffs-appellants, whose learned Counsel also accepts the finding that the cultivating rights in *sir* do not bear a small proportion to the whole property in value. The sole claim in appeal is one made under section 15 of the Specific Relief Act, for specific performance of the contract excluding cultivating rights in *sir* on payment of the whole price of Rs. 4,500. For the respondents it is objected that this is a totally new claim, not raised in the lower Court, where the plaintiffs asked for a relief inconsistent with a relief under section 15 of the Specific Relief Act; the plaintiffs asked for either the specific performance of the whole contract, or specific performance of part on a reduced price under section 14. If sections 14 and 15 applied to the case, I would have no hesitation in holding this objection to be well founded. In the words of Ismay, J. C., in an exactly similar case in *Ramkrishnapuri v. Sitaram* (2), "No such relief was asked for in the Courts below. On the contrary the appellant distinctly repudiated his liability to pay the full amount of the purchase-money if rights of occupancy were reserved, and I am unable to see upon what grounds the appellant is entitled in second appeal to ask for a relief which was never refused him at any stage of the litigation." The force of these remarks does not appear to be lessened in this case of a first appeal.

But I am of opinion that neither section 14 nor section 15 of the Specific Relief Act have any application to the facts of this case. As I read the contract for sale it is a contingent contract within the meaning of

section 32 of the Contract Act. The following is a translation of the material clauses of the contract:—

"I have made a final settlement with the said *mahajans* intending to sell them for Rs. 4,500 a 4-anna share out of my 5-anna 4-pie share of *Mauza Amethi, Tahsil* and District Raipur, together with the *sir* land and cultivating rights appertaining to the 4-anna share, with *lambardari* rights, and the dwelling houses together with their boundaries. But as, at present, sanction for the sale of the *sir* land has not been obtained, I am unable to execute the sale-deed. Therefore this day I make an agreement, and lay down, that the price of the 4-anna share of the property together with *sir* land, cultivating rights and *lambardari* rights appertaining to the said 4-anna share of *Mauza Amethi, Tahsil* and District Raipur, has been finally settled at Rs. 4,500, four thousand five hundred. I will, therefore, make a petition and without delay obtain sanction for the sale of the *sir* land and after obtaining the sanction, I will execute a sale-deed for the above-mentioned amount of Rs. 4,500, and get the same registered, and deliver possession of the property sold, viz., the 4-anna share together with *sir* land and cultivating rights appertaining thereto and the *khudkasht* land with cultivating rights, and *lambardari* rights appertaining to that share."

* * * * * If I refuse to sell the property after receipt of the sanction, or obtain the sanction in the name of some other person, I shall be liable to the said purchasers to pay Rs. 1,000 on account of damages. Or, if the said purchasers refuse to buy the said property, or to obtain the sale-deed after receipt of the sanction for sale of the *sir* land, they also shall be liable to pay me Rs. 1,000 on account of damages."

The 1st defendant made two undertakings. The first was to apply for sanction for the sale to the plaintiffs of *sir* land without reservation of occupancy rights. This part of his contract he duly performed. The second undertaking was that, if sanction were granted, he would sell his share with cultivating rights in *sir*. No provision was made for the event of sanction being applied for and refused. This part of the contract was purely a contingent

(1) 8 Ind. Cas. 1184; 6 N. L. R. 185.

(2) Second Appeal No. 132 of 1905.

SHARDAPRASAD V. SIKANDAR.

contract, and if the future event provided for became impossible the contract fell through. Sections 14 and 15 of the Specific Relief Act appear to ■■■ to refer to cases where the inability to perform the whole contract ■■■ not contemplated by the contracting parties. Where, as here, the contracting parties knew of and contemplated the possibility of the whole contract being incapable of performance, for reasons beyond the control of either of the parties, the sections have no application. They apply to unforeseen contingencies, not to foreseen contingencies. The parties should have provided in the contract for such an eventuality, but failed to do so.

As this aspect of the case had not presented itself to the learned Counsel on either side, I provided them with an opportunity of further argument and of searching for authorities.

The learned Advocate for the respondents supported the view put forward by the Court, but did not cite any cases. The learned Counsel for the appellants referred to two English cases; *Poole v. Middleton* (3) and *Castle v. Wilkinson* (4). Both these cases are cited in Collett's Specific Relief Act and in Fry on the Specific Performance of Contracts. In the former case the seller of shares, which could not be transferred without the consent of a Board, was compelled to transfer such interest as he had, though it was left doubtful whether the buyer would thereby become a share-holder. This case at first sight seems to militate against my view since the parties must have known of the possible objection of the Board to the transfer, but an examination of the case shows that the *ratio decidendi* was that the Board had not an arbitrary power to prevent the sale of shares. The Board's powers were, therefore, very different from the full powers of refusing sanction possessed by the Revenue Authorities under section 45 of the Tenancy Act. Where the possibility of completing a contract is dependent on the will of ■ third person, the principle enunciated in *Mansingh v. Rampiare* (1) is well expressed in Fry, *op. cit.*, 5th

edition, paragraph 999: "As the consent of ■ third party is, or may be, a thing impossible to procure, ■ defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility."

The case of *Castle v. Wilkinson* (4) affords strong support to the view that the principles embodied in sections 14 and 15 of the Specific Relief Act have no application where the obstacle to the full performance of the contract is known by the parties and no provision is made to meet the eventuality. A husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey; it was held that the purchaser could not compel the husband to convey his interest and accept an abated price. The view taken was that while if ■ man professes to be owner of a fee simple, and undertakes to sell it, and it turns out that he had not power to do so, the purchaser not being at the time aware of the difficulty, the vendor must convey as much as he can, and submit to an abatement, yet the case is wholly different when there is no such profession. Here the buyer knew that he could only get what the wife was willing to convey, and failing that, he could not insist on the partial interest of the husband being conveyed, the agreement being by both to convey the whole. The *ratio decidendi* was that the vendor was aware of the probable impediment to the fulfilment of the contract.

I am, therefore, confirmed in my view that as the contract in this case for the sale was contingent on the grant of sanction, the contract cannot be specifically enforced at all since the sanction was refused, and there was no alternative contract to meet the event of it being refused. In any case the relief now asked for cannot be granted. The appeal is dismissed with costs.

There is a cross-appeal by the respondents to the effect that they should have been awarded full instead of half costs ■ regards the item of Pleader's fee. There is no force in this contention, since the defence was common to both sets of defendants, and the District Judge correctly applied rule 10 of the rules regulating Legal Practitioners'

(3) (1861) 7 Jur. (N. S.) 1262; 4 L. T. 634; 9 W. R. 758

(4) (1870) 5 Ch. 534; 39 L. J. Ch. 843; 18 W. R. 586.

RAJENDRA KUMAR ROY v. MAHARAJA MANINDRA CHANDRA NANDY.

fees. The cross-objection is dismissed with costs.

Both appeal and cross-objection dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2388
AND 2759 OF 1914.

May 10, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

RAJENDRA KUMAR ROY AND OTHERS—
DEFENDANTS—APPELLANTS

versus

The Hon'ble MAHARAJA MANINDRA
CHANDRA NANDY—PLAINTIFF—

RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 52—Landlord
and tenant—Diluvion—Claim for reduction of rent—
Lease, construction of.*

A tenant is entitled to claim abatement of rent under section 52 of the Bengal Tenancy Act for partial diluviation of his lands, save where he expressly waives the privilege in his *kabuliyat*. [p. 466, col. 1.]

If, for no fault of the tenant, all the lands of his *jote* are washed away, he cannot, on general principles, be held liable to pay rent to the landlord, unless he is precluded by the terms of his *kabuliyat* from pleading non-liability on that ground. [p. 466, col. 1.]

In a suit for recovery of rent, therefore, the tenant is entitled to claim exemption from rent for total diluviation of his lands. [p. 465, col. 2.]

The above rule is also applicable to tenants who hold over, even if they did not surrender the *jote* or avoid the tenancy when the lands were washed away. [p. 466, col. 1.]

Afsarudin v. Musammatt Shorasiibala Debi, Marsh 558; 2 Hay 664; *Sheikh Enayutollah v. Sheik Eluheet-buksh*, W. R. (1864) Act X Rulings, 42, referred to.

Where in a *kabuliyat* the lessees stipulated "Cultivation or non-cultivation, profit or loss in respect of the *jote* will be ours and we shall not be competent to make any objection to the rent settled":

Held, that the lessees were not precluded by the terms of the *kabuliyat* from pleading non-liability to pay rent if all the lands of the *jote* were washed away. [p. 465, col. 2.]

Appeals against the decree of the District Judge, Rangpur, dated the 14th May 1914, reversing those of the Munsiff, 1st Court, Gaibandha, dated the 31st March 1913.

FACTS material to the cases were as follows:—

Two tenures were leased out to the defendants under two *kabuliyats* for a term of five years, which expired in 1313. In the *kabuliyats* there was a stipulation to the effect that on the expiry of the term thereof the defendants would take out a fresh lease

undertaking to pay enhanced rents. The defendants did not, however, take fresh leases but continued in possession and paid rents for 1314 and 1315 at the *kabuliyat* rates. In the *kabuliyat* there was a stipulation which was construed by the lower Appellate Court to mean that on no account should the lessee be entitled to claim any reduction of rent settled under the *kabuliyat*. The tenancies were tenures. The lands of the tenancies between 1313 and 1315 *Faslis* suffered total extinction on account of diluvion.

The plaintiff Maharaja brought these suits claiming rents for 1316, 1317 *Faslis* and six months of 1318 *Fasli*.

The first Court dismissed the suit but the first Appellate Court decreed it. From this decision the present appeal was preferred.

Babu Jogesh Chandra Roy (with him Babu Madhab Gobind Roy), for the Appellants.—The *kabuliyats* use very vague words....., which literally means cultivation or no cultivation. The tenants undertook to pay the rent settled whether there was cultivation or no cultivation. They did not contemplate total destruction of the land for the use of which they were to pay rent.

[N. R. CHATTERJEA, J.—They paid the entire rent for 1314 and 1315 *Faslis* though a portion of the land had been washed away. They might have done so in the hope of the river changing its course. The Privy Council case of *Durga Prasad Singh v. Rajendra Narayan Bagchi* (1) makes the *kabuliyat* binding on the tenant.]

Even if the terms of the *kabuliyat* apply, they are so vague that they cannot cover cases of diluvion or other causes of destruction of the entire land for which the tenant is not responsible. In all cases where diluvion has been held not to exempt from liability to pay rent, there is specific mention of it, as in *Rhettermani Dasi v. Jiban Krishna Kundoo* (2).

When the entire land is destroyed, there ceases to be any consideration for the *kabuliyat*. In such a case there cannot be any holding over. This is one of the most general principles of tenancy.

(1) 21 Ind. Cas. 750; 41 C. 493; 18 C. W. N. 66; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42.

(2) 28 Ind. Cas. 510; 21 C. L. J. 315; 19 C. W. N. 546.

RAJENDRA KUMAR ROY v. MAHARAJA MANINDRA CHANDRA NANDY.

Babu Ram Charan Mitter (with him Babus Jogesh Chander De, Hemendra Nath Sen and Sarat Kumar Mitter), for the Respondent.—The *kabuliyat* says in most clear and unambiguous terms that no reduction will be claimed in any case. The words used are very wide and cover cases of diluvion. The tenants also took it in this sense and had been paying the entire rent for several years, even though a considerable portion of the land was submerged.

No exemption is allowed in such cases by law, *Maharaja Manindra Chandra Nandi v. Kashi Chandra Bakshi* (3). There is no difference in principle between partial diluvion and total diluvion.

Babu Jogesh Chandra Roy, in reply.—All diluvion cases are very specific in their terms, *Nunda Laul Mukherjee v. Kymuddin Sardar* (4); *Khettermanni Dasi v. Jiban Krishna Kundoo* (2). In the present case, the words used are as vague as possible, "cultivation or no cultivation."

With regard to the case of *Maharaja Manindra Chandra Nandi v. Kashi Chandra Bakshi* (3) we have not the *kabuliyat* in the report, secondly, there was no total destruction of the land. There was some consideration, however small, for the payment of the rent. In the present case there is absolutely none.

JUDGMENT.

N. R. CHATTERJEA, J.—These appeals arise out of suits for rent of two *jotes*, one comprising 24 *bighas* and odd and the other 23 *bighas* and odd.

The defence was that all the lands of the *jotes* had diluviated and that the defendants were not, therefore, liable for rent. There was a local investigation by a Commissioner and it was found that the *jotes* "suffered total extinction on account of diluvion."

The lands were held under two *kabuliyats* for a term of five years, and there was a stipulation that on the expiry of the term a fresh settlement would be taken on enhanced rents. No fresh settlement was taken and the defendants paid rent for

two years (after the expiry of the lease) during which the lands were partly diluviated. They did not pay rent for the years in suit, as the lands were wholly washed away.

The Court of first instance dismissed the suit, but his decree was reversed, and the suit was decreed, by the Court of Appeal below. The defendants have appealed to this Court.

The learned District Judge, differing from the Munsif, held that according to the agreement contained in the *kabuliyats* the lessees were not entitled to claim any reduction of the rent.

The *jotes* consisted of 24 *bighas* and 23 *bighas* of land respectively but they were stated to be tenures in the written statement and in the judgment of the Court of Appeal below, and the arguments in this Court proceeded upon that footing.

The learned District Judge observes, "Now one of these stipulations is to the effect that on no account should the lessees be entitled to claim any reduction of the rent settled under the *kabuliyats*." The *kabuliyat*, however, does not contain the words "on no account." All that it says is that "the cultivation or non-cultivation, profit or loss in respect of the *jote* shall be ours. We shall not be competent to make any objection to the rent settled". We think that the lessees agreed not to make any objection to pay rent, only on the grounds stated before, *viz.*, non-cultivation, &c., or similar grounds which presuppose the existence of the lands, and not where the lands are entirely washed away. Had it been intended that the lessees would be bound to pay rent even if the lands were diluviated, it would have been so stated in the *kabuliyats*. We are of opinion that the lessees were not precluded by the terms of the *kabuliyats* from pleading non-liability to pay rent if all the lands of the *jotes* were washed away. That being so, we think the defendants are exempted from the payment of rent for the years in suit.

It is contended on behalf of the respondent that as the defendants were holding over, they were liable to pay rent so long as they did not surrender the *jotes* or avoid the tenancy. But rent is paid

(3) 15 Ind. Cas. 458; 15 C. L. J. 507.

(4) 9 C. W. N. 886.

SINGHESWAR MISSIR v. RAMESHWAR JHA.

by a tenant for the use of land, and if for no fault of his own, the lands are washed away, he cannot, on general principles, be held liable to pay rent. Section 52 of the Bengal Tenancy Act provides that every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him. In the present case all the lands of the tenure had been washed away and we do not see why the defendants are not entitled to claim exemption from payment of rent in a suit for recovery of rent. In the case of *Afsarudin v. Musammatt Shorashibala Debi* (5) Sir Barnes Peacock, C. J., observed: "It was contended that the respondent would not be entitled to any diminution of rent if the land had been washed away. But we think he is so entitled, unless there was an express stipulation that he should pay whether the land was washed away or not. If a man stipulates to pay rent, it is clear that he engages to pay it as compensation for the use of the land rented and independently of section 18, Act X of 1859, we are of opinion that according to the rules of law if a *taluqdar* agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent, if a portion only be washed away. According to English Law a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent."

Again in *Sheik Enayutoollah v. Sheik Elakeebuksh* (6) Sir Barnes Peacock, C. J., held that a tenant, whether with or without a right of occupancy, is entitled to abatement of rent for land washed away, unless precluded by the terms of the *kabuliyat* from claiming that abatement and referring to the rule laid down in Bacon's Abridgment, 7th Edition, Vol. VII, page 63, that if the use of the thing be entirely lost or taken away from the tenant the

rent ought to be abated or apportioned because the title to the rent is founded upon this presumption that the tenant enjoys the thing during the contract, observed that the rule is founded on the principles of natural justice and equity that if a landlord let his land at a certain rent, to be paid during the period of occupation and the land is, by the act of God, put in such a state that a tenant cannot enjoy, the tenant is entitled to an abatement.

We are accordingly of opinion that the defendants are not liable for the rents claimed. The decrees of the Court of Appeal below are reversed and those of the Court of first instance restored with costs here and in the Court below.

RICHARDSON, J.—I agree and merely add that a similar principle is enunciated in clause (e) of section 108 of the Transfer of Property Act.

Appeals allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 220 OF 1913.

April 25, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

SINGHESWAR MISSIR—PLAINTIFF—
APPELLANT

versus

RAMESHWAR JHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Partition, partial—Suit for partition of properties reserved—Nature of proof—Burden of proof—Possession within 12 years prior to suit—Limitation—Findings to be arrived at on pleadings.

In a suit for partition, if it is clear that there has been a partial partition, the burden of proof is on the plaintiff to show that there has been no partition of the properties of which partition is claimed. [p. 468, col. 1.]

It is also necessary that the plaintiff should show that he was either in possession at the date of suit or within 12 years prior to it. Adverse possession by defendants for 12 years prior to the institution of the suit bars the claim. [p. 468, col. 1.]

When the plaintiff makes a definite case of possession by himself in the plaint, he cannot be allowed to make in appeal an entirely new case of possession through co-sharers in order to save the bar of limitation. [p. 469, col. 2; p. 470, col. 1.]

It is extremely dangerous for a Court to arrive

(5) Marsh. 558; 2 Hay 664.

(6) W. R. (1864) Act X Rulings, 42.

SINGHESWAR ~~■■■■~~ V. RAMESHWAR JHA.

at a conclusion which is not in accordance with the case of either side, and each case must be fought upon the pleadings. [p. 468, col. 1.]

First appeal from a decision of the Sub-Judge, Darbhanga, dated the 3rd August 1911.

Mr. Ganesh Dutt Singh, for the Appellant.

Mr. Sorashi Charan Mitter, for the Respondents.

JUDGMENT.—This is an appeal from the decision of the Subordinate Judge of Darbhanga, dismissing the suit of the plaintiffs for partition. Plaintiff No. 2 is the widow of Dukha Jha, who died in 1891. He had two brothers, named, Chandeshwar Jha and Porander Jha. These brothers are also dead, their interests being represented by their sons Rameshwar Jha and Kedar Nath Jha, who are recorded in the finally published Record of Rights as in possession of the property in dispute. This property, as set forth in the schedule attached to the plaint, consists of a tenure in Lohna shown in *Khewat* No. 21, a tenure in Kishenpatti shown in *Khewat* No. 3 and tenures in Lohna shown in *Khewats* Nos. 13, 32 and 33. The Kishenpatti tenure is a rent-free *barh mottar* tenure. A half share of the interest of plaintiff No. 2 in the Kishenpatti tenure was sold to plaintiff No. 1 for a thousand rupees, paid in cash, and a promise to expend not less than Rs. 3,000 in securing the property to plaintiff No. 2. The suit is for a partition of the properties named in the plaint. The allegation of the plaintiffs is that though there had been separation in mess from before the time of the death of Dukha, there had been no partition by metes and bounds of the property in dispute. The defence to the case, as put forward in the lower Court by the principal defendants-mortgagees of the whole property in dispute, was that the three brothers Dukha, Chandeshwar and Porander were never separated, and that, therefore, under the Mitakshara Law Chandeshwar and Kedar Nath succeeded to the property by survivorship on the death of Dukha. The learned Subordinate Judge has found as a fact that the defence is a false defence, that there was a separation in mess between the three brothers before the death of Dukha, and, therefore, the widow would, in due course, have been entitled to succeed. But he also found that, from the

time of the death of Dukha, the debts outstanding against him were settled by his two brothers, and that, in consideration of that settlement, the widow abandoned all rights in the property. He also found that there had, in fact, been a complete partition by metes and bounds of the whole property, and that, therefore, the suit must fail. Against that decision the plaintiffs appealed. During the pendency of the appeal Singheswar Missir, the plaintiff No. 1, came to terms with the principal defendants-mortgagees who had acquired, by auction-purchase in execution of decrees upon their mortgages, the estates of Rameshwar and Kedar Nath. He executed an 'ekrarnama' disclaiming all rights in the property.

An attempt was made to make the second plaintiff a party to this 'ekrarnama'. That attempt failed, and she remains on the record as an appellant. In appeal before us the arguments advanced are, (1) that the Subordinate Judge acted without jurisdiction in dismissing the plaintiffs' suit on a defence not taken in the written statement, (2) that there was in fact no separation by metes and bounds of the property now claimed, and (3) that the question of abandonment of the lands by the plaintiff No. 2 was not one raised by the parties at any stage of the proceedings, that it was entirely an effort of the imagination on the part of the lower Appellate Court, and that the true facts are that the plaintiff No. 2 entrusted the management of her affairs to Rameshwar Jha and Kedar Nath after her husband's death and that they were in possession of the property, if in possession at all, as trustees for the plaintiff No. 2 and that, therefore, no limitation could arise out of their possession of the property. In answer to this argument the learned Vakil for the respondents, as though he had filed a cross-appeal against the decision that there had been a separation in mess between Dukha and his brothers, supports the lower Court's decisions all points. In answer to the argument that the lower Court had no jurisdiction to entertain a defence not pleaded, it was urged that the contesting defendant was a stranger to the village and was not in possession of the true facts, that it was the duty of the plaintiff to put the Court in possession of the true

SINGHESWAR MISSIR v. RAMESHWAR JHA.

facts, and that when upon the evidence upon the record the lower Court came to a finding of fact which must result in a dismissal of the plaintiff's case, the lower Court was justified in so dismissing it.

That each case must be fought upon the pleadings, is in general a sound rule. It is extremely dangerous for any Court to arrive at a conclusion which is not in accordance with the case of either side. But in a suit for partition the burden of proof is on the plaintiff, if it is clear that there has been a partial partition, to show that there has been no partition of the properties of which partition is claimed.

It is also necessary that the plaintiff should show that she is either in possession at the time of the suit or has been in possession within twelve years. If it is shown that possession has been held adversely against her for twelve years prior to the institution of the suit, her suit must fail. Moreover in the suit before us issue No. 4 runs, "Is the suit barred by limitation."

Upon the first question of fact whether or not the property is still joint, it is clear that the decision of the learned Subordinate Judge is in part only correct. It is not correct to say that the Kishenpatti property was divided. Both sides are agreed and the Survey Records show that it was never divided. The property in suit we have already described; in addition to this property Exhibit 1 shows that Dukha was in separate possession of a one-third share of 25 *bighas* in village Hata Rupowli. He was also in possession of 7 *bighas* out of 15 *bighas* in Lohna. The family had also *milkiat* in village Mekan Baida. None of these properties are mentioned in the plaint. It is, therefore, to be presumed that they were separately held at the time of Dukha's death. That they were separately held is clear from the fact that in the finally published Record of Rights the plaintiff Sankari Ojhain is recorded as in sole possession of 8 *bighas* in Hata Rupowli. Of the lands mentioned in the plaint, it is also certain that there must have been before 1901 a separation of shares in the four Lohna tenures. The Survey Record shows that of *Khewat* No. 21 of Lohna composed of *Khatas* Nos. 694 to 753; 694 and 695 are

separately recorded ■ *bakasht* respectively of Kedar Nath and Ramji; and in *Khewats* Nos. 13, 32 and 33 of Lohna, consisting of *Khatas* Nos. 509 and 530 to 569, 539 is the *bakasht* of Kedar Nath Jha and 530 is the *bakasht* of Ramji Jha. It is quite certain, therefore, that in the private lands of these *khewats* in Lohna there was separation by metes and bounds prior to 1901. And we find from the evidence of Singheswar Missir that he claimed to be, with his vendor, in separate possession of 20 *bighas* of *bakasht* land. Great stress was laid in the arguments before us upon Exhibits 17 and 18 as showing that 72 *bighas* in Lohna and 210 *bighas* in Kishenpatti were always jointly held. This argument was based upon the fact that in Exhibits 17 and 18 Rameshwar and Kedar mortgaged by separate deeds each an unspecified 36 *bighas* out of 72 *bighas* in Lohna and 140 *bighas* out of 210 *bighas* in Kishenpatti. Exhibits 17 and 18 are dated June 1902. If it be shown that there was complete separation in Lohna between Chandeshwar and Kedar Nath before 1901 when the Record of Rights was finally published, Exhibits 17 and 18 are valueless as evidence that there was no separation in Lohna when these two documents were made. We have shown that in the lands held *bakasht* by the brothers there must have been separation by metes and bounds many years ago. In Exhibit 12, whereby Chandeshwar and Kedar Nath are giving in *sudhbarna* 7 *bighas* of Lohna the lands are described as east of the *patti* of Dukha and west of the *patti* of Dukha; other boundaries given in this document are not *pattis* but lands or fields or *kasht* lands of the various neighbouring holders. The word *patti* there used is significant, and is, when added to the other evidence of separation in Lohna, conclusive proof that in Lohna Dukha had a separate *patti*. No suit for a partition of the Lohna lands can lie.

The remaining property is that of *Mouzah* Deohar, Tola Kishenpatti, *Khewat* No. 3. In this village there are no *bakasht* lands. No arrangement had been arrived at by the brothers whereby each collected one-third of the rent from the tenants. It is the case of both sides that there the *putwari* collected the rents in one lump from the tenants, and divided between the three sharers the sum collected.

SINGHESWAR MISSIR v. RAMESHWAR JHA:

The Kishenpatti property is clearly joint and should be divided if the widow of Dukha has not lost by limitation her claim to partition.

On the question of limitation the plaintiff's case was that the plaintiff No. 2 Sankari Ojhain paid up her husband's debts by selling paddy, and was in actual possession of her husband's property up to the date of the suit by receipt of *batai* rents from the Lohna lands and by receipt of Rs. 200 per annum as her share of the rents of the Kishenpatti lands. All this is entirely untrue. The documents on the record show clearly what was the position of Dukha's affairs at the time of his death. Exhibits Nos. 1 and 2 are mortgages made by Dukha of some 15 *bighas* of land. Exhibits Nos. 3, 13 and 14 show that a decree was obtained, including costs, for Rs. 598 upon these debts. Exhibit D shows that Dukha and Chandeshwar were jointly indebted to the extent of Rs. 1,100 by a mortgage upon the Kishenpatti tenure, and Exhibit C shows that Dukha and Chandeshwar again mortgaged this Kishenpatti tenure for Rs. 1,572 on the 19th December 1890. These debts were unpaid at the time of Dukha's death. Exhibit K shows that on the 14th September 1893 Chandeshwar and Kedar Nath gave a *sudhbarna* of Mikan Baida for Rs. 4,000 and with that money paid up all Dukha's debts, including the mortgage upon the Kishenpatti tenure. Exhibit I shows that on the 7th June 1906 Rameshwar, the son of Chandeshwar, sold 2 annas 13 *gandas* 1 *cowri* 1 *karrant* of Mikan Baida to pay off his Rs. 2,000 in the *sudhbarna*. Exhibit 20 shows that each brother had a 1-15-2-0-2 share in Mikan Baida, of which Dukha had in his lifetime sold 0-17-3-0-1. Kedar Nath got himself recorded in Register D for the shares of Poronder Jha and Dukha Jha, 2-13-1-1 of Mikan Baida, on the 18th December 1903 and then sold his own *milkiat* and Dukha's *milkiat* to pay off the *sudhbarna*. Thus all Dukha's liabilities were cleared by the sale of Mikan Baida, not by the sale of paddy by the widow.

In the alienation of Mikan Baida the widow acquiesced, and still acquiesces. Mikan Baida is not one of the properties of which she asks for partition. She allowed

Rameshwar and Kedar Nath to plough the Lohna lands. What she did with regard to Kishenpatti it is impossible to say. It was not till 1908 that she appointed any one to look after her interests in her husband's estate. The man she then appointed was Sashi Nath Jha. This person's evidence and Sankar's evidence are entirely unworthy of belief. The widow was paying rent for the *mokarari* lands of Lohna. Rameshwar and Kedar Nath were hopelessly hard pressed for money. It is very improbable that they even sent the widow anything. All payments received by the widow are said to have been entered in account books. All these accounts are said to have been burnt; all the road-cess receipts said to have been burnt; Bajrangi who carried to the widow's house her share of the collections is not called a witness. We are satisfied that it is untrue that the plaintiff No. 2, Sankari Ojhain, has any sort of possession in the Kishenpatti lands from the date of the death of Dukha to the present day.

It may be mentioned in this connection that she was a second wife. There were two daughters living by the first wife. She had only lived one year with Dukha when Dukha died.

We find in all the evidence in the ample justification for the finding of the lower Court that the plaintiff has been out of possession for twelve years prior to the institution of the suit, that she left her husband's home on her husband's death, and received no profits from the estate from the day of his death. She allowed herself to be ousted at the time of her husband's death in 1891.

It is argued that this is not sufficient to establish limitation. In support of the argument is quoted the well-known rule that possession by co-sharers is not adverse until some overt act has been committed in denial of the title of the ousted co-sharer. There was at least one such overt act committed in 1893 when Kedar Nath and Chandeshwar gave away Mikan Baida in *sudhbarna*. Apart from this we hold that it is impossible for us to consider the case one in which two co-sharers have been holding land in trust for all. The plaintiff made a definite case of possession by herself. She

CHUTO v. KHUDA BUX.

cannot be allowed to make in appeal an entirely new case of possession through co-sharers.

We hold that the suit was barred by limitation and was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 10 OF 1914.

October 7, 1915.

Present:—Mr. Pratt, J. C., and
Mr. Boyd, A. J. C.

CHUTO AND ANOTHER—APPELLANTS

versus

KHUDA BUX *valad* JIO—RESPONDENT.

Muhammadian Law—Husband and wife—Ante-nuptial agreement by husband to live with his wife at her father's house, validity of—Public policy.

An ante-nuptial agreement by a husband that he would live with his wife at her father's house, virtually amounts to providing for a future separation on a certain contingency and as such is contrary to public policy and cannot be enforced. There is nothing in Muhammadian Law definitely permitting such an agreement, which is invalid as between Mahomedans, just as it would be in any other community. [p. 470, col. 2; p. 471, col. 1.]

Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, 28 C. 751; 5 C. W. N. 673; *Meherally v. Sakerkhanobai*, 7 Bom. L. R. 602; *Krishna Iyer v. Balammal*, 8 Ind. Cas. 412; 34 M. 398; 8 M. L. T. 314, referred to.

Hamidunnessa Bibi v. Zohiruddin Sheikh, 17 C. 670, distinguished.

Appeal against the decree of the District Judge, Hyderabad.

Mr. Fatehchand Asudomal, for the Appellant.

JUDGMENT.—Plaintiff obtained a decree for restitution of conjugal rights against his wife defendant No. 5 and an injunction against her father defendant No. 1 and other defendants. The District Judge confirmed the decree. Defendants Nos. 1 and 5 have come here in second appeal. The sole argument put forward for them is that plaintiff is bound by a pre-nuptial agreement that he would live with her at her father's house, plaintiff wants her to live at his own house; and, therefore, it is urged, she is justified in refusing to go to him.

This was an agreement providing for a future separation on a certain contingency; and as such it is contrary to public policy and cannot be enforced. *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* (1).

Here the parties are Mahomedans. And it is urged for defendants that such an agreement is allowed by Muhammadan Law and, therefore, the Courts ought to enforce it.

We cannot find that the Muhammadan Law either definitely forbids or definitely sanctions an agreement like the present. Commentators differ in opinion. We are inclined to the view that such an agreement is forbidden. But in any case we find no authoritative opinion that such agreements ought to be enforced. We can find no clear text on the subject. Mr. Ameer Ali gives his own opinions at pages 312 and 371 of the second edition of his book. He says: "If it be agreed that a husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own." He cites no text to support this opinion, which appears to be based on *dicta* of certain Kazis in Algeria, as reported by a French Commentator. This cannot be said to be an opinion which a Court is bound to follow, even if Algeria were the headquarters of Islam, which it is not. On the other hand a contrary opinion is given in Sir Roland Wilson's Digest, edition 1895, page 56, and in Macnaghten, edition 1897, page 256, case VIII. Both these jurists lay down as settled law that an agreement like the present is illegal and invalid. In *Hamidunnessa Bibi v. Zohiruddin Sherkh* (2) the present point was not decided. But the learned Judges referred to in the passage in the Hedaya, in which a similar case was mentioned. There, however, the agreement was considered only in its bearing on the amount of dower which the wife could claim if the husband took her away from her native city, having agreed to keep her there. In that case the ante-nuptial agreement also provided for a certain amount of dower. We have referred to this passage, and, reading on further, find that Abu Hanifa was of opinion that the wife could claim more dower (if otherwise entitled): another disciple Zaffar, however,

(1) 28 C. 751; 5 C. W. N. 673.

(2) 17 C. 670.

NARSINGDAS V. RATANLAL.

thought that in spite of the agreement she could get her full dower though that might exceed the amount stipulated. So it appears that small importance was attached to the agreement. Neither disciple considered the possibility of the wife's absolute refusal to leave her city and go to her husband. And indeed it seems likely that no woman had ever dared so to refuse.

The law being thus hard to ascertain, still we are asked to say that such agreements between Mahomedans are definitely permitted by their personal law and anyhow are consonant with the spirit of that law that the Court ought to enforce them, although they would be clearly illegal if entered into by persons of other religions. We cannot assent to this view.

We agree with the views expressed by Batchelor, J., in *Meherally v. Sakerkhanobai* (3), which was approved by Bench of the Madras High Court in *Krishna Iyer v. Balammal* (4). The former was a case between *Khoja* Mahomedans. The learned Judge held that an agreement between husband and wife providing for a future (as opposed to an immediate) separation was invalid as being opposed to public policy. He enumerated authorities showing that it would not stand under the law of England; and, as stated at the outset, it is settled that such an agreement between Hindus will not be enforced.

The result of enforcing the agreement in this case would be most unsatisfactory. The plaintiff's failure to reside in defendants' house could not be held to dissolve the marriage either now or at any particular time; for he might at any time decide to return there. The result would be an indefinite separation, and the wife could not marry any one else.

For the above reasons we think that the agreement in question is invalid as between Mahomedans, just as it would be in any other community in this part of the Empire.

In Sind an agreement of this nature is particularly undesirable; for women are scarce, and fathers of marriageable daughters are at present inclined to impose unconscionable conditions on suitors.

(3) 7 Bom. L. R. 602.

(4) 8 Ind. Cas. 412; 34 M. 398; 8 M. L. T. 314.

The appeal is dismissed with costs.

Mr. Fatehchand for defendant No 5 asks us to add to the decree a proviso that it shall be enforced by her imprisonment. This is ordinarily a matter for the Court which executes the decree, though at the time of passing judgment such a proviso is allowed by Order XXI, rule 33 (1), of the Civil Procedure Code. In this case the facts before us are very meagre; so we leave the matter to the discretion of the Subordinate Judge. We may express a hope that he will not use severity, unless there is a good chance that it will lead to the ultimate happiness and welfare of both husband and wife. He might bear in mind the fact that compulsion and force seldom lead to domestic felicity.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 453 OF 1914.

April 26, 1915.

Present:—Mr. Stanyon, A. J. C.

NARSINGDAS—PLAINTIFF—APPELLANT

versus

RATANLAL—DEFENDANT—RESPONDENT.

Easements Act (V of 1882), ss. 52, 53, 60, 62—*License, coupled with a void grant—Licensee, whether trespasser—Revocation of license, when valid—Adverse possession, nature of.*

The transfer of a mill or factory and a license to use the site are two distinct rights. [p. 473, col. 1.]

The grant of a mere license need not be in writing and it may be proved by oral evidence. [p. 473, col. 1.]

Krishna v. Rayappa Shanbhaga, 4 M. H. C. R. 98; *Bhagwan Sahai v. Narsingh Sahai*, 3 Ind. Cas. 615; ■ A. L. J. 871; 31 A. 612; *Wood v. Leadbitter*, (1845) 13 M. & W. 838 at p. 845; 67 R. R. 831; 14 L. J. Ex. 161; 9 Jur. 187; 153 E. R. 351; *Hewitt v. Isham*, (1851) 7 Ex. 77; 21 L. J. (N. S.) Ex. 35; 86 R. R. 576, referred to.

Narayan v. Jaswant Singh, 1 N. L. R. 147, distinguished.

Where a license is coupled with an invalid grant of property, the grant exists independently of the license. If the grant is void, the license, stripped of its accompaniment, remains a license. [p. 474, col. 1.]

Quare:—Whether the sale of an oil mill is the sale of chattels only or the sale of realty by reason of the buildings in and on which the machinery of the mill is fixed. [p. 474, col. 2.]

The licensee, in such an event, is not a trespasser and cannot acquire a title by adverse possession where the first entry was permissive. [p. 474, col. 2.]

NARSINGDAS V. RATANLAL.

Hewlins v. Shippam, (1826) 7 D. & R. 783; 5 B. & C. 221; 4 L. J. (o. s.) K. B. 241; 31 R. R. 757; 108 E. R. 82; *Cocker v. Courper*, (1834) 1 Cr. M. & R. 418; 40 R. R. 626; 5 Tyr. 103; 149 E. R. 1143; *Aldin v. Latimer Clark, Murhead & Co.*, (1894) 2 Ch. 437 at p. 448; 63 L. J. Ch. 601; 5 R. 352; 71 L. T. 119; 42 W. R. 453, referred to.

A license is in its nature revocable, but a license coupled with a grant is irrevocable. [p. 474, col. 2.]

Prosonna Coomar Singha v. Ram Coomar Ghose, 16 C. 640, referred to.

A license coupled with a void grant is revocable save (1) where the licensee entered into occupation and paid rent and (2) where the licensee, acting on the license, has executed a work of a permanent character and incurred expense in so doing. [p. 474, col. 2; p. 475, col. 1.]

Walsh v. Lonsdale, (1852) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109; *Lowe v. Adams*, (1901) 2 Ch. 598; 70 L. J. Ch. 783; 50 W. R. 37; 85 L. T. 195; 17 T. L. R. 763; *Land Mortgage Bank of India v. Moti*, 8 A. 69; A. W. N. (1885) 3, referred to.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 14th March 1914, reversing that of the Junior Subordinate Judge, Wardha, dated the 23rd June 1913.

Messrs. J. Mittra and V. R. Pandit, for the Appellant.

Mr. G. P. Dick and Dr. H. S. Gour, for the Respondent.

JUDGMENT.—The material facts and allegations may be stated briefly for the purposes of this appeal. On the 25th January 1887 one Rekchand Mohta, who is now represented by the plaintiff, obtained from Government a 99 year lease over a plot of *nuzul* land, area 1.90 acres, at Hinganghat in the Wardha District. This lease was obviously for building purposes, and the lessee at once erected an oil mill on the site. On the 31st December 1888 the possession of the oil mill and site was transferred by Rekchand Mohta to a corporate body calling itself the Hinganghat Mill Company, Limited. No document was executed embodying the terms of this transfer.

On the 25th September 1899 the Hinganghat Mill Company resolved to sell the mill to Waman Narayan Joshi, the husband of the first defendant, and a conveyance in pursuance of this resolution was executed on the 7th May 1900 and duly registered (Exhibit D-11). In anticipation of this deed, Waman Narayan sold the mill on the 22nd November 1899 by a registered deed to Balchand, the father of the second defendant. This procedure was rendered practicable by the act of the Hin-

ganghat Mill Company in delivering possession of the mill and site to Waman Narayan, on the 4th May 1899, in anticipation of the formalities necessary to effect a legal transfer being carried out. Waman Narayan paid Rs. 12,000 for the mill, and re-sold it to Balchand for the same sum. It is worthy of notice that this was half the price paid in 1888.

On the 19th October 1909, that is, ~~more~~ ten years after the Hinganghat Mill Company transferred possession of the mill and site to Waman Narayan, the plaintiff lodged the present suit for recovery of the site. The plaintiff is the son of Rekchand Mohta by birth, but was given in adoption to Prayagdas, who was formerly a co-parcener with Rekchand Mohta in joint family estate. On a partition of that estate, the site now in dispute fell to the share of the plaintiff, who has thus become the legal representative of Rekchand Mohta in respect of the leasehold. Rekchand Mohta himself is said to be dead. Waman Narayan and Balchand, the successive purchasers of the oil mill, also died before the institution of the suit, and are represented respectively by Narmada Bai, widow of Waman, and Ratanlal, the minor son of Balchand, with Bana Bai, widow of Balchand, as guardian *ad litem*.

The material allegation in the plaint is that on the 31st December 1888—the year is given as 1889 in Exhibit P-1—Rekchand Mohta sold the mill only to the Hinganghat Mill Company for Rs. 23,325 and at the same time granted that Company a license to use the site for the purpose of working the mill, subject to the condition that if at any time the Company sold the mill, they would restore possession of the site to Rekchand Mohta. It is this agreement which the plaintiff seeks to enforce in the present suit.

The first Court gave the plaintiff a decree, but the lower Appellate Court has dismissed the suit upon an assumption that what Rekchand gave was a lease of the site, and that no registered document having been executed, it became illegal to prove the nature of the possession by the transferees, which was, therefore, presumably adverse and had extinguished Rekchand's title and hence also that of the plaintiff in the site. The plaintiff has, therefore, made this second appeal.

NARSINGDAS V. RATANLAL.

I am of opinion that the learned Divisional Judge has been led into a misapprehension of the case by an argument which included in a single transaction, indivisible in law, both the mill and the site. The fallacy lies in the supposed indivisibility. No doubt the transfers of the mill and of possession over the site were simultaneous, but transfers of different rights in two properties may be simultaneous and yet distinct. The case for the plaintiff, clearly stated in the plaint, is that while the mill, which belonged to Rekchand Mohta absolutely, was sold to the Hinganghat Mill Company, a mere license to use the site, of which Rekchand was the lessee, was granted. Such a grant is quite practicable and is as well recognized in India as in England. It is defined thus in section 52, Indian Easements Act, 1882:—

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

In India, as in England, the express grant of a mere license need not be in writing: *Krishna v. Rayappa Shanbhaga* (1); *Bhagwan Sahai v. Narsingh Sahai* (2); section 54, Act V, 1882; *Wood v. Leadbitter* (3); *Hewitt v. Isham* (4). Therefore the plaintiff in the present case is entitled to a consideration of the oral evidence adduced by him to prove the alleged license. That consideration has been refused by the lower Appellate Court, on the erroneous assumption that the condition for return of the land cannot legally be proved by such evidence. The case of *Narayan v. Jaswant Singh* (5), stated by the learned Divisional Judge to be "exactly in point", seems to me to have no application whatever to the present case. The plaintiff does not wish to use an oral or unregistered lease to prove the quality of the possession held by the

Hinganghat Mill Company and its transferee over the site. He asserts a mere license to occupy the site, and the Court must examine his evidence and decide whether or not that assertion is proved to be true. If the license is not proved, there is an end of the plaintiff's case, which must be adjudicated upon *secundum allegata et probata*. What has so far been done in the lower Appellate Court is to set up a case not put forward by the plaintiff, namely, that of an unregistered transfer of an interest in land, and then to knock it down with legal arguments. The plaintiff's allegation as to the site is one of a license to occupy and use for a particular purpose subject to a specified condition. It may, in a given state of circumstances, have been equivalent to a transfer of the whole interest of Rekchand Mohta in the site, but section 53, Indian Easements Act, 1882, allows a license even to that extent: while a conditional and contingent revocation of it is recognized by section 62 (c) of the same enactment.

The pleaders and propagandists of "adverse possession for 12 years" are now many, but in the majority of cases insufficient attention is given to the propædæutics of that branch of the law, and titles all over the country are constantly endangered and sometimes unjustly destroyed by judicial decision. Presumption and rules of evidence are carried much too far, and upon artificial grounds Judges hold a possession to be adverse when they know it to be permissive. Thus where B obtains the permission of A to go upon the land of A as a lessee for, say, 20 years, and no registered document is executed, the Courts are accustomed to presume that B's possession is adverse because A cannot prove the terms of the lease nor the real quality of the possession. Why should the failure of B to get a title-deed, or, having got a title-deed, to have it registered, make him a trespasser any more than a licensee? He has never asserted any adverse title. He admits that he went on the land with the permission of A; and yet the Courts close their eyes to that permissive entry and treat it as an adverse entry because the law prevents proof of the terms of the lease. To my mind this is an erroneous extension of the principles of title by pres-

(1) 4 M. H. C. R. 98.

(2) 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871.

(3) (1845) 13 M. & W. 838 at p. 845; 67 R. R. 831; 14 L. J. Ex. 161; 9 Jur. 187; 153 E. R. 351.

(4) (1851) 21 L. J. (N. S.) Ex. 35; 86 R. R. 576; 7 Ex. 77.

(5) 1 N. L. R. 147.

NARSINGDAS V. RATANLAL.

cription, and makes the law unjust and absurd. Though the law may, in certain cases, for excellent reasons, exclude oral evidence in favour of documents, and prevent the use of both kinds of evidence in support of the law relating to the registration of documents, these provisions must not be carried beyond their proper limitations so as to perpetrate injustice. A rule, which prevents proof of the *terms* of an agreement, does not necessarily shut out proof of the *fact* that there was an agreement. Where *B* admittedly goes on the land of *A* under an agreement with *A*, the *terms* of which cannot be proved for want of writing or registration, the quality of *B*'s possession, namely, that it is permissive of *A*, is a fact admitted, and there is no room for any presumption of an adverse possession. If *B*, for want of a lawful form of transfer, cannot prove his acquisition of any interest, he remains a mere licensee unless and until he sets up the position of a trespasser.

In the present case, suppose that, upon a consideration of the oral evidence, the lower Appellate Court finds that the plaintiff has proved his allegation that the Hinganghat Mill Company were the grantees of a license to use and occupy the land; certain further questions of law will then demand attention.

We have seen that the express grant of a mere license need not be in writing. But where a license is coupled with a grant of immovable property or of an interest in immovable property of a kind for which writing and registration are compulsory, it is necessary to see the legal effect of a failure to write and register. In this case it seems to have been assumed in the lower Appellate Court that the license, being inseparable from the property or interest with which it is coupled, becomes itself incapable of proof. That is not the law. In such cases it is obvious that the grant of property must exist independently of the license, and where writing and registration are compulsory the grant, if unwritten and unregistered, would be void and the license, stripped of its accompaniment, would remain a mere license: *Wood v. Leadbitter* (3); *Hewitt v. Isham* (4). In the present case *Rekchand* is said to have sold an oil mill.

It is not necessary to decide whether that was a sale of chattels only, ■ argued by the appellant, or of realty ■ argued by the respondent by reason of the buildings in and on which the machinery of the mill was fixed. Let it be supposed that the alleged license to occupy and use the site was in fact given and was coupled with the sale of immovable property for which a registered deed was required by law. The result is that the so-called sale became void and all that the Hinganghat Mill Company got in law was so much of the machinery as was moveable, and ■ mere license to occupy and use the site. Their failure to become vendees in law did not convert them from licensees of the site into trespassers thereon. This principle was recognized and acted on in *Hewlins v. Shippam* (6). The same doctrine was followed in *Cocker v. Cowper* (7), and recognized in the leading case of *Wood v. Leadbitter* (3) cited above. See also *Aldin v. Latimer Clark, Muirhead & Co.* (8).

The decision in *Wood v. Leadbitter* (3), so far as it affirms on general principles that ■ mere license is, in its nature, revocable and that ■ license coupled with a grant is irrevocable, has not been questioned by subsequent English authorities and has been followed in India: Indian Easements Act, 1882, section 60; *Prosonna Coomar Singha v. Ram Coomar Ghose* (9).

It is, however, to be observed that the general proposition, that ■ license coupled with a void grant remains nothing but a mere license and is accordingly revocable, must now be taken as subject to the reservation that a licensee under ■ void agreement made for valuable consideration, who has entered into occupation and paid rent, is in the same position in equity as if a valid grant had been made, and that his license cannot, therefore, be revoked at will: *Walsh v. Lonsdale* (10);

(6) (1826) 31 R. R. 757; 7 D. & R. 783; 5 B. & C. 221; 4 L. J. (o. s.) K. B. 241; 108 E. R. 82.

(7) (1834) 1 Cr. M. & R. 418; 40 R. R. 626; 5 Tyr. 103; 149 E. R. 1143.

(8) (1894) 2 Ch. 437 at p. 448; 63 L. J. Ch. 601; 8 R. 352; 71 L. T. 119; 42 W. R. 453.

(9) 16 C. 640.

(10) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

BIKKINA RAMAYYA v. ADABALA SESHAYYA.

Lowe v. Adams (11). Further, a mere license is not revocable when the licensee, acting upon the license, has executed work of a permanent character and incurred expense in so doing. This principle has received statutory and judicial recognition in India; Act V, 1882, section 60; *Land Mortgage Bank of India v. Moti* (12).

In the present case, assuming that there was a lawful sale of an oil mill—the fact of the sale, so far as agreement between vendor and vendee and payment of price are concerned, is admitted by both parties—coupled with a license to occupy and use the site for the working of that mill, *prima facie* the license would be irrevocable while the site is required to work the mill. But if an express agreement is proved that the license was personal to the Hinganghat Mill Company and only permitted that Company and no one else to work the mill thereon, then, on the transfer of the mill, the license became revocable unless, acting upon the license, the Company executed work of a permanent character and incurred expense in so doing. In that case it would be for the Court to decide the terms on which the license is to continue.

It will now be necessary for the lower Appellate Court to try the appeal before it from a proper standpoint and decide:—

(1) Whether Rekchand sold the oil mill to the Hinganghat Mill Company coupled with a license to occupy and use the site for the purpose of working the mill; if so

(2) Whether the license was expressly limited to the Hinganghat Mill Company, and made revocable on their transfer of the mill; if so

(3) Whether the Hinganghat Mill Company executed any works of a permanent character, and in doing so, if at all, whether the Company acted reasonably on the license.

(4) If the works erected were not in reasonable pursuance of the license, whether the defendants are entitled to any compensation for them on revocation of the license by reason of any laches or acquies-

cence on the part of the plaintiff or his predecessor.

(5) If revocation of the license is refused, upon what terms should the defendants continue to occupy and use the site.

These seem to be the main points requiring to be decided, ■ far as may be necessary, ■ the result of the finding or findings on one or more of them. But I do not intend them to be exhaustive of what the lower Appellate Court may have to determine. The case is one, supposing the plaintiff is held to have proved the facts alleged by him, of a *profit ■ prendre*, and the learned Divisional Judge must be quite sure of all the material facts before he proceeds to apply the law to them.

The appeal is allowed, the decree of the lower Appellate Court is reversed and the case is remanded to that Court for a decision on the merits. The decision now set aside can reasonably be described as one which proceeded on a preliminary point as explained in *Govind Rao v. Supajee* (13). The appellant will, therefore, be given the usual refund certificate. Other costs here and hitherto will abide the result.

Appeal allowed; Case remanded.

(13) 12 C. P. L. R. 45.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 123 OF 1914.

February 9, 1916.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

BIKKINA RAMAYYA—PLAINTIFF—
APPELLANT

versus

ADABALA SESHAYYA AND OTHERS—
DEFENDANTS NOS. 1 TO 6—

RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 2 (c), 58 (c), 67—Mortgage-deed executed before the Act—Condition to relinquish property in case of default of payment—Construction—Remedies given by the Act, whether available—Suit for foreclosure—Limitation Act (IX of 1908), s. 31, Sch. I, Arts. 132, 135.

The right to relief arising from a certain relation existing between parties is ■ matter of adjective law, and consequently the parties are entitled, where a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of Law. [p. 476, col. 2; p. 477, col. 1.]

(11) (1901) ■ Ch. 598; 70 L. J. Ch. 783; 50 W. R. 37; 85 L. T. 195; 17 T. L. R. 763.

(12) ■ A. 69; A. W. N. (1885) 3.

BIKKINA RAMAYYA v. ADABALA SESHAYYA.

Pergush Koer v. Mahabir Pershad Narain Singh, 11 C. 582; *Bhobo Sundari Debi v. Rakhal Chunder Bose*, 12 C. 583, followed.

Where in a suit for foreclosure of a mortgage it appeared that the mortgage-deed executed in 1879 did not purport to sell the mortgaged property, but contained a provision to the effect that in default of payment of the mortgage-money in the prescribed manner, the property should be relinquished by the mortgagor as if sold to the mortgagee:

Held, (1) that the mortgage-deed should be construed with reference to the law as it stood before the Transfer of Property Act and so construed it was a mortgage by conditional sale; [p. 476, col. 2.]

Srinivasa Aiyangar v. Radhakrishna Pillai, 22 Ind. Cas. 54; 38 M. 667; 14 M. L. T. 547; (1914) M. W. N. 81; 26 M. L. J. 47; *Hakeem Patte Muhammad v. Sheikh Davood*, 30 Ind. Cas. 569; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. N. 852; *Pattabhiramier v. Vencatarow Naicken*, 13 M. I. A. 560; 15 W. R. 196; 7 B. L. R. 136; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660; *Thumbusawmy Moodelly v. Hossain Rowthen*, 2 I. A. 241; 1 M. 1; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531, followed.

(2) that the remedy given by section 67 of the Transfer of Property Act could be availed of by the parties to the document and that there was nothing in section 2, clause (c), of the Act to disentitle the parties from seeking the relief; [p. 477, col. 2.]

Pergush Koer v. Mahabir Pershad Narain Singh, 11 C. 582; *Bhobo Sundari Debi v. Rakhal Chunder Bose*, 12 C. 583; *Kaveri v. Ananthayya*, 10 M. 129; 11 Ind. Jur. 138; *Mota Din Kasodhan v. Kazim Husain*, 13 A. 432; *Ganga Sahai v. Kishen Sahai*, 6 A. 262; A. W. N. (1884) 79; *Srinath Das v. Khettar Mohan Singh*, 16 I. A. 85; 16 C. 693; 13 Ind. Jur. 132; 5 Sar. P. C. J. 315, followed.

(3) that the suit for foreclosure was governed not by Article 135 but by Article 132 read with section 31 of the Limitation Act and was not barred by time. [p. 477, col. 2.]

Second appeal against the decree of the District Court of Godaveri at Rajahmundry, in Appeal Suit No. 111 of 1913, preferred against that of the Additional District Munsif, Amalapur, in Original Suit No. 361 of 1912.

Mr. P. Narayanamurthi, for the Appellant.

Mr. P. Somasundaram, for the Respondents.

JUDGMENT.—The first point for consideration in this case is whether Exhibit A is a mortgage by conditional sale or a simple mortgage. If we are to apply the tests contained in section 58, clause (c), of the Transfer of Property Act, the document cannot be treated as evidencing a mortgage by conditional sale, because it does not purport to sell the mortgaged property. The only condition which provides for passing an absolute right is in these terms: "Therefore in default of payment of any instalment in the aforesaid manner, the

said entire mortgaged property shall be relinquished as if I had sold it to you." It is clear that there was no ostensible sale to the mortgagee which was intended to convey an absolute estate after the expiration of the prescribed period. See *Srinivasa Aiyangar v. Radhakrishna Pillai* (1) and *Hakeem Patte Muhammad v. Sheikh Davood* (2). But it was contended for the respondents and we think rightly, that this document, should be construed with reference to the law as it stood before the Transfer of Property Act. It was held by the Judicial Committee in *Pattabhiramier v. Vencatarow Naicken* (3) that a document which was not *ex facie* a sale but only contained a covenant to give up all rights in the property as if it had been sold should be regarded as a mortgage by conditional sale. This view was re-affirmed by their Lordships in *Thumbusawmy Moodelly v. Hossain Rowthen* (4). At page 248 the definition of a mortgage by conditional sale by Mr. Justice Macpherson in his book is quoted with approval. According to that definition all that was required was that the borrower should not have made himself personally liable for the payment of the loan, and have covenanted that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee. Applying these tests to the document in question we have come to the conclusion that Exhibit A is a mortgage by conditional sale.

The next question is whether the remedy given by the Transfer of property Act in section 67 can be availed of by the parties to the document. It was contended that if the document is to be construed according to the canons of construction which prevailed before the Transfer of Property Act was enacted, the relief sought must be the one which was available before the Act came into force. We cannot agree with this contention. The right to a relief arising from a certain relation existing between parties is a matter

(1) 22 Ind. Cas. 54; 38 M. 667; 14 M. L. T. 547; (1914) M. W. N. 81; 26 M. L. J. 47.

(2) 30 Ind. Cas. 569; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. N. 852.

(3) 13 M. I. A. 560; 15 W. R. 35 (P. C.); 7 B. L. R. 136; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660.

(4) 2 I. A. 241; 1 M. 1; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531.

BIKEINA RAMAYYA v. ADABALA SESHAYYA.

of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of Law. This was the view taken by Mitter and Field, JJ., in *Pergash Koer v. Mahabir Pershud Narain Singh* (5) and that has been approved by a Full Bench in *Bhobo Sundari Debi v. Rakhal Chander Bose* (6). Wilson, J., says: "It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. I do not think we ought to conclude that the Legislature in the Transfer of Property Act meant to depart from the settled principle of legislation, unless that intention is shown beyond reasonable doubt." The other learned Judges expressed the same view. *Kaveri v. Ananthayya* (7) and *Mata Din Kasodhan v. Kazim Husain* (8) accept this principle as sound. See also *Ganga Sahai v. Kishen Sahai* (9). Our attention was drawn to the decision of the Judicial Committee in *Srinath Das v. Khetter Mohan Singh* (10). That was the case of a mortgage by conditional sale executed in the year 1865. Their Lordships of the Judicial Committee point out that the cause of action under the old law arose in February 1866 when the mortgagor's right to possession was determined, and that when the Act of 1882 came into force that right had become extinguished; and they consequently held that there was nothing in the Transfer of Property Act, section 2, to revive a right which had become extinct. Reference may also be made to *Khunni Lal v. Gobind Krishna Narain* (11) and *Mahomed Mehdi Faya Tharia Topan v. Sakinabai* (12). *Srinath Das v. Khetter Mohan Singh* (10) is only authority for the position that if when the new Act comes into force the right is not subsisting, the parties

cannot avail themselves of the remedy given by the new Act. On the other hand, we have a catena of decisions under the Limitation Act and section 6 of the General Clauses Act, which hold that if the right to sue is subsisting on the date of the new or amending Act, the remedy provided by it is available to the parties. See *Chidambaram Chetty v. Karuppan Chetty* (13) and *Lala Soni Ram v. Kanhaiya Lal* (14). It is true that the new Act cannot be applied to take away any vested rights to relief existing under the repealed Act. [See *Gopeshwar Pal v. Jiban Chandra Chandra* (15).] But that will not be the effect of this case. In the present case although the document is of 1879, the cause of action accrued only in 1881. In very similar circumstances the Madras High Court in *Ammana v. Gurumurthi* (16) came to the conclusion that the remedy given by the Transfer of Property Act could be availed of. Apart from these decisions, we see nothing in section 2, clause (c), of the Transfer of Property Act to disentitle the parties from seeking the relief given by the Transfer of Property Act. It is a provision intended to preserve existing rights and not a disabling provision. That section appears to us to have been intended to preserve the earlier remedies if the parties chose to avail themselves of them, and not to take away the remedy given under the Act. In the view we have taken, the Article of the Limitation Act applicable to this suit is not Article 135, but Article 132 read with section 31 of the Limitation Act and consequently the suit is not barred by limitation. The decision of the Courts below must be reversed and the suit remanded for disposal according to law. The costs will abide the result.

Appeal allowed; Suit remanded.

V. R. P.

(13) 8 Ind. Cas. 543; (1910) M. W. N. 711; 9 M. L. T. 75; 35 M. 678.

(14) 19 Ind. Cas. 291; 40 I. A. 74; 25 M. L. J. 131; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) W. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 35 A. 227 (P. C.).

(15) 24 Ind. Cas. 37; 41 C. 1125; 18 C. W. N. 604; 19 C. L. J. 549.

(16) 16 M. 64; 2 M. L. J. 155.

(5) 11 C. 582.

(6) 12 C. 553.

(7) 10 M. 129; 11 Ind. Jur. 138.

(8) 13 A. 432.

(9) 6 A. 262; A. W. N. (1884) 79.

(10) 16 I. A. 85; 16 C. 693; 13 Ind. Jur. 132; 5 Sar. P. C. J. 315.

(11) 10 Ind. Cas. 477; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; 33 A. 356; (1911) 1 M. W. N. 432.

(12) 17 Ind. Cas. 629; 37 B. 393; 14 Bom. L. R. 908.

NIKKI v. GUJAR MAL.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1608 OF 1912.

May 13, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

Musammât NIKKI—DEFENDANT—
APPELLANT

versus

GUJAR MAL, MINOR, THROUGH VAISHNO
DAS—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Essential portion of the ceremony—Khatris of Lahore—Adoption of daughter's son, whether valid.

In the Punjab the strict Hindu Law ceremonies are rarely observed in their entirety, and the giving and accepting of a child in adoption is all the ceremony that is essential. [p. 478, col. 2.]

A rule of custom exists among the *Khatris* of Lahore by which the adoption of a daughter's son is valid. [p. 479, col. 1.]

First appeal from the decree of the Subordinate Judge, Lahore, dated the 29th May 1912, decreeing the claim in part.

Lala Durga Das and Mr. Nihal Chand Mehra, for the Appellant.

Mr. Kirkpatrick, and Lala Dharm Das Suri and Niamat Rai, for the Respondent.

JUDGMENT.—The parties in this case are *Khatris* of Lahore City, and the plaintiff, Gujar Mal, came into Court alleging that Musammât Narain Devi under the authority conveyed to her by the Will of her late husband, Nihal Singh, who died in 1896, had adopted him, the plaintiff, and had died on the 7th of February 1908. The plaintiff's claim was for certain house property and mesne profits in respect of the same and also for relief in cash and other moveables, on the ground that the defendant, Musammât Nikki, a daughter of Musammât Narain Devi, had illegally taken possession of this property after the death of her mother. The Subordinate Judge has found that Musammât Narain Devi had power to adopt to her husband, Nihal Singh, and that she did in fact adopt the plaintiff as the son of Nihal Singh but not until the year 1907. The same Court has also found that prior to the adoption of the plaintiff by Musammât Narain Devi she made a gift to the defendant of one house at Lahore and another half house at Amritsar and that the plaintiff was consequently entitled to the possession of only the *haveli*, or the family residential house, in Lahore and

to mesne profits on account of that house. The Subordinate Judge has accordingly given plaintiff a decree for possession of the *haveli* and Rs. 195 mesne profits and has dismissed his suit in all other respects.

This appeal has been preferred by Musammât Nikki, the defendant, and her main contentions are that as the plaintiff failed on his plea that he had been adopted in 1897 his suit should have been dismissed *in toto*. In any case, it was further contended, the plaintiff had not established the existence of a custom by which among these *Khatris* a daughter's son could be validly adopted. Cross-objections also have been put in by the plaintiff in respect of that portion of his claim which has been dismissed and his contention is that he has been the adopted son of the late Nihal Singh since 1897 and that, therefore, the gift, dated the 21st November 1907, in accordance with which the lower Court has rejected ■ certain portion of his claim, was invalid. Though in grounds Nos. 2 and 3 of the cross-objections mention is made of moveable property and of mesne profits for a greater period than that granted by the first Court, these points have not been touched before us and all argument on behalf of the plaintiff has been concentrated on establishing that plaintiff was adopted in 1897, and not in 1907. The questions for decision in the appeal are, whether among these *Khatris* any religious ceremonies are necessary at adoption and whether daughter's sons can be adopted. As to the necessity for ceremonies, even according to Hindu Law the essential and operative portion of the ceremony is the giving and the accepting, and in the Punjab where the strict Hindu Law ceremonies are rarely observed in their entirety, the giving and accepting of a child in adoption is all the ceremony that is essential. As to the custom of adopting a daughter's son, it is admitted by appellant that such a custom is prevalent among the Lahore *Khatris* generally. Indeed, *Harsuhai v. Bhawani Das* (1) and *Musammât Parmeshri v. Vasdeo* (2) ■■■

(1) 43 P. R. 1869.

(2) 35 P. R. 1885.

NIKKI v. GUJAR MAL.

two judicial decisions of this Court dealing with this custom among *Khatris* of Lahore. Further, on behalf of the plaintiff 19 cases of adoption of daughter's among Lahore *Khatris* have been cited. That these cases are real instances has not been seriously challenged, but Counsel for the appellant contends that only three of them, Nos. 9, 10 and 17, are really relevant, for, he maintains, the *Khatris* of Lahore are divided into sub-sections and that the parties to this case belong to the *Baraghar* sub-section of the *Khatris*. As, however, it is admitted that all the sub-sections of the *Khatris* intermarry, we are quite unable to hold that in the matter of the adoption of daughter's son there will be any divergence between the various sub-sections of the *Khatris*. In short we have no doubt as to the existence of a rule of custom among the *Khatris* of Lahore by which the adoption of daughter's son is valid.

In order to determine the main point raised in the plaintiff's cross-objections it has been necessary for us to read all the evidence on the record and our conclusion, after due consideration, is that the plaintiff's cross-objections must succeed, for we find that the probabilities and the balance of the evidence, especially the documentary evidence are in favour of his contention that he was adopted in 1897, and that the gift made in favour of defendant in 1907 by *Musammatt Narain Devi* is void as against the plaintiff.

The plaintiff's oral testimony of the adoption in 1897 is that of witnesses Shankar Das, P. 4, Puran Chand, P. 6, Hira Nand, P. 8, Chet Ram, P. 9, Devi Das, P. 11, Har Parshad, P. 13, Narsingh Das, P. 18, Jai Kishen Das, P. 21, Kura, P. 29, Natha Singh, P. 33, Fateh Singh, P. 34, Veshno Das, P. 35.

Now these persons are those who would have been likely to be present at the adoption ceremony and their statements are in a way corroborated by the admission of *Narain Devi* herself—in the formal deed of adoption—that she had cared for *Gujar Mal* from his infancy and had had his tonsure ceremony performed at *Dipalpur*, and also by documentary evidence (printed at pages 6 to 22 of the paper-book) showing that ■ early as

1901 *Gujar Mal* was recognised as the son of his grandfather *Nihal Singh*.

The genuineness of these documents has not been seriously attacked and we make no doubt that they are genuine.

As against this defendant exhibits a very meagre array of purely negative oral evidence, the sale-deed by *Narain Devi*, dated May 1904, and the formal adoption deed of 1907 with its pendant, *Narain Devi's Will* of 1908. Now the sale-deed of 1904 by *Musammatt Narain Devi* in favour of one *Radha Kishen* includes an assertion that the vendor had a power to adopt but that she had not made any adoption up to then and had no intention to do so.

This protestation of the lady seems to be unnecessarily emphatic and to be designed to meet a suggestion that she had already effected an adoption. Similarly the formal deed of adoption of 1907 contains a postscript to the effect that gifts had been made by the adoptor before the adoption. As a fact, they were made by deeds of the same date as the adoption deed.

The fact that leases continued to be executed in favour of *Musammatt Narain Devi* after 1897 is not inconsistent with an adoption by *Musammatt Narain Devi* in 1897.

In our opinion the document of adoption of 1907 was drawn up merely to justify *Musammatt Narain Devi's* gifts to her other descendants, for obviously she had no power to gift away her husband's property if the plaintiff was adopted in 1897.

In the result we dismiss the appeal except in respect of the mesne profits. Technically plaintiff is entitled to mesne profits; on the other hand defendant has not made any money out of the *haveli* and has merely continued to dwell in it as she had done for many years. Her Counsel admits that she has no legal, but only ■ moral right to continue to reside therein.

We accordingly reduce the mesne profits to the nominal sum of Rs. 5 only. Plaintiff-respondent has not pressed his cross-objection regarding the jewels, but as regards the immoveable property, he succeeds.

We accept the cross-objection and grant plaintiff a decree for the *haveli*, and for the two houses gifted to *Musammatt Nikki* by *Musammatt Narain Devi*, also for Rs. 5, mesne profits, but in view of the relationship of the

VIZAYANAGARAM v. POOSAPATI APPALA.

parties, we direct that they bear their own costs throughout.

Appeal dismissed; Cross-objections allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1041 AND 1042
OF 1914.

April 4, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Bakewell.

THE RAJAH OF VIZAYANAGARAM,

REPRESENTED BY HIS *muktyar*

G. APPAYYA PANTULU GARU—

DEFENDANT NO. 1—APPELLANT

versus

POOSAPATI APPALA NARASIMHA-

RAJU AND OTHERS—PLAINTIFF AND

DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 122, 128, 189, 213, Sch. A, Art. 21—Distrain proceedings—Arrears of rent—Sale of holding not belonging to defaulting ryot—Payment by ryot in possession under protest—Suit for recovery of amount thus paid against landlord and defaulting ryot—Jurisdiction of Civil Court—Scope of ss. 128, 213—Contract Act (IX of 1872), ss. 69, 72.

Per Seshagiri Aiyar, J.—A ryot whose land has been sold for arrears of rent due by another ryot and who has paid the amount to avoid the sale, can recover it by suit both from the landlord and the defaulting ryot. The action is not one for damages but for money had and received under section 69 of the Contract Act and is cognizable only by a Civil Court. The restrictive language of section 213 of the Madras Estates Land Act does not take away this right. [p. 481, cols. 1 & 2.]

Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry, 12 M. I. A. 65; 10 W. R. 29 (P. C.); 1 B. L. R. 21 (P. C.); 2 Suth. P. C. J. 145; 2 Sar. P. C. J. 380; 20 E. R. 265 and *Pamu Sanyasi v. Zamindar of Jayapur*, 25 M. 540, referred to.

Section 128 of the Madras Estates Land Act permits a third party, whose property has been attached, to protect that property by paying the arrears due on it, and applies both to derivative owners, as mortgagees, and independent owners who can institute other proceedings under clause (2) of the section. [p. 480, col. 2; p. 481, col. 1.]

The object of section 213 of the Madras Estates Land Act is to give a summary remedy to those against whom irregularities in procedure have been committed. The section does not cover cases where

there is no power in the landlord to invoke the aid of the Act against an individual. [p. 481, col. 2.]

Per Bakewell, J., (dissenting).—The only other remedy, besides the charge reserved by section 128 of the Madras Estates Land Act to a tenant who pays money under protest to avoid a wrongful sale of his holding, is a suit for repayment of money paid under coercion under section 72 of the Contract Act as damages. Such a suit is cognizable only by a Revenue Court either under section 189 and Article 21 of Schedule A or under section 213 of the Madras Estates Land Act. [p. 481, col. 2; p. 482, col. 2.]

Second appeals against the decrees of the District Court, Vizagapatam, in Appeal Suits Nos. 37 and 42 of 1913, preferred against those of the District Munsif, Chodavaram, in Original Suits Nos. 547 and 548 of 1911, respectively.

The Advocate General and Mr. S. Desikachariar, for the Appellant.

The Hon'ble Mr. B. N. Sarma, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The case is one of first impression, but as it has been fully argued, I do not think it necessary to reserve judgment. The facts found are that the property in dispute was attached as belonging to the holding of defendants Nos. 2 and 3, who had committed default in the payment of rent. The plaintiff claimed the property as his own and contended that, as no arrears were due from him, the property should not be sold.

Notwithstanding the objection, the property was about to be sold, when the plaintiff paid the arrears claimed to be due under protest. In this suit, he sues for the money which he was thus compelled to pay. The landlord is the first defendant and defendants Nos. 2 and 3 are the tenants who claimed the property against the plaintiff.

The defences were that the land sought to be sold really belonged to defendants Nos. 2 and 3 and that the Civil Courts have no jurisdiction to entertain the suit. The Courts below held that the land belonged to the plaintiff and that the Civil Courts have jurisdiction.

Mr. Desikachariar's first contention is that the plaintiff ought not to have paid the money, as the Estates Land Act provides no machinery for collecting arrears from persons who were not in default. In my opinion section 128 of the Estates Land Act permits a third party, whose property has been attach-

RAJA OF VIZAYANAGARAM v. POOSAPATI APPALA.

ed, to protect that property by paying the arrears said to be due on it. Mr. Desikachariar's suggestion that as section 128 gives a charge for the arrears, the only persons who are entitled to put in a claim are derivative owners like mortgagees, etc., and not independent full owners, is opposed to clause (2) of that section. A derivative owner will have a charge and he can tack it on to the mortgage; an independent owner can institute other proceedings under clause (2). Further, a person whose property is sought to be sold wrongfully and who pays the money to save it from sale has a right of suit independent of the Estates Act. [See *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry* (1) and *Pamu Sanyasi v. Zamindar of Jayapur* (2).] In the latter decision, the right is said to be for money had and received.

If a claim can be presented under section 128, section 213 would not affect the right to sue in the ordinary Civil Court. Moreover, this is not a claim against the landlord alone for acts done under the colour of the Act, but against defendants Nos. 2 and 3 in the alternative for payment from them of the money paid by the plaintiff which was claimed against them. The restrictive language of section 213 does not take away the plaintiff's right to recover the monies from defendants Nos. 2 and 3 in the Civil Court.

Next, coming to section 213, I agree with Mr. Sarma that that section applies only where the relationship of landlord and tenant subsists and where the landlord has used the remedies given by the Act wrongfully. In this case, *ex concessio* no proceedings were taken against the plaintiff because he was not regarded as the owner of the property. The fact that the plaintiff is also a tenant of the common landlord cannot affect the question. For the purpose of the distraint proceedings instituted under the Act, he was a stranger. No arrears were claimed from him. No notice was served on him and the property was not sought to be sold as belonging to him. I take the scope of section 213 to be to give a speedy

remedy between landlord and tenant in matters in regard to which the landlord, while purporting to invoke the aid of the Act, has failed to comply with the provisions enacted therefor. The object is to give a summary remedy to those against whom irregularities in procedure have been committed. I do not think that the section covers cases where there is no power in the landlord to invoke the aid of the Act against an individual. The analogy of sections 89 to 91 to which Mr. Sarma drew our attention favours this view. In sections 89 and 90, a complete remedy is provided for cases where moveable property of a third party is attached. By section 91 the remedy of the 3rd party is to institute a suit in the Civil Court. I do not think that the Legislature intended wrongs to immoveable properties belonging to third parties to be differently dealt with.

The claim as laid in the plaint is really for money had and received for the use of defendants Nos. 2 and 3; there is an alternative claim against the 1st defendant for having compelled the plaintiff to pay that arrears. I do not think this is a claim for damages. The claim is under section 69 of the Contract Act. [See *Subramania Iyer v. Vengappa Reddi* (3).]

For all these reasons, I hold that the decision of the Courts below is right. I would dismiss the second appeal with costs.

BAKEWELL, J.—The dispute in this case was between a landholder, the appellant in the case, and a *ryot*, the first respondent, as to whether a certain parcel of land fell within the latter's holding. The landholder treated it as falling within the holding of another *ryot* and took proceedings against him for sale of the holding for arrears of rent. It has been found by the lower Courts that the land in fact fell within the 1st respondent's holding and that the sale thereof for arrears of rent under the Estates Land Act was without notice to the *ryot* under section 112 and was wrongful. The 1st respondent, under section 122, paid the amount claimed in order to stop the sale, and section 128 gives him a remedy by way of charge on the holding and also reserves to him any other remedy to which he may be entitled. Clearly the 1st respondent's remedy was under section 72 of the Contract Act for

(1) 12 M. I. A. 65; 10 W. R. 29 (P. C.); 1 B. L. R. 21 (P. C.); 1 Suth. P. C. J. 149; 2 Sar. P. C. J. 380; 20 E. R. 265.

(2) 25 M. 540.

(3) 4 Ind. Cas. 1083; 33 M. 232; 19 M. L. J. 750.

DAYA BHAI v. MAHARAJ BAHADUR SINGH.

payment of money paid under coercion as against 1st respondent and his suit would be one for damages. Under the English Common Law an action in this case would lie under these circumstances upon an implied assumpsit, and the measure of damages would be the amount paid by the plaintiff.

Under section 189 of the Estates Land Act and Article 21 of Schedule A, a suit for damages not otherwise provided for is heard by the Revenue Officer and a Civil Court is prohibited from taking cognisance of a matter in respect of which such suit might be brought. Under section 213 a suit for damages before the Collector may be brought in respect of any proceedings taken under colour of the Act, or a neglect or breach of any of its provisions, and a suit may be brought in a Civil Court in any case not taken out of its jurisdiction by the Act.

The relation of landholder and *ryot* existed between the parties. The land in question formed part of an estate, and the sale of that land was certainly under the provisions of the Act, and there was neglect to give the 1st respondent notice that he was in arrears under section 112 in respect of this land, and for these reasons I think that a suit to recover the amount paid by him falls within section 213. Such a suit, being a suit for damages, falls, in my opinion, within section 189 and Article 21 of Schedule A and is, therefore, taken out of the jurisdiction of the Civil Court. I do not think that any cause of action arises against the other defendants, because the plaint does not allege that they were bound to pay the rent for the plot in dispute and it was in fact payable by the plaintiff.

For these reasons I would allow this appeal and dismiss the suits with costs throughout.

SESHAGIRI AIYAR, J.—My learned brother takes a different view. The result is that the second appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2336 of 1912.

May 5, 1916.

Present:—Sir Edward Chamier, Kt., Chief-Justice, and Mr. Justice Jwala Prasad.

DAYA BHAI AND OTHERS—DEFENDANTS—

APPELLANTS

versus

MAHARAJ BAHADUR SINGH—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 14, 40, 54—Specific Relief Act (I of 1877), s. 27 (b)—Iqrarnamah—Covenant to grant land to a Society when needed for construction of dharmsala—Right of grantee—Contract void for indefiniteness—Rule against perpetuities—Personal contract—Suit for possession, maintainability of—Specific performance, right to—Appeal, second—Conversion of suit into one for specific performance, whether permissible.

The Raja of Palganj executed an *iqrarnamah* in 1872 in favour of one G as manager of the Sitambari Jain Society, covenanting to grant land on or below Paras-nath Hill to the latter whenever they required it for the purpose of building a *mandir* or *dharmsala*, and empowering the grantees to take the land if the grantor or his heirs should refuse to give it. The plaintiff, manager of the Jain Society, gave notice to the Raja that land was required and took possession of suit land in 1907. The defendants, a rival Society, it was alleged, dispossessed the plaintiff. The plaintiff instituted the present suit for possession under the terms of the said *iqrarnamah*:

Held, (1) that, if the covenant was to be construed as creating an interest in the land or as running with the land, it was bad as offending against the rule against perpetuities and preventing the owner from alienating his estate before the happening of a condition which may never occur, both on general principles and under Hindu Law; [p. 484, col. 2; p. 486, col. 2; p. 487, col. 1.]

Sreemutty Tripoora Soondurce v. Jaggur Nath Dutt, 24 W. R. 321; *Nobin Chandra Soot v. Nawab Ali Sarkar*, 5 C. W. N. 343; *Ananth Nath Maitra v. Kumar Keshab Narain Roy*, 5 Ind. Cas. 487; 14 C. W. N. 601; *London South Western Railway Company v. Gomm*, (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620; *Chandi Churn Barua v. Sidheswari Debi*, 16 C. 71; 15 I. A. 159; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231, referred to.

(2) that the covenant was in the nature of a personal contract, and, though as such not obnoxious to the rule against perpetuities, was invalid and inoperative owing to its vague and indefinite nature; [p. 484, col. 2; p. 487, col. 2; p. 488, col. 1.]

(3) that the grant did not create a religious endowment but only a secular estate and was, therefore, not exempt from the rule against perpetuities; [p. 487, col. 2.]

(4) that section 40 of the Transfer of Property Act did not apply to the covenant which was, therefore, not enforceable against the heirs and assigns of the grantor; [p. 487, col. 2.]

(5) that plaintiff could not be allowed, in second appeal, to convert his suit into one for specific performance. [p. 485, col. 1; p. 488, col. 1.]

Per Jwala Prasad, J.—Assuming that plaintiff was

DAYA BHAI v. MAHARAJ BAHADUR SINGH.

entitled to sue for specific performance, it could not be a sound exercise of the Court's discretion to grant specific performance, having regard to the vague, indefinite and uncertain terms of the covenant. [p. 488, col. 1.]

Bibi Jawahir Kumari v. Chatterput Singh, 2 C. L. J. 343; *Singheeram Poddar v. Bhagbat Chander*, 6 Ind. Cas. 632; 11 C. L. J. 543; *Puchha Lal v. Kunj Behari Lal*, 20 Ind. Cas. 808; 19 C. L. J. 213; 18 C. W. N. 445 and *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, distinguished.

Per *Chamier, C. J.*—It would seem to follow from the terms of section 54 of the Transfer of Property Act that a contract to give immovable property does not, of itself, give any interest in the property. [p. 484, col. 2.]

The fact that the plaintiffs have taken possession of the land in pursuance of a contract which could be specifically enforced does not, on the principle of the decision in *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, give them the same rights as if the land had actually been conveyed to them. The principle of that decision has been applied to India with some misgiving and it should not be applied to this case. It is doubtful whether it should be applied to any case in India, except possibly the Presidency towns. [p. 484, col. 1; p. 455, col. 1.]

Second appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 27th June 1912.

Messrs. *Hasan Imam, K. P. Jayaswal and Sailendra Nath Palit*, for the Appellants.

Mr. *Pugh* (with him Messrs. *Shorashi Charan Mitter, Chandra Sekhar Banerjee, Haran Chandra Mitter and Bankim Chunder De*), for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit by the respondent for possession of a small plot of land in *Mauza Madhuban*, which adjoins the celebrated hill of *Parasnath*, both being within the *zemindari* of the *Raja of Palganj*.

The respondent is the manager of the affairs of the *Sitambari Jain Society* at *Parasnath* and *Madhuban* and he brought this suit for and on behalf of that Society. His case is that under an *iqarnamah* of May 16th, 1872, executed by *Raja Parasnath Singh*, father of the present *Raja of Palganj*, in favour of *Harakh Chand Golaicha* representing the *Sitambari Jain Society*, the Society is entitled to build temples and *dharamsalas* anywhere that it pleases on the *Parasnath Hill* or in *Madhuban* and to take possession of the land required for the same in case the *Raja* for the time being refuses to give it, that accordingly in 1907 the Society, being under the necessity of building a *dharamsala* on the

land now in suit, gave *Raja Parasnath Singh* notice to that effect and took possession of the land without objection on his part and remained in possession till April 1910, when it was dispossessed by the appellant *Daya Bhai*, acting in the interest of a rival sect of *Jains (Uigambaris)*.

The appellants, *Daya Bhai* and others who were the principal defendants to the suit, denied that notice had been given to the *Raja* or that the *Sitambari Jains* had any intention of building a *dharamsala* or that they had taken possession of the land, or that they were entitled, as and when they pleased, to take possession of land on the *Parasnath Hill* or in *Mauza Madhuban*. These defendants pleaded that they were entitled to the land in suit under a *patta* granted to them in 1910 by *Rani Parbati Kuar*, who holds *Mauza Madhuban* under a *khorphosh mukarrari* executed in her favour in 1902 by *Raja Parasnath* whose daughter-in-law she was.

The *Munsif* held that the respondent was bound to give notice to the *Raja* before taking possession of the land. He doubted whether any notice was given in 1907 but held that if notice was given, it was irregular and did not entitle the respondent to take possession; he held also that the respondent had failed to prove that the *Sitambari Jains* had been in possession from 1907 to 1910.

The *Judicial Commissioner* on appeal held that notice was proved to have been given to the *Raja* but that it was irregular and defective, inasmuch as it should have been given either to the *khorphoshdar* or to the manager of the *Raja's* estate, which was at the time under the *Chota Nagpur Encumbered Estates Act*. He held, however, that the defect in the notice was not fatal to respondent's claim that the *Sitambaris* were entitled to take possession of the land without notice under the *iqarnamah* of 1872, which was a "limited transfer" of the *Raja's* rights, and that they had in fact taken and held possession for three years. He accordingly decreed the claim.

In second appeal it is contended that the provision in the *iqarnamah* on which the respondent relies is void for uncertainty and vagueness and also because it offends against the rule against perpetuities or remoteness. Alternatively it is contended that the provi.

DAYA BHAI v. MAHARAJ BAHADUR SINGH.

sion in question was only a personal contract to convey land to the Sitambaris and created in their favour no interest entitling them to maintain the present suit.

The respondent disputes the correctness of the first contention. His position is that the land which was the subject of the *igrarnamah* was not the property of the Raja, but was dedicated to the deity on whose behalf the Sitambari Jain Society managed it and that this was recognized by the *igrarnamah*. The respondent urges that if the alternative contention is correct and there was only a personal contract to convey land to the Sitambaris, the contract is binding on the present Raja and his assignees and further that the Sitambaris, having taken possession in pursuance of a contract which could be specifically enforced, have on the principle of the decision in *Walsh v. Lonsdale* (1) the same rights as if the land had actually been conveyed to them. In the last resort the respondent contends that the suit should be treated as one for specific performance.

The provision in question runs as follows: "If the Sitambari Jain Society shall require any place on Parasnath Hill or below at Madhuban for erecting *mandir* or *dharamsala* and for doing repairs and making bricks for the said purpose, in that case, I and my heirs shall give for making *mandir*, *dharmasala* and bricks land, stones and timber from the hill free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power (*upne ikhtyar se*)."

It is quite clear that the hill of Parasnath and the village Madhuban were the property of the Raja. On this point it is unnecessary to add anything to what was said by the Calcutta High Court in the famous 'Piggery' case [*Dhunput Singh v. Paresh Nath Singh* (2)]. There is no foundation whatever for the suggestion that the *igrarnamah* recognized any title in the deity. If the respondent has any right in or to the land now in suit it must be under the provision set out above.

If that provision should be regarded as an attempt to create an interest in favour of future generations of Sitambaris, it is void for remoteness, whether the case is governed by general principles or by section 14 of the Transfer of Property Act, or by the Hindu Law [if the operation of that section is excluded by section 2 (d) of the Act]: *Chandi Churn Barua v. Sidheswari Debi* (3), *Avula Charamudi v. Marriboyina Raghavulu* (4).

If, on the other hand, the provision was no more than a personal contract to convey land to the Sitambaris it is not affected by the rule against remoteness [*Avula Charamudi v. Marriboyina Raghavulu* (4) and *South Eastern Railway Company v. Associated Portland Cement Manufacturers* (5).] In my opinion the provision was not intended to create an interest in favour of the Sitambaris and further such a provision cannot in India be regarded as creating an interest in favour of the other party to the transaction. Section 54 of the Transfer of Property Act, which, as I understand, reproduces the previously existing law on the subject provides, that a contract for sale of immoveable property does not of itself create any interest in the property, and it would seem to follow that a contract to give immoveable property does not of itself create any interest in the property. The respondent, however, contends that the contract is binding upon the present Raja and his assignees including the appellants under section 40 of the Transfer of Property Act. Mr. Pugh pointed out that the Act was passed before the decision in the case of *London and South Western Railway Company v. Gomm* (6) and he suggested that until that decision was pronounced, the case of *Tulk v. Moxhay* (7) was understood to apply well to affirmative as to restrictive covenants and hence section 40 of the Transfer of Property Act, which was intended to reproduce the English Law, is not confined to restrictive covenants

(3) 16 C. 71; 15 L. A. 159; 12 Ind. Jur. 329; 15 Sar. P. C. J. 231.

(4) 28 Ind. Cas. 871; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

(5) (1910) 1 Ch. D. 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61.

(6) (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

(7) (1848) 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 13 Jur. 89; 41 E. R. 1143; 78 R. R. 269; 12 L. T. (o. s.) 469.

(1) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

(2) 21 C. 180.

DAYA BHAI V. MAHARAJ BAHADUR SINGH.

but applies to every obligation arising out of a contract and annexed to the ownership of immoveable property. In this connection Mr. Pugh relied also upon section 27 (b) of the Specific Relief Act. Assuming that this contention is correct, we have next to consider whether the respondent is entitled to maintain this suit. The principle of the decision in *Walsh v. Lonsdale* (1) has been applied in India with some misgiving. [See *Bibi Jawahir Kumari v. Chatterput Singh* (8), *Singheeram Poddar v. Bhagbat Chander* (9) and *Puchha Lal v. Kunj Behari Lal* (10).] It has never been applied to such a case as this where there is no question of an agreement for a lease. In the absence of authority I am certainly not prepared to apply the doctrine of *Walsh v. Lonsdale* (1) to the present case, and I doubt very much whether it should be applied to any case in India except possibly in the Presidency towns. In my opinion the respondent has failed to prove any title to the land in suit and, therefore, the suit as a suit for possession should be dismissed.

Assuming that the respondent might have maintained a suit for specific performance, I do not think that we should at this stage allow him to convert this suit into a suit for specific performance. Nor is there anything in the conduct of the Sitambaris which should induce us to show them any indulgence. The dispute is in reality one between the rival sects. Each sect wishes to keep the other away from the Parasnath Hill. The Sitambaris have gone so far as to contend that the owner of the estate or his representative for the time being must for all time consult the Sitambaris before leasing to other persons any plots of land on the hill or in Madhuban. I would allow Second Appeal No. 2336 of 1912, dismiss the suit and give the appellants their costs in all three Courts.

JWALA PRASAD, J.—This appeal arises out of a suit which was brought by the respondent in the Court of the Munsif of

Giridih to recover possession of a piece of land measuring $2\frac{1}{2}$ *kathas*, from which the plaintiff is said to have been dispossessed. The plaintiff is a member and representative of the Sitambari Jain Society and manager and *shebait* of Parasnathji on behalf of the said Society. The land in suit is situated at Madhuban close to the Parasnath Hill, which belongs to the Raja of Palganj. The plaintiff has based his claim upon an *igrarnamah*, bearing date the 16th May 1872, executed by Raja Parasnath Singh, father of the present Raja of Palganj, in favour of Babu Harakh Chand Golaicha, then Manager of the Sitambari Jain Society, in order to settle certain disputes that existed between the Raja and the Sitambari Jain Society regarding the offerings presented to the Jain Mandir which stands on the Parasnath Hill, appertaining to the *gaddi* Palganj. The plaintiff asserts that by virtue of the said *igrarnamah* the Sitambari Jain Society is empowered to build temples and *dharamsalas* at any place on the Parasnath Hill and in Madhuban according to its pleases and in case of refusal by the Raja or his heirs to give such land, the Society is competent to take the same of its own power. The plaintiff's case is that by virtue of the right vested in him by the *igrarnamah*, he sent an *ittala* or notice to the Raja of Palganj in 1907, informing him that he required the land in suit for the purpose of erecting a *dharamsala*, took possession of it in that very year and continued to be in possession without any objection on the part of the said Raja till April 1910, when he was dispossessed by the defendants-appellants, representing the rival Jain Society called the Digambari. The appellants resisted the claim of the plaintiff. They took all possible pleas in their written statement, most of which do not now arise in this appeal and need not be stated. They contend *inter alia* that the plaintiff never took possession of the land in suit, that his allegation of possession and dispossession is false and that the plaintiff did not acquire any right to the land and was not entitled to take any land at Madhuban at his own choice, as alleged by the plaintiff. The defendants claim that the land in suit was settled with them in 1910 by Rani Parbati Kuar, in whose favour the late Raja Parasnath Singh had executed a *kharposh*

(8) 2 C. L. J. 343.

(9) 6 Ind. Cas. 632; 11 C. L. J. 543.

(10) 20 Ind. Cas. 802; 19 C. L. J. 213; 18 C. W. N. 445.

DAYA BHAI v. MAHARAJ BAHADUR SINGH.

mukarrari lease on 14th April 1902 for 20 years and that the defendants took possession of the land and built a house on it. Rani Parbati Kuar was subsequently impleaded as defendant in the suit at the instance of the defendants, but she did not contest the suit. The Munsif dismissed the plaintiff's claim, holding that the plaintiff's right in the disputed land was not established and the Society's possession was not proved. The plaintiff appealed to the Judicial Commissioner of Chota Nagpur, who by his judgment, dated the 27th June 1912, reversed the decision of the Munsif and decreed the suit in favour of the plaintiff. The Appellate Court below has found that the plaintiff took possession of the land for the purpose of erecting a *dharamsala* in 1907 and remained in possession of it until dispossessed by the defendants in 1910. The lower Appellate Court has further held that the *iqarnamah* operated as a limited transfer of the Raja's right in favour of the plaintiff and that he was entitled to take possession of the land in suit and as soon as he took possession of it, he acquired a perfect title to it.

It is contended on behalf of the appellant that the plaintiff has no right to the land in suit and that the *iqarnamah* in question is null and void. It is vague and uncertain in its terms and offends against the rule of perpetuities or remoteness applicable to Hindus.

It is a suit in ejectment and in order to succeed the plaintiff must clearly establish his title to the land. The plaintiff has based his claim entirely upon the *iqarnamah*, which among other things recites as follows:

"If the Sitambari Jain Society shall require any place on Parasnath Hill and below thereof at Madhuban for erecting *mandir* and *dharamsala* and for doing repairs and making bricks for the said purpose, in that case I and my heirs shall give for making *mandir*, *dharamsala* and bricks land, stones from the hill and timber free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power."

A translation of the clause is also to be found in Exhibit 32, judgment in the

Piggery case [*Dhunput Singh v. Paresh Nath Singh* (2)].

The covenant in question gives to the Sitambari Society power to take possession of any land on the whole of Parasnath Hill and at Madhuban without any limitation as to time, area or situation and upon the contingency of a *dharamsala* or temple being required to be built, which may or may not happen, and it is not known when the contingency would arise.

The covenant is unlimited in point of time and was obviously intended to be so. It is not possible to insert a limit of time or to put in "within a reasonable time", as it would be contrary to the intention of the parties. If the covenant can in any way be construed to create an interest in the land and as running with the land, it is affected by the rule against remoteness, or perpetuity, inasmuch as it creates a future interest which may possibly vest after an indefinite period, and as by the existence of such interest the owner is prevented from alienating his estate, discharged of it, before the happening of the condition, and that event may possibly never occur. This view was adopted as early as in the case of *Sreemutty Tripoora Soonduree v. Juggur Nath Dutt* (11) and followed in a series of cases [*Nobin Chandra Soot v. Nawab Ali Sarkar* (12) and *Anath Nath Maitra v. Kumar Keshab Narain Ray* (13)]. In *London South Western Railway Company v. Gomm* (6) it was held that the covenant to reconvey land whenever the Company required was invalid, as it gave to the Company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness.

In the Privy Council case *Chandi Churn Barua v. Sidheswari Debi* (3), the Raja of Bijni had agreed that if ever the descendants or the donees were not provided with means of maintenance by the Raja or his heirs, they would be entitled to take possession of the villages mentioned in the agree-

(11) 24 W. R. 321.

(12) 5 C. W. N. 343.

(13) 5 Ind. Cas. 487; 14 C. W. N. 601.

DAYA BHAI v. MAHARAJ BAHADUR SINGH.

ment. Their Lordships in the Privy Council held that the covenant was void and ineffectual, observing that the covenant "might be regarded as importing a present assignment to persons not in existence, subject to a suspensive condition which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified." In either view the covenant was held to be equally ineffectual and to impose a restraint upon alienation which is contrary to the principles of Hindu Law. If the covenant purports to give to the Sitambaris a right to take any land and at any time they like on the whole of the Parasnath Hill, which covers a very large area, it prevents the owner of the property or his successors from ever alienating the property, discharged of the estate created by the covenant. It is vague, indefinite and unreasonable in its terms and hence invalid and inoperative. Thus if the covenant in question be regarded as creating an interest in land in favour of the Sitambaris for all time, it is void for remoteness both on general principles and under the Hindu Law.

It is further contended on behalf of the plaintiff-respondent that the Parasnath Hill was not the property of the Raja but it belonged to the Sitambari Jains and was dedicated to the deity, and that the agreement in question did not create a new interest in them but simply confirmed the pre-existing title of the Society. The Sitambaris, therefore, having taken possession of the land in suit in order to erect a *dharamsala*, could not be ousted by the Raja of Palganj or his transferees, the defendants. There is no evidence on the record to show that the hill ever belonged to the Sitambaris. On the other hand the recital in the agreement itself, the pleadings in the case and the judgment in the Piggery case [*Dhunput Singh v. Paresh Nath Singh* (2)] clearly show that the hill is the property of the *gaddi* Palganj and the name of the Raja as proprietor thereof is registered in the record of earliest Settlement of the hill.

The contention of the respondent that the grant creates a religious endowment and hence the rule as to perpetuities does not

apply, must fail. The *iqrarnamah* creates only a secular estate, if at all, though the motive may be a religious one. There is no dedication to any deity in the *iqrarnamah* and it cannot stand on the same footing as a religious endowment and is not exempt from the rule against perpetuities as held in *Anantha Tirtha Chariar v. Nagamuthu Ambatagaren* (14).

The covenant in question does not, to my mind, in any way create any interest in land in favour of the plaintiff. It is not a transfer of any right in the property and, therefore, does not give to the plaintiff a right, vested or conditional, in the land. Under section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not itself create any interest in the property. It is nothing more than a personal contract by the late Raja Parasnath, the executant of the agreement, in favour of the Sitambaris. If it is merely a personal covenant to convey land, it is of course not obnoxious to the rule of remoteness, as held in the *South Eastern Railway Company v. Associated Portland Cement Manufacturers* (5) and *Arula Chara-mudi v. Marriboyina Ragharulu* (4).

The respondent, however, contends that if it is a personal covenant, it is binding upon the Raja who executed the agreement of 1872 and his heir, the present Raja of Palganj, as well as upon his assignees including the appellants. Counsel for the respondent has relied upon section 40 of the Transfer of Property Act and upon the decision in *Tulk v. Moxhay* (7). Section 40 of the Transfer of Property Act does not apply to the covenant in question. Section 40 of the Transfer of Property Act makes Chapter 11, in which section 40 occurs, subject to the rules of Hindu Law. The principle of the decision in *Tulk v. Moxhay* (7) only applies to restrictive covenants and does not apply to the covenant in question, which is clearly an affirmative one and I cannot agree with the learned Counsel for the respondent when he asks us to read into the covenant a restrictive clause by implication. Our attention has been drawn

THIRUVENKATA CHARIAR v. SESHADRI IYENGAR.

to section 27 (b) of the Specific Relief Act to show that the agreement is binding upon the assignees of the covenantor including the present appellants. The question is whether the covenant is a contract of which specific performance could be obtained.

I doubt whether it would be a sound exercise of discretion under section 27 of the Specific Relief Act to grant specific performance of the covenant in question, regard being had to the vague, indefinite and uncertain terms of the covenant.

The agreement was executed in 1872 and in 1902 the Raja granted the estate in which the land in suit is situate to the *khorphoshdar*. No attempt was made to enforce the rights given the Sitambaris under the covenant in question until 1907. The Raja is dead and his present heir is not made a party to the suit.

In *Bibi Jawahir Kumari v. Chatterput Singh* (8) and *Singheeram Poddar v. Bhagbat Chander* (9) the agreements for lease were complete in every respect and were acted upon by the delivery of possession of the premises and the payment of rent. Similarly in *Puchha Lal v. Kunj Behari Lal* (10) the purchase-money was paid and the possession of the property sold was obtained under the *kabala*. In the case, following the principle of *Walsh v. Lonsdale* (1), it was held that the requisite formalities of the execution of documents and the registration thereof did not bar the accrual of the legal rights and liabilities as between the parties to the agreement and that specific performance of such a contract could be given effect to. There was no question in these cases of the covenant being vague or indefinite or being affected by the rules as to remoteness or perpetuity. These authorities, therefore, have no application to the present case.

Assuming that the plaintiff could have maintained a suit for specific performance, he is not entitled to any relief in the suit as framed and he cannot be allowed to amend the plaint at this stage so as to materially alter the character of the suit. The plaintiff has failed to prove his title to the land and cannot maintain the suit for ejectment. The result is that the suit must be dismissed and the appeal allowed with costs.

By THE COURT.—The order of this Court is that this Appeal (No. 2336 of 1912) is allowed and the suit is dismissed. The appellants will get their cost from the respondent in all three Courts.

Appeal allowed; Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 966 of 1914.

March 13, 1916.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Srinivasa Aiyangar.

MALAIMEL THIRUVENKATA CHARIAR AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

PARI SESHADRI IYENGAR AND OTHERS
—PLAINTIFF AND DEFENDANTS NOS. 1 TO 3
—RESPONDENTS.

Vendor and purchaser—Purchaser under registered deed with notice of prior contract to sell to another—Subsequent execution of registered conveyance to contractee—Possession, suit for, by first purchaser—Right of second purchaser to resist suit—Priority—Trusts Act (II of 1882), s. 91—Specific Relief Act (I of 1877), s. 27—Transfer of Property Act (IV of 1882), s. 40.

A vendee of immoveable property in possession under a registered sale-deed executed by the legal owner can resist a suit for possession by a prior registered transferee, if the conveyance to the defendant was made in pursuance of a contract to sell by the vendor, of which the plaintiff had notice at the date of his sale, inasmuch as under section 91 of the Trusts Act the prior transferee holds the property for the benefit of the subsequent transferee to the extent necessary to give effect to the contract to sell. [p. 489, col. 2; p. 491, col. 1.]

Kurri Veerareddi v. Kurri Bapireddi, 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153, explained and distinguished.

Lakshmi Doss v. Roop Lall, 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4; *Raja Rajeswaru Dorai v. Arunachellam Chettiar*, 19 Ind. Cas. 596; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321; 24 M. L. J. 592; *Puchha Lal v. Kunj Behari Lal*, 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213; *Madugula Latchiah v. Mukhalinga*, 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350; *Namasivayam Pillai v. Nelliappa Pillai*, 18 M. 43; *Khagendra Nath Chatterjee v. Sonatan Guha*, 31 Ind. Cas. 987; 20 C. W. N. 149, referred to.

Where, however, the person in whose favour there is a contract of sale, sues to enforce the contract against a transferee, he should ask for possession and also for conveyance, as his right to possession shall commence from the date of such conveyance. [p. 490, cols. 1 & 2.]

THIRUVENKATA CHARIAR v. SESHADRI IYENGAR.

Potter v. Sanders, (1846) 6 Hare 1; 67 E. R. 1055; 77 E. R. 1; *Daniels v. Davison*, 17 Ves. 433; 34 E. R. 167; *Gaffur v. Bhikaji*, 26 B. 159; 3 Bom. L. R. 596; *Gudur Ranga Reddi v. Gundala Pitchi Reddi*, 25 Ind. Cas. 973; 1 L. W. 879, referred to.

Per *Srinivasa Aiyangar, J.*—The right of a person in possession under a contract of sale to resist a claim for possession by a transferee from the vendor has to be determined by the joint application of section 91 of the Trusts Act, section 40 of the Transfer of Property Act and section 27 of the Specific Relief Act, which enact in substance the right of the former to enforce the contract not only against the vendor but also against any person who has subsequently obtained the legal title from the vendor. The contract does not create a right *in rem* but only a right *in personam* against the vendor, and that obligation is made enforceable against the subsequent purchaser as an obligation *in personam* to a limited extent, viz., to the extent of compelling him to give effect to the previous contract by way of specific performance, though he is not liable in damages as the original vendor would be. [p. 480, col. 1.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 226 of 1913, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 23 of 1912.

Mr. S. T. Srinivasa Gopalachariar, for the Appellants.

Mr. V. Venkatachariar for Mr. C. Narasimha Chariar, for the Respondents.

JUDGMENT.

WALLIS, C. J.—In this case the plaintiff sues to recover property in possession of defendants Nos. 4 and 5. Defendants Nos. 1 to 3 first contracted on the 12th July 1911 to sell the property to the defendants Nos. 4 and 5, then on the 11th September 1911 sold it by registered sale-deed to the plaintiff, who had notice of the previous contract, and, subsequently, on the 17th October 1911 executed a registered sale-deed in favour of defendants Nos. 4 and 5 and put them in possession, after which the plaintiff instituted the present suit, Original Suit No. 23 of 1912, for possession. The lower Appellate Court has decided that, as the defendants Nos. 4 and 5 have not obtained a registered sale-deed, they are not entitled to possession, citing the Full Bench decision in *Kurri Veerareddi v. Kurri Bapireddi* (1). That, however, was a suit by the plaintiff to recover possession from the defendant who had not obtained a registered

sale-deed, but only a contract to sell. Here the plaintiff has obtained a transfer by duly registered document from defendants Nos. 1 to 3, with notice of the prior contract by these defendants to sell the property to defendants Nos. 4 and 5. In this state of things he is bound by section 91 of the Indian Trusts Act to hold the property for the benefit of defendants Nos. 4 and 5 to the extent necessary to give effect to the contract. No such statutory obligation is imposed on the original owner who refuses to carry out his contract to sell and the decision in *Kurri Veerareddi v. Kurri Bapireddi* (1) is, therefore, distinguishable. The question then is whether the defendants Nos. 4 and 5, who, in the absence of a registered conveyance, have no right to recover possession of the property, can defend their possession as against the plaintiff, by reason of the duty imposed on him by section 91 of the Indian Trusts Act to hold the property for them so far as may be necessary for the performance of the contract with defendants Nos. 1 to 3. In *Lakshmi Doss v. Roop Laul* (2) a defendant who had made a transfer under circumstances which entitled him to avoid it, was held by a Full Bench to be entitled to retain his possession against the transferee, though he had not sued to set it aside and such a suit had become barred. Similarly in the present case, it seems to me, that defendants Nos. 4 and 5 are entitled to resist the plaintiff's suit for possession, by virtue of the duty he is under to hold the property for the benefit of defendants Nos. 4 and 5 by virtue of section 91 of the Indian Trusts Act. Though the provision would not enable the 4th and 5th defendants to sue for possession without at the same time praying for a conveyance, there is, as pointed out in *Rajah Rajeswara Dorai v. Arunachellam Chettiar* (3), a great difference between the position of a plaintiff and a defendant in such a case, and I think it is quite unnecessary to deprive the defendants Nos. 4 and 5 of possession and drive them to another suit. This is also the decision in *Puchha*

(2) 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4.

(3) 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321.

(1) 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153.

THIRUVENKATA CHARIAR v. SESHADRI IYENGAR.

Lal v. Kunj Behari Lal (4). I would, therefore, reverse the decrees of the lower Courts and remand the suit to the first Court for trial of issues Nos. 2, 3 and 4. Costs will abide.

SRINIVASA AIYANGAR, J.—The question whether defendants Nos. 4 and 5 are entitled to resist the suit for possession by the plaintiff, who has now got the title, has to be determined by a consideration not merely of the provisions of section 91 of the Trusts Act, but also of section 40 of the Transfer of Property Act and section 27 of the Specific Relief Act. All the three sections enact in substance the right of a person who had obtained a contract of sale, to enforce the contract against a person who has subsequently obtained a legal title to the property from the vendor; the contract by itself does not create a right *in rem*, but only creates a right *in personam* against the vendor and that obligation is made enforceable against the subsequent purchaser, as an obligation *in personam* to a limited extent, namely, to the extent of compelling him to give effect to the previous contract by way of specific performance, though he is not liable in damages as the original vendor would be. The language of section 91 of the Trusts Act is that the subsequent transferee "must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." It is clear, therefore, that the subsequent transferee is not a simple trustee for the person holding the contract, but he is only a person who holds the property for the benefit of the contractee to the extent necessary to give effect to the contract. If the contract by itself does not create a right *in rem* in the property contracted to be sold [as is now settled by the decision of the Full Bench in *Kurri Veerareddi v. Kurri Bapireddi* (1)], it cannot have any greater effect as against the transferee with notice. The person holding a contract for sale can undoubtedly bring a suit as plaintiff to enforce that contract against the subsequent transferee and obtain a conveyance from him [*Potter v. Sanders* (5); *Daniels v. Davison* (6)]; and

in the same suit he may be entitled to recover possession of the property, although, strictly speaking, his right to such possession would accrue to him only after the execution of the conveyance. In *Gaffur v. Bhikaji* (7) the plaintiff, who had obtained a sale-deed from the vendor, sued to recover possession from a person to whom his vendor had sold the property with notice of the agreement for sale, but before the actual conveyance. Section 91 of the Trusts Act was considered and the plaintiff was given a decree for possession against the subsequent purchaser, but the correct form of the decree was said to be a decree for conveyance by the defendant to the plaintiff. A similar view was taken in a case in this Court, *Gudur Ranga Reddi v. Gundala Pitchi Reddi* (8). In that case specific performance against the vendor and the subsequent transferee with notice was directed by ordering that the conveyance should be executed by both the vendor and the transferee.

In the case of a simple trust, where the trustee is a bare legal owner, the *cestui que trust* may be entitled to possession of the property and may compel the trustee to place him in possession. If, however, the trust is an active trust, that is, if the trustee has to perform any duties in connection with the trust property, the *cestui que trust* is not entitled to possession as a matter of right, though the Court can, in its discretion, give possession. See *Lewin on Trusts*, page 847; *Perry on Trusts*, sections 328 and 329; *Underhill on Trusts*, page 363; and *Godefroi on Trusts*, page 431.

The further question, which is the only one which arises in this case, is whether a person who is actually in possession under a prior agreement for sale could be deprived of his possession by a subsequent purchaser on the strength of his title. In *Kurri Veerareddi v. Kurri Bapireddi* (1), already referred to, this Court has held that as against the vendor himself he cannot keep possession, though, undoubtedly, he would be entitled to enforce the contract

(4) 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445.

(5) (1846) 6 Hare 1; 67 E. R. 1055; 77 R. R. 1.

(6) 17 Ves. 433; 34 E. R. 167.

(7) 26 B. 159; 3 Bom. L. R. 596.

(8) 25 Ind. Cas. 973; 1 L. W. 879.

THIRUVENKATA CHARIAR v. SESHADRI IYENGAR.

by calling for a conveyance. But the difference between that case and the present case is that Chapter IX of the Indian Trusts Act contains no provision which imposes an obligation on the vendor to hold the property as a trustee for the contractee. I must, however, confess that on principle this should not make any difference. In the first place it was wholly unnecessary to enact that the seller should hold the property for the benefit of the purchaser to the extent necessary to give effect to the contract, for that is his obligation under the contract itself. The need for section 91 arose, because the obligation of the original seller was made enforceable against the subsequent transferee with notice. If by the contract of sale the purchaser obtained no kind of interest in the property, if the ownership was wholly in the seller, and if by virtue of such ownership he is entitled to eject the purchaser as if he were a trespasser, it is difficult to see why a transferee from him should be in a worse position. In *Kolathu Aiyar v. Rangavadhya* (9) the learned Judges seem to think that such a transferee can recover possession.

Questions have arisen as to the position of persons bound by obligations in the nature of trusts under one or other of the sections contained in Chapter IX of the Trusts Act, and in these cases it has been held that a person in possession of the property is entitled to resist a claim for possession on the part of those who are bound by such obligations by pleading such an obligation, though an action by him as plaintiff to enforce that obligation by calling for a conveyance or by setting aside a conveyance already executed, under some one or other of the provisions of the Specific Relief Act, may have been barred by limitation. Though there have been observations here and there in this Court [See *Roop Laul v. Lakshmi Doss* (10) per Subramania Aiyar, J.; *Raja Rajeswara Dorai v. Arunachellam Chettiar* (3) per Sadasiva Aiyar, J.] that a defendant in possession who had not taken steps to set

aside a conveyance or to call for a conveyance within the time limited by law is not entitled to resist a suit for possession by the legal owner, it may be taken as settled, so far as this Court is concerned, by the decision of the Full Bench in *Lakshmi Doss v. Roop Laul* (2) that persons in possession, who have parted with their ownership by a legal conveyance, which they are at liberty to repudiate, can by virtue of the possession plead the invalidity of the plaintiff's title as against them and prevent the plaintiff from recovering possession on a defeasible title. In *Madugula Latchiah v. Mukkalinga* (11) the contrast between a suit to recover possession in defeasance of a legal title after the time limited to set aside that title, and a suit in which the plea that the plaintiff has a defeasible title is set up to defend the possession, is clearly brought out. The various provisions in Chapter IX of the Trusts Act were discussed at length in *Raja Rajeswara Dorai v. Arunachellam Chettiar* (3), where also the same principle was laid down, though Sadasiva Aiyar, J., was inclined to doubt the correctness of the decision in *Lakshmi Doss v. Roop Laul* (2). These were, however, cases where the defendant in possession was the original owner who had conveyed the property to the plaintiff under circumstances which entitled him to rescind, and in which he defended his possession on his original title which did not pass absolutely to the plaintiff. In cases, however, where the defendant in possession was not the owner at any time, but was only entitled to get a transfer of the ownership as a personal obligation, it is difficult to distinguish on principle the decision in *Kurri Veerareddi v. Kurri Bapireddi* (1) and hold that he is entitled to resist the transferee's suit for possession. There is, however, the provision in section 91 of the Trusts Act, and it is unnecessary to extend that decision to cases of transferees. After all, in legal theory, there does not seem to be any difference between the position of a buyer under a contract of sale in England and under the Indian

(9) 18 Ind. Cas. 203; 24 M. L. J. 84 at p. 87; (1913) M. W. N. 163; 13 M. L. T. 179.

(10) 29 M. 1 at p. 12.

(11) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350.

JAN MAHOMED V. MANTHAR.

Statute. Maitland's Equity, page 111. In *Namasivayam Pillai v. Nelayappa Pillai* (12), on ■ consideration of the several statutory provisions as regards ■ subsequent transferee with notice, it was held that he cannot sue to recover possession from a person who had a prior contract for sale. This decision was not referred to, or overruled, by the decision of the Full Bench. The same view was taken in *Puchha Lal v. Kunj Behari Lal* (4), which has been followed in ■ still more recent case in Calcutta, *Khagendra Nath Chatterjee v. Sonatan Guha* (13). Whether even the original vendor can recover possession, if he had delivered possession in pursuance of an express stipulation in the contract of sale, it is unnecessary to consider. Such possession may enure till the conveyance is executed, when the purchaser would become entitled to possession, not by virtue of the contract, but by virtue of his title. See *Doe d. Tomes v. Chamberlaine* (14); *Zimmler v. Abrahams* (15). There is this further fact in this case; the 4th and 5th defendants have obtained a conveyance from their vendors. Though at the time of the conveyance to the said defendants they had already executed a sale in favour of the plaintiff, I am inclined to hold that they were still entitled to fulfil their original contract by executing a conveyance at the request of the contractees and to this extent repudiate the title conveyed to the plaintiff, not for their own benefit, but for the benefit of the 4th and 5th defendants and to the extent necessary to fulfil their obligation. The question whether the plaintiff was transferee for value without notice has not been tried. I agree the appeal must be allowed and the suit remanded to the first Court for the trial of issues Nos. 2 to 4. Costs incurred hitherto will abide.

Appeal allowed; Suit remanded.

V. R. P.

(12) 18 M. 43.

(13) 31 Ind. Cas. 987; 20 C. W. N. 149.

(14) (1839) 5 M. & W. 14; 9 L. J. Ex. 38; 151 E. R. 7.

(15) (1903) 1 K. B. 577; 72 L. J. K. B. 103; 51 W. R. 343; 88 L. T. 46; 19 T. L. R. 189.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 260 OF 1915.

ORIGINAL CIVIL SCIT No. 95 OF 1915.

November 10, 1915.

Present:—Mr. Pratt, J. C.

JAN MAHOMED—APPLICANT

versus

MANTHAR—JUDGMENT-CREDITOR—

OPPONENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Attachment, threatened—Third party's property—Payment under protest to avoid attachment—Claim for refund—Separate suit.

A, in execution of an award decree against B, sought to seize the moveable property of B's father, C, who thereupon, to avoid the attachment, paid the amount named in the warrant under protest and applied under Order XXI, rule 58, Civil Procedure Code, for return of the money:

Held, (1) that Order XXI, rule 58, Civil Procedure Code, was inapplicable as no property had been attached; [p. 492, col. 2; p. 493, col. 1.]

(2) that C's claim could not be determined in execution under section 47, Civil Procedure Code, as he was neither ■ party to the suit nor his representative, but could only be enforced in a separate suit. [p. 493, col. 1.]

Lodge v. National Union Investment Company Limited, (1907) 1 Ch. 300 at p. 307; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187; *Dulichand v. Ramkishan*, 7 C. 648; 8 I. A. 93; 4 Sar. P. C. J. 245; 5 Ind. Jur. 493; *Kanhya Lal v. National Bank of India*, 18 Ind. Cas. 949; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; ■ C. 598; 40 I. A. 56, referred to.

Mr. Wadhmal Oodharam, for the Applicant.

Mr. Kalumal Pahlumal, for the Opponent.

JUDGMENT.—The judgment-creditor Manthar had an award decree against Umerdin.

In execution of that decree moveable property was sought to be attached in the house of the judgment-debtor, Umerdin's father, Jan Mahomed.

The applicant Jan Mahomed states in his application to this Court:—

"The bailiff was about to actually seize the goods of the applicant when to avoid attachment, though illegal, the applicant under protest paid the amount named in the warrant."

On this statement of fact the applicant applies under Order XXI, rule 58, that the money should be returned to him.

But rule 58 has no application, for it refers

KOLUMAL V. AGA KHAN SULTAN MAHOMED SHAH.

to the release of property which has been wrongfully attached. Here no property was attached. Mr. Wadhmal argues that the money was attached instead of the goods. But it is clear from the passage quoted from the application that the money was not attached. The money was paid by the applicant to avoid the attachment.

The applicant is neither a party to the suit nor a representative of a party and, therefore, his claim cannot be determined by a Court of execution under section 47, Civil Procedure Code.

If the attachment was wrongful he has a right of action. It is the equitable action described by Lord Mansfield in *Moses v. Macferlan* (1), quoted in *Lodge v. National Union Investment Company Limited* (2), as one which lies for money which *ex requo et bono* the defendant ought to refund. This right of action was recognised by the Privy Council in *Dulichand v. Ramkishan* (3) and *Kanhya Lal v. National Bank of India* (4).

Applicant's remedy is, therefore, by suit and not by application in execution proceedings. This application is dismissed with costs.

Application dismissed.

(1) (1763) 2 Burr. 1005; Buller 129; 1 Black. 219 97 E. R. 676.

(2) (1907) 1 Ch. 300 at p. 307; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187.

(3) 7 C. 618 (P. C.); 8 I. A. 93; 4 Sar. P. C. J. 245; 5 Ind. Jur. 493.

(4) 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 I. A. 56.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 6 OF 1914.

September 16, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Boyd, A. J. C.

KODUMAL alias GULAMALI—

DEFENDANT—APPELLANT

versus

H. H. SIR AGA KHAN SULTAN

MAHOMED SHAH—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act I of 1908), s. 96 (2), O. XLI, r. 27—Ex parte decree, appeal from—Remand for further evidence—Appellate Court, powers of.

An Appellate Court has power under Order XLI, rule 27, to direct the production of additional evi-

dence, which has been wrongly excluded by the original Court, even in appeals against *ex parte* decrees. [p. 493, col. 2.],

Sadhu Krishna Ayyar v. Kuppan Ayyangar, 20 M. 54; 16 M. L. J. 479; 1 M. L. T. 268, followed.

Jonardan Dobey v. Ramdhone Singh, C. 738; *Parvati Shankar Durga Shankar v. Bai Naval*, 17 B. 733, referred to.

Appeal against the decree of the Joint Judge, Hyderabad.

Mr. Dipchand Chandumal, for the Appellant.

Mr. Fatehchand Asudomal, for the Respondent.

JUDGMENT.—The appeal before the lower Court was an appeal from an *ex parte* decree. The appellant, who was defendant, contended that he had not been given a reasonable opportunity of adducing his evidence, and wished that that evidence should be taken. The lower Court held that such an application could only be made to the original Court and that the appeal was limited to the evidence on the record. We see no reason for putting that narrow construction upon the right of appeal against *ex parte* decrees, which is conferred by section 96 (2) of the Civil Procedure Code. The Appellate Court has power under Order XLI, rule 27, to direct the production of additional evidence which has been wrongly excluded by the original Court. And there is nothing in the Code to suggest that the powers of an Appellate Court in hearing an appeal from an *ex parte* decree are more limited. Mr Fatehchand refers to the expression "an appeal may lie" in section 96 (2) and attributes some mysterious significance to that phrase, because the words "an appeal shall lie" appear in section 96 (1). The right of appeal from *ex parte* decrees was at one time doubted and the doubt was removed by an amending Act. The phrase "an appeal may lie" only expresses the idea that such an appeal is competent. Mr. Fatehchand also relies on the cases of *Jonardan Dobey v. Ramdhone Singh* (1) and *Parvatishankar Durgashankar v. Bai Naval* (2). Both these cases, however, have been considered in a Full Bench decision in *Sadhu Krishna Ayyar v. Kuppan Ayyangar* (3), in which we concur.

(1) 23 C. 738.

(2) 17 B. 733.

(3) 30 M. 54; 16 M. L. J. 479; 1 M. L. T. 268.

NARAPRATH KUMMALI v. PARAMBOLI KANDI.

We think the lower Appellate Court ought to consider the question as to whether the defendant's evidence should have been taken.

We accordingly reverse the decree of the lower Court and direct the Court to re-admit this appeal on its register under Order XLI, rule 23, and determine it according to law. Costs to be costs in the cause.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2338 OF 1914.

March 14, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

NARAPRATH KUMMALI KANDUNGO KURUP AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

PARAMBOLI KANDI THAVAZHAYIL AYAVATAN KRISHNA KURUP AND OTHERS—PLAINTIFFS NOS. 1 TO 4 AND

DEFENDANTS NOS. 3 TO 5—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—Applicability to Court auction-purchasers.

Although the Transfer of Property Act deals only with transfers by acts of parties, the principle of section 41 of the Act applies in favour of a Court auction-purchaser.

Radha Madhab Paikara v. Kalpataru Roy, 16 Ind. Cas. 811; 17 C. L. J. 209, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 166 of 1913, preferred against that of the District Munsif, Tellicherry, in Original Suit No. 531 of 1911.

Mr. T. Erroman Unni, for Mr. C. V. Ananthakrishna Aiyar, for the Appellants.

Mr. C. Madhavan Nair, for the Respondents.

JUDGMENT.—Though section 41 of the Transfer of Property Act does not directly apply in favour of a Court auction-purchaser (the Transfer of Property Act dealing only with transfers by acts of parties), the prin-

VISHINDAS v. MUNICIPALITY OF HYDERABAD.

ciple of that section applies in favour of a Court auction-purchaser [*Radha Madhab Paikara v. Kalpataru Roy* (1)].

But on the finding of fact arrived at by the lower Appellate Court in this case, namely, that the 2nd defendant (Court auction-purchaser) was aware that the properties purchased by him did not belong to the judgment-debtors as their private property, there is no basis for the application of the principle of section 41 of the Transfer of Property Act in his favour and we, therefore, dismiss this second appeal (filed by defendants Nos. 1 and 2) with the plaintiffs' costs.

Appeal dismissed.

V. R. P.

(1) 16 Ind. Cas. 811; 17 C. L. J. 209.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 14 OF 1914.

February 11, 1916.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Rao Bahadur Seth VISHINDAS NIHAL-CHAND—APPELLANT

versus

THE MUNICIPALITY OF HYDERABAD, SIND, AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 1—Admission of fact by Pleader, for purpose of dispensing with further proof—Estoppel of party from disputing correctness thereof—Title to land—Possession, as evidence of title, nature of.

A party to a suit is estopped from disputing the correctness of an admission made by his Pleader for the purpose of dispensing with further proof. [p. 495, col. 1.]

A plaintiff, relying upon possession as evidence of his title, must show that he has juridical possession as against the defendant. The same possession which is juridical against one person may not be juridical against another. [p. 495, col. 2.]

Possession could not be said to be juridical, where it was taken behind the back of the defendant, who did not acquiesce therein but sought to evict the plaintiff as soon as he discovered his dispossession. [p. 495, col. 2.]

Virjivandas v. Mahomed Ali Khan, 5 B. 208 at p. 221, referred to.

Appeal against the decree of the Joint Judge, Hyderabad.

Mr. Gopaldas Jhamatmal, for the Appellant.

Mr. Lalchand Chuharmal, for the Respondent No. 1.

VISHINDAS v. MUNICIPALITY OF HYDERABAD.

JUDGMENT.—The plaintiff on the 20th October 1910 obtained a sale-deed of one-half and a lease of the other half of a plot of land, being part of the village site of Malana and situated within the limits of the Hyderabad Municipality, from three persons who were joined as defendants Nos. 2 to 4 in the suit.

On the 14th December 1910 the Hyderabad Municipality served the plaintiff with a notice to quit.

The plaintiff then filed this suit for a declaration of his right of ownership and possession.

The lower Appellate Court has dismissed the suit on the ground that the plaintiff has failed to prove either title or juridical possession.

In this finding we concur.

The title set up by the plaintiff is that the land belonged to his vendor, who has inherited it from Gowher to whom it had been given by Hashim Shah, the original owner. Hashim Shah is entered in the Survey Records as the occupier of Survey No. 79 and the Pleader for the Municipality admitted that this Survey No. was converted into the village site. The lower Court has brushed aside this admission as erroneous, but it was an admission made by the Pleader who was conducting the case for the defendant Municipality and who was, therefore, an agent impliedly authorized to make such admission. It was further an admission made for the purpose of dispensing with further proof and, therefore, estops the defendant Municipality unless circumstances are shown which would justify the Court in requiring proof under the proviso to section 58, Indian Evidence Act. No such circumstance has been suggested—so it must be taken as proved that the land was originally part of Survey No. 79 and that Hashim Shah was the owner. But even this assumption does not assist plaintiff, for there is no evidence beyond hearsay as to the transfer of the land from Hashim Shah to Gowher.

But although plaintiff has failed to prove title it is contended that he is entitled to rely upon his possession as evidence of title until the Municipality prove a better title; and that he should at least be granted a declaration

of his right to possession according to *Ismail Ariff v. Mahomed Ghose* (1).

In order to succeed on the strength of his possession, plaintiff must show that he has juridical possession as against the defendant. The same possession which is juridical as against one person may not be juridical as against another. A trespasser may have juridical possession as against a third person though he has no juridical possession against the person whom he dispossessed.

Has the plaintiff established juridical possession as against the defendant Municipality?

On the evidence it has been found as a fact that neither the plaintiff nor his vendors and lessors had possession prior to the 20th October 1910. On that day the plaintiff took possession and within two months his possession was disputed by the Municipality. This possession, though not forcible, seems to us to be both *clam et precario*—furtive and precarious and to differ in no way from that of a squatter; for he took possession behind the back of the Municipality who sought to evict him as soon as they discovered it. As said by West, J., in *Virjivandas v. Mahomed Ali Khan* (2). "If suddenly taken and not acquiesced in till it had acquired a colour of right, it could not be deemed a possession on which a suit could be brought."

It is not, therefore, necessary to determine whether the Municipality have proved their title.

We confirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed

(1) 20 C. 834; 20 I. A. 99.

(2) 5 B. 208 at p. 221.

NAGESHAR SAHAI v. MATA PERSHAD.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1915-16 OF
HARDOI DISTRICT.

February 8, 1916.

Present:— Mr. Holms, S. M., and
Mr. Campbell, J. M.

Kuar NAGESHAR SAHAI AND ANOTHER—
APPELLANTS

versus

Kuar MATA PERSHAD AND ANOTHER—
RESPONDENTS.

Mutation—Possession with Receiver—Revenue Court, duty of—Title to possession—Summary inquiry—Hindu Law—Adopted son, position of—Talukdari or non-talukdari property, effect of.

Where in mutation cases possession is admittedly with a Receiver, the Revenue Courts have simply to decide, and that by summary inquiry, who is the person best entitled to possession.

In Hindu Law an adopted son takes exactly the same position as a natural son.

Padmakumari Debi Chowdhurani v. Court of Wards, 8 C. 302; 8 I. A. 229; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148, referred to.

An adopted son is entitled to mutation of his name in respect of the property of his adoptive father's uncle, whether the property be *talukdari* or non-*talukdari*.

Appeal against the order of the Commissioner, Lucknow, dated the 20th November 1915, reversing that of the Deputy Commissioner, Hardoi, dated 22nd May 1915.

Pandit Gokaran Nath Misra, Babu Baldeo Prasad and Syed Amjad Ali Rizvi, for the Appellants.

Mr. St. George Jackson and Syed Shahenshah Husain Rizvi, for Respondent No. 1.

Mr. F. G. D. Lincoln and Babus Chhote Lal and Salig Ram, for Respondent No. 2.

JUDGMENT.

CAMPBELL, J. M.—(February 2nd, 1916.)—This seems to me to be a perfectly simple case, into which unnecessary complications have been introduced in the lower Courts. Possession is admittedly with a Receiver, so that what the Revenue Courts have to decide, and that by summary inquiry, is who is the person best entitled to possession. The Commissioner has found that, as a matter of fact, there is a very strong *prima facie* case that Nageshar Sahai, the appellant before me, is the lawfully adopted son of Kuar Narendra Bahadur, who had authorized his widow Musammatt Jagrani to make the adoption on his behalf. Where I do not follow the Commissioner, however, is in his

finding that Nageshar Sahai cannot be held to be a male lineal descendant of Narendra Bahadur: for in Hindu Law an adopted son takes exactly the same position as a natural son and their Lordships of the Privy Council have specifically ruled in *Padmakumari Debi Chowdhurani v. Court of Wards* (1) that "An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption." I think, therefore, that there is no doubt that Nageshar Sahai is the male lineal descendant of Narendra Bahadur, and as such entitled to succeed to the property of Wazir Chand, the uncle of his adoptive father, whether we treat the property as *talukdari* and subject to the special rules of succession laid down in section 22 of the Oudh Estates Act, or non-*talukdari* and subject to the ordinary laws of succession governing Hindu inheritance. In these circumstances it seems to me an act of supererogation for the Revenue Courts to try and solve the very difficult question whether the estate now in dispute is non-*talukdari* as previously decided by the Judicial Commissioner, or whether it has been transferred to the category of a *talukdari* estate by the provisions of sections 7, 8 and 21 of the Oudh Estates Amendment Act, III of 1910.

For the above reasons I would set aside the orders of the lower Courts and order mutation in favour of Nageshar Sahai, and order the parties to bear their own costs in all Courts.

HOLMS, S. M.—Whether an adopted son is a male lineal descendant within the meaning of section 22 (5) of the Oudh Estates Act, 1869, as amended, is perhaps not altogether free from doubt, as clauses (1) and (3) and (4) distinguish between sons and adopted sons. But on the whole I agree with the order proposed to be passed.

Appeal allowed.

(1) 8 C. 302; 8 I. A. 229; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148.

AFILADDI v. SATISH CHANDRA BANERJI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 327
OF 1914.

March 23, 1916.

Present:—Mr. Justice Beachcroft and
Mr. Justice Newbould.AFILADDI—DEFENDANT No. 4—APPELLANT
*versus*SATISH CHANDRA BANERJI AND
OTHERS—RESPONDENTS.*Landlord and tenant—Ejectment of tenant for breach of condition—Bengal Tenancy Act (VIII of 1885), s. 155 (b), scope and applicability of—Bengal Tenancy Act (VIII of 1885), ss. 178, 179—Compensation to be ordered, whether breach capable of remedy or not.*

In a suit under section 155 (b) of the Bengal Tenancy Act for ejectment of a tenant, if the breach complained of is capable of remedy, it must be remedied by the tenant; but whether it is capable of remedy or not, a sum is to be specified by the Court which will be reasonable compensation for the breach, and it is only if the tenant fails to deposit that sum within the time given, that the landlord can have his decree for ejectment. [p. 499, col. 2.]

Pershad Singh v. Ram Pertab Roy, 22 C. 77, followed.

Section 155 applies with full force, even where the suit for ejectment is brought by the landlord for breach of condition in a contract made before the passing of the Bengal Tenancy Act and even if there is a provision for re-entry by the landlord. [p. 500, col. 1.]

In a suit by a landlord for ejectment of his tenant, a declaration ought not to be given to the transferee of the tenant that he is to be regarded as the tenant. [p. 500, col. 1.]

Section 155 allows the deposit of compensation specified by the Court to be made not only by the original tenant, but by any person who is impleaded as a defendant in the landlord's suit in ejectment. [p. 500, col. 2.]

Appeal against the decree of the Subordinate Judge, Second Court, Backergunj, dated the 15th September 1913, reversing that of the Officiating Munsif, third Court, Patuakhoti, dated the 10th June 1912.

FACTS material to the report will appear from the arguments and the judgment given below.

Babu Sarat Chandra Khan (for Babu Hirendra Nath Ganguly), for the Appellant.—The plaintiff in this case appealed on the ground that the breach here committed by the tenure-holder was not such as to admit of any compensation. The lower Appellate Court has held that ejectment should be decreed. My contention is that it was a breach of covenant against alienation and this breach

is capable of remedy, and so the first Court's decree is good. I have no interest in the holding, but I am certainly a necessary party and so I should be impleaded. If the landlord gets *khas* possession of the tenure, I shall be compelled to pay compensation to the transferee-defendant No. 7. Under section 155 of the Bengal Tenancy Act compensation might be allowed. [See *Keshab Lal Nag v. Madhu Sudan Pal* (1).] As regards the mode of assessing compensation, see *Keshob Lal Nag v. Jnanendra Nath Ghose* (2). As the tenure is a permanent tenure, there is no likelihood of its reversion to the landlord. The breach of the condition is amply remedied if the landlord gets compensation. The tenant is entitled to protection under section 155 of the Bengal Tenancy Act on deposit of the amount found to be reasonable compensation. It is wrong to hold that section 155 does not apply and that the section is intended to apply only where the breach is capable of remedy or of compensation in money.

Babu Dwarkanath Chakravarti (with him Babus Gunada Charan Sen and Kali Prasad Piplai), for the Respondents.—The main question is whether compensation is to be decreed. Both principles of law and authorities are against my learned friend. The breach as has occurred in this case cannot be remedied by compensation in money. Here the purchaser has got the tenure and he has not appealed. The sub-lease is not binding on the landlord. So far as the tenure is concerned defendant No. 4 has no interest now, he has transferred his interest to defendant No. 7. So far as defendant No. 4 and my client—the landlord—are concerned there is an end of relationship as landlord and tenant. The present appellant, i.e., defendant No. 4, cannot claim the same right which defendant No. 7 could have claimed.

The covenant is that the landlord can re-enter on transfer by the tenure-holder. The restriction against alienation is not void but capable of enforcement. My contention is that section 155 of the Bengal Tenancy Act has no application in a case like this. Unless the breach is capable of remedy, there cannot be any alternative relief by way of damages. Here the finding is that the breach

(1) 6 Ind. Cas. 685; 12 C. L. J. 126.

(2) 24 Ind. Cas. 538; 20 C. L. J. 332.

AFILADDI v. SATISH CHANDRA BANERJI.

is incapable of remedy and so it cannot be remedied by compensation in money, and the above finding was not challenged in the lower Appellate Court. In view of this finding, the Munsif could not have applied section 155. Compensation is allowed when the breach is capable of remedy. Clause (2) of section 155 makes the whole matter clear.

This lease was executed before the Bengal Tenancy Act came into operation and section 179 of the Act validates the creation of permanent *mokarrari* leases.

So far as land is concerned, the Specific Relief Act provides that contracts should not be enforced when compensation by damages can remedy the breach, see section 12, clauses (a), (b) and (d). The scheme of section 155 of the Bengal Tenancy Act is that where there is a "misuse" of tenancy, it is capable of remedy; the tenant should not be ejected if he agrees to pay compensation. Here the breach was the transfer of the land in violation of the contract and is capable of remedy by the landlord re-entering on the land: *Rajani Kanta Biswas v. Ekkari Das* (3). How can he remedy the breach? *Harak Singh v. Kirat Narayan Singh* (4) deals with "misuse" under section 155, Bengal Tenancy Act. Is it the intention of section 155 to negative the breach by compensation? My contention is that when the breach is capable of such remedy by compensation, there cannot be any ejection. Here the breach is incapable of remedy. There is no reason why this contract between landlord and tenant should not be specifically enforced. *Keshab Lal Nag v. Madhu Sudan Pal* (1) is clearly distinguishable, there the clause about re-entry was not distinctly mentioned. Where there is no right of re-entry mentioned, the landlord is entitled to compensation on the breach of the covenant, see *Basarat Ali Khan v. Manirulla* (5). On the authority of this case the case of *Keshab Lal Nag v. Madhu Sudan Pal* (1) was decided. Compensation cannot be allowed in lieu of the right of re-entry. Section 155 cannot bar a right to re-entry, as this is a tenure. Sections 178 and 179 of the Bengal Tenancy Act provide for unconditional con-

tracts. The contract is enforceable if section 178 does not apply. *Tejendro Narain Singh v. Bakai Singh* (6) refers to contracts as regards tenures created before the Bengal Tenancy Act. Section 155 does not create or take away any right. It has no application in the case of a contract with a provision for re-entry between a landlord and a tenure-holder. Section 155 must be read subject to any valid contract. If any right provided for in a contract validly made is interfered with by the Bengal Tenancy Act, the contract should be enforced if there is nothing in the Bengal Tenancy Act making the contract invalid. As the contract here is enforceable, section 155 does not apply. I rely on section 179 of the Bengal Tenancy Act. Defendant No. 4 has no right to step in as a tenant under me. The transferee here is a trespasser, *vide Buddhimanta Pramanik v. Sarat Chandra Banerjee* (7). If the breach is remedied, the old tenant *i.e.*, defendant No. 4 will be restored, but that is impossible here as the lower Court has admitted the right of defendant No. 7, the transferee. Section 155 provides for a decree against a tenant, not a transferee. Defendant No. 4 cannot be heard to say that he is entitled to a decree as somebody made a deposit compensation. The benefit of section 155 is claimable, if at all, by a tenant. It is a valid contract between the landlord and the tenure-holder, so the Bengal Tenancy Act cannot apply.

The tenant did not make any deposit as required by the decree. Defendant No. 4 cannot claim the decree.

Babu Sarat Chandra Khan, in reply.—As regards defendant No. 7 not appearing, I contend that Order XLI, rule 33, Civil Procedure Code, gives the Appellate Court ample jurisdiction to pass any order that the first Court could pass.

Keshab Lal Nag v. Madhu Sudan Pal (1) is an authority, there was right of re-entry and this is in on all fours with the present case. Notwithstanding section 179, section 155, is applicable. *Keshob Lal Nag Juanendra Nath Ghose* (2) is an authority, where measure of compensation is discussed. Payment of compensation would amount to

(3) 7 C. L. J. 78; 11 C. W. N. 811; 34 C. 689

(4) 4 Ind. Cas. 734; 10 C. L. J. 595.

(5) 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49.

(6) 22 C. 658 at p. 663.

(7) 6 Ind. Cas 147; 13 C. L. J. 672.

AFILADDI v. SATISH CHANDRA BANERJI.

recognition of defendant No. 7 ■ tenant. The cases of *Rajani Kanta Biswas v. Ekkari Das* (3), *Harak Singh v. Kirat Narayan Singh* (4), *Buddhimanta Pramanik v. Sarat Chandra Banerjee* (7) are distinguishable; the first one is a case of non-transferable occupancy holding, the second is a case of misuse of holding and the case of *Buddhimanta Pramanik v. Sarat Chandra Banerjee* (7) is in my favour. As regards compensation the defendant No. 7 will pay it and not the tenant. The assignee is a necessary party defendant. The transferee is ■ necessary party in every case of suit for ejectment where transfer is made in breach of restraint against alienation. What does it matter if the money is deposited by transferor or transferee?

JUDGMENT.—The predecessor of defendants Nos. 1 to 6 obtained a permanent tenure from the plaintiff. One of the conditions of the lease was that the defendants should not transfer the tenure and that if they did, the plaintiff should be entitled to re-enter. Eventually, the defendants sold the tenure to defendant No. 7. The plaintiff brought the present suit for ejectment and in accordance with the terms of section 155 of the Bengal Tenancy Act, he specified the sum of Rs. 566-4 as reasonable compensation for the breach of the condition.

The Munsif found that the breach was not capable of remedy; but he found that a sum of Rs. 250 would be reasonable compensation for the breach of the condition. He allowed the defendants a fortnight's time within which to pay that sum, failing which the plaintiff was to get *khas* possession. He also directed that the defendant No. 7 would be recognised as the plaintiff's tenant. The plaintiff appealed. The Subordinate Judge, while agreeing that the breach of contract was not capable of remedy, set aside the decree of the Munsif and directed that the plaintiff should get *khas* possession of the tenure by ejecting the defendants. He also made an order for re-payment of Rs. 250, which had been deposited in accordance with the Munsif's decree, by defendant No. 7. The sufficiency of the sum awarded as compensation was not questioned.

The present appeal is by defendant No. 4 and is based on the ground that, under section 155, the tenant was entitled to protection on deposit of the amount found to be

reasonable compensation. Against this view, it is argued that section 155 does not apply and that the section is intended to apply only where the breach is capable of remedy or of compensation in money.

The terms of section 155 seem to be clear. That section provides that ■ suit for the ejectment of ■ tenant on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served in the prescribed manner ■ notice on the tenant specifying the particular breach complained of, and where the breach is capable of remedy, requiring the tenant to remedy the same, and *in any case* to pay reasonable compensation for the breach, and the tenant has failed to comply within a reasonable time with that request. The scope of the section seems to be that in every case, whether the breach is or is not capable of remedy, the notice has to specify reasonable compensation for the breach; and in accordance with sub-section (2) of the section, ■ decree passed in favour of a landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the breach and whether in the opinion of the Court the breach is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay the amount to the plaintiff and where the breach is declared to be capable of remedy, to remedy the same. The result seems to be that if the breach is capable of remedy, it must be remedied, but whether it is capable of remedy or not, ■ sum is to be specified by the Court which would be reasonable compensation for the breach, and it is only if the tenant fails to deposit that sum within the time given, that the landlord can have his decree for ejectment. This view of the meaning of the section seems to be in accordance with the view taken in the case of *Pershad Singh v. Ram Pertab Roy* (8).

But it is argued that where, as here, the contract was made before the passing of the Tenancy Act the section cannot apply to the case of a permanent tenure; otherwise sections 178 and 179 of the Act would be defeated,

RAJAH OF RAMNAD v. SELLACHAMI TEVAR.

Now section 179 provides that nothing in the Act shall be deemed to prevent a proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent *mokarrari* lease on any terms agreed in between him and his tenant. That section pre-supposes a contract made after the passing of the Tenancy Act and, therefore, it has no application to the present contention.

Then section 178, so far as it is applicable, provides that nothing in any contract between a landlord and a tenant made before the passing of the Act shall entitle a landlord to eject a tenant otherwise than in accordance with the provision of the Act that makes contracts made before the passing of the Act subject to all the provisions of the Act with reference to the questions of ejectment, and one of these provisions is contained in section 155, and, as under that section, the rights of the landlord to eject are subject to the defendant paying what is assessed as reasonable compensation within the time allowed, the effect of section 178 is that even where there is a provision for re-entry in a contract made before the passing of the Act, section 155 applies with full force.

Then it is argued that the defendant No. 4 cannot appeal as defendant No. 7, the transferee, has not appealed. But defendant No. 4, it appears, has again taken a settlement from his transferee. He is interested in the question before the Court and there appears no reason why he should not be allowed to appeal. After all, he is the person who is the tenant within the meaning of section 155.

In one respect, the decree of the learned Munsif is open to criticism in that he has declared that the defendant No. 7 is to be recognised as the plaintiff's tenant in respect of the tenure. In a suit by the landlord-plaintiff for ejectment of his tenant, a declaration ought not to be given to the transferee that he is to be regarded as the plaintiff's tenant. Subject to this, there appears no objection to the order of the Munsif.

Finally, it was argued that section 155 would not protect the defendant in this case; because the deposit was made not by the tenant but by the transferee. This suit is against the tenant, but the section provides that the Court has to fix the period during

which it is open to the defendant to pay to the plaintiff. The transferee has been impleaded by the plaintiff and he was bound to be if the plaintiff wanted *khas* possession of the tenure. In terms, the section appears to allow the deposit to be made not only by the original tenant but by any person who is impleaded as a defendant.

We think the decree of the Subordinate Judge ought to be set aside and the decree of the Munsif restored, subject to this that the declaration that the defendant No. 7 will be recognised as plaintiff's tenant in respect of the said *nim-howla* be omitted. The appeal is, subject to this, allowed, with costs in this Court, as well as in the lower Appellate Court.

We are informed that the Rs. 250 deposited by defendant No. 7 has been withdrawn in accordance with the order of the learned Subordinate Judge. If that be so, we allow the defendant No. 4 a fortnight's time from the date of the receipt of the record in the lower Court, within which to make the deposit of Rs. 250 as ordered by the Munsif. If that deposit be not made within the time aforesaid, the appeal will stand dismissed with costs.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 416 OF 1914.

March 10, 1916.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

B. RAJA RAJESWARA SETHUPATI
AVERGAL *alias* MUTHU RAMALINGA
SETHUPATI AVERGAL, RAJAH OF
RAMNAD—PLAINTIFF No. 4—APPELLANT

versus

SELLACHAMI TEVAR AND OTHERS—
DEFENDANTS NOS. 1 TO 7 AND PLAINTIFFS
NOS. 1 TO 3—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Contract Act

RAJAH OF RAMNAD V. SELLACHAMI TEVAR.

Amendment Act (VI of 1899), s. 4—Contract, breach of—Agreement to sell house on failure to repay loan—Penalty.

A penal provision, under section 74 of the Contract Act ■ amended by section 4 of the Amending Act of 1899, is not restricted to money, increased interest or the like. It is wide enough to include a stipulation to convey a house ■■ default of payment of a debt on a fixed date. [p. 501, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 285 of 1912.

The Hon'ble Mr. S. Srinivasa Aiyangar, Advocate-General, and Mr. R. Krishnamachariar, for the Appellants.

Messrs. C. Rajagopalachariar and A. Krishnaswamy Aiyar, for the Respondents.

JUDGMENT.—The first defendant, who is the principal respondent before us in this appeal, entered into ■ contract with the original owner of the house in dispute in 1909 for the purchase of the house. It appears that he had already advanced to the owner certain sums of money amounting to Rs. 3,650. The price of the house was fixed at Rs. 10,000. On the 25th November 1911, he borrowed Rs. 6,500 from the 4th plaintiff and executed a promissory note to the 1st and 2nd plaintiffs and also ■ *varthamanam* or agreement. The amount of the promissory note was payable on demand and carried interest at the rate of 9 per cent. In the *varthamanam* which was executed on the same date ■ the promissory note, it was stipulated that the amount of the promissory note was to be paid by the end of March 1912 and that in default of such payment, the 1st defendant was to execute a conveyance of the house in question by the 10th April of the same year for ■ sum of Rs. 6,500, the amount borrowed under the promissory note. In this suit the plaintiffs asked for specific performance of the agreement to sell inasmuch as the amount due on the promissory note was not paid by the stipulated date. They also ask in the alternative for a decree for the amount due to them with interest. The learned Subordinate Judge gave ■ decree to the 4th plaintiff for the amount due on the promissory note with interest at the stipulated rate, but he disallowed the prayer for specific performance, holding that the contract sought to be enforced was in the nature of ■ penalty within the meaning of section

74 of the Contract Act. That section says: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for." It is argued on behalf of the appellant by the learned Advocate-General that this case does not come within section 74, inasmuch as the stipulation in default of payment of the amount borrowed under the promissory note was to convey certain immoveable property and not to pay a sum of money and that section contemplates that the penalty should be in the shape of a sum of money or increased rate of interest or something of that nature. That apparently was the law under the old Contract Act, but the language has been changed. What we have now got is that the penalty may be either in the shape of a specified sum of money or any other stipulation intended by the parties to be penalty for breach of the contract. The language of section 74 of this present Contract Act is wide enough, therefore, to cover this case. Nor is there any good reason why the penalty should be held to be limited to money.

The next question is whether in this case, the stipulation in Exhibit A as regards the conveyance of the house was intended to be by way of penalty. Upon the facts, it is quite clear that it was so intended. The 1st defendant had already entered into an agreement two years previous to the date of the *varthamanam* in question to purchase this house, and on the very date the promissory note and the *varthamanam* were executed, an agreement was entered into, or rather the old agreement was renewed, with the owner of the house under Exhibit II in the presence of the 2nd plaintiff himself. It recites that the property was to be sold to the 1st defendant for Rs. 10,000. The learned Advocate-General is unable to suggest any reason why, if the 1st defendant was to buy the house for Rs. 10,000 and he renewed the agreement to that effect on the very date of the promissory note and the

GANGA RAM v. RAM SARAN.

varthamanam, Exhibit A, he should have agreed to sell the same house for Rs. 6,500 to the 4th plaintiff.

The only reasonable explanation is that the parties intended that the stipulation in Exhibit A regarding the conveyance of the house in default of payment of the amount of the promissory note on the date fixed was to be by way of penalty for default of payment on the fixed date. The learned Advocate-General also argued that as a matter of fact the house was not sold to the 1st defendant for Rs. 10,000 but only for Rs. 6,500. But there is no foundation for that argument. The price of the house *i. e.*, Rs. 10,000 was recited in the deed of sale as well as in Exhibit II. Of this amount Rs. 3,650 represented what the purchaser, that is, the 1st defendant had already paid to the owner of the house.

The decree of the learned Subordinate Judge is right and we dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 13
OF 1916.

May 19, 1916.

Present:—Sir Henry Richards, Kt., Chief
Justice, and Mr. Justice Sunder Lal.

GANGA RAM AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Mahant RAM SARAN *alias* RISBIJI—
PLAINTIFF—RESPONDENT.

Math—Custom—Succession—Civil Procedure Code
(Act V of 1908), s. 92—Mahant—Suit for declaration, if
maintainable.

In the case of a *math* the succession to a *gaddi* is governed by the custom and rules of the sect to which the *math* belongs, which the plaintiff has to prove in each case unless the custom is admitted. [p. 502, col. 2.]

A suit for declaration that the plaintiff is a duly constituted *mahant* is not barred by section 92 of the Civil Procedure Code, 1908. [p. 503, col. 1.]

First appeal from the order of the Subordinate Judge, Moradabad, dated the 23rd December 1915.

Dr. Tej Bahadur Supru (with him Mr. Sham Nath Mushran), for the Appellants.

Mr. Nehal Chand (for Mr. O'Connor) and Mr. Jang Bahadur Lal, for the Respondent.

JUDGMENT.—This suit relates to a religious institution which has been described as the *samad* of Babu Lal Chand. The plaintiff's claim is that the defendant Nanak Saran was at one time the *mahant* of this *samad*, that by reason of certain acts of which he has been guilty he has forfeited the position of *mahant* and that the plaintiff has been appointed *mahant* of the *gaddi*. The claim does not describe how the plaintiff was appointed and who appointed him, but it goes on to say that the defendant Nanak Saran has, without legal rights, granted a lease of the property to the defendant Ganga Ram for a term of 24 years. The plaintiff sues for possession of the property and for an injunction. The suit was dismissed by the Court of first instance. In the first place the Court held that it was a suit under section 92 of the Code of Civil Procedure. It also held that as the plaintiff was not in possession of the property in suit, he was not entitled to bring a declaratory suit. The learned Judge in appeal has reversed the decision of the Court below and remanded the case for trial under Order XLI, rule 23. In the case of a *math* like this, according to the ruling of the Privy Council in the case of *Genda Puri v. Chatar Puri* (1), the succession to a *gaddi* is governed by the custom and rules of the section to which the *math* belongs, which the plaintiff has to prove in each case unless the custom is admitted. The first point for decision by the Courts below was whether the plaintiff was really appointed by a duly constituted body a *mahant* of this institution. The next point for decision of the appeal was whether Nanak Saran had ceased to be a *mahant* and whether he had authority to grant a lease. The authority of *mahants* according to the Privy Council is like that of guardians in charge of minors' property. They can do all acts which are for the benefit of the institution and the Court would have to try whether the lease was one beneficial to the *math* itself. These are points which will

(1) 9 A. 1; 13 I. A. 100; 4 Sar. P. O. J. 726.

PARAMASIVAM PILLAI v. PERIYANAYAGATH AMMAL.

arise for decision in the Court of first instance. The suit is clearly not barred by section 92 of the Code of Civil Procedure. It is one for a declaration and if the plaintiff is a duly constituted *mahant*, as he alleges himself to be in the plaint, he would be entitled to the declaration sought for by his suit. We think the order of remand was correct, but it ought to have been an order on more general terms, directing the Court below to dispose of all issues arising in the case. We modify the order of remand by directing the Court of first instance to frame the proper issues in the case and try the case *de novo* and dispose of it according to law. Subject to the above observations, the order of remand stands. Costs here and hitherto will abide the result, which in this Court will include fees on the higher scale on behalf of the respondents.

Order modified.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 222 OF 1915.

March 1, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

PARAMASIVAM PILLAI—PLAINTIFF—
APPELLANT

versus

PERIYANAYAGATH AMMAL—

DEFENDANT—RESPONDENT.

Madras Village Courts Act (I of 1889), s. 73—Review of order passed under s. 73—Civil Procedure Code (Act V of 1908), s. 115—Charter Act (24 & 25 Vic., c. 104), (1861), s. 15—Revision—Appeal.

An order passed by a District Munsif under section 73 of the Village Courts Act can be revised only under section 15 of the Charter Act. Where, however, such an order was revised by a Judge of the High Court under section 115, Civil Procedure Code, the High Court declined to interfere with it on Letters Patent Appeal.

Dubitante.—Such an order can be revised by the High Court under section 115, Civil Procedure Code.

Obiter dictum.—An inferior Court has no power of review except when it is granted by Statute.

Burra Fukeer Doss Bera v. Fukeer Dos Bera, 20 W. R. 180, *Drew v. Willis*, (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373 referred to.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri, (reported in 32 Ind. Cas. 527), in Civil Revision Petition No. 436 of 1914 preferred to the High Court against the order of the Court of the District Munsif of Tiruvadi, in Original Petition No. 130 of 1914 (Civil Suit No. 1 of 1913 on the file of the Court of the Village Munsif of Someswarapuram).

FACTS.—For facts see 32 Ind. Cas. 527 where the judgment appealed against is reported.

Mr. A. V. Viswanatha Sastri, for Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. S. Muthiah Mudaliar, for the Respondent.

JUDGMENT.—We must admit that there is much to be said for the contention of the appellant that an inferior Court has no power of review except when it is granted by Statute. [See *Burra Fukeer Doss Bera v. Fukeer Doss Bera* (1) and *Drew v. Willis* (2) and *Damodra Nadar v. Manicka Vachaka Desika Ganana Pandara Sannadhi* (3).] But it is unnecessary to express a final opinion on this matter, as we think that the learned Judge from whose decision this Letters Patent Appeal has been filed had a discretion to interfere under section 115 of the Code of Civil Procedure and we have also the like discretion, and we do not think that this is a fit case to so interfere.

In so declining, we must guard ourselves from intending to express a considered view that the order of the District Munsif passed under section 73 of the Village Courts Act is subject to revision under section 115 of the Code of Civil Procedure. If it is not subject to review under that section and if it can be revised only under section 15 of the Charter Act, we are not prepared in this case to invoke the extraordinary powers under the Charter Act.

The appeal is dismissed with costs.

Appeal dismissed.

V. R. P

(1) 20 W. R. 180.

(2) (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373.

(3) 3 Ind. Cas. 463; 33 M. 65; 6 M. L. T. 177; 19 M. L. J. 725.

SURAJ DEO NARAYAN SINGH v. MUSAHROO RAUT.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 516 of 1914.

May 16, 1916.

Present:—Mr. Justice Roe and

Mr. Justice Jwala Prasad.

SURAJ DEO NARAYAN SINGH—

JULGMENT-DEBTOR—APPELLANT

versus

MUSAHROO RAUT AND OTHERS —

DECREE-HOLDERS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 152—
Decree—Execution, application for—Appointment of
Commissioner to take accounts and help in preparing
decree—Decree signed after Commissioner's report—
Starting point—Limitation.*

A decree for redemption was passed on 27th July 1909. The District Judge appointed a Commissioner to find out the exact sum to be paid in redemption, though that was only a matter of official routine. He actually signed the decree on 23rd February 1910. The defendant applied on 29th January 1913 to execute that portion of the decree which awarded to him costs payable by the plaintiff.

Held, that time commenced to run from the date when the decree was pronounced on 27th July 1909 and that the application was barred.

Gulam Gaffar Mandal v. Guljan Bibi, 25 C. 109, referred to.

Second appeal from an order of the District Judge of Darbhanga, dated the 27th July 1914.

Mr. Baidyanath N. Sinha, for the Appellant.

Mr. Saroshi Charan Mitter, for the Respondents.

JUDGMENT.—This appeal arises from an order of the District Judge of Darbhanga, holding that an application for the execution of a decree bearing the signature of the District Judge, under date the 27th day of July 1909, and made in a suit for redemption was not barred by limitation on the 29th day of January 1913. The decree was actually signed on the 23rd of February 1910. The reason upon which the learned District Judge has based his decision that limitation should run from February 1910, is that it was necessary, in order to the preparing of the decree made upon the judgment dated the 27th July 1909, to take an account through a Commissioner and ascertain the exact amount for which the property in suit might be redeemed, and the amount was not definitely ascertained till the 23rd February 1910. That part of the decree under execution before us is not with reference to the redemp-

SHAHUL v. ALLAH BACHAYO.

tion of the property, but with reference to the costs payable by the plaintiffs for redemption to the defendants-mortgagees. This, however, is immaterial. The decree itself bears a certain date. That date has been placed upon it in accordance with the provisions of the Code, and before it can be said that it should be regarded as bearing any other date, there must be some ground more substantial than that given by the learned District Judge. The judgment of the District Judge, dated the 27th July 1909, sets forth clearly the exact method of ascertaining the sum to be paid in redemption. The calculation of that sum was a matter purely of office routine, and it would have been unnecessary for the District Judge to pass any further orders on the matter at all. That he chose to appoint a Commissioner to assist in the preparation of the decree, and himself supervised the work of the Commissioner, does not affect the fact that the preparation of the decree is a routine matter.

We hold that the decree was rightly dated by the District Judge the 27th July 1909 and it was barred by limitation on the 29th January 1913. In this view we are fortified by the decision in the case of *Gulam Goffar Mandal v. Goljan Bibi* (1). The facts of the case before us are indistinguishable from the facts of that case. The appeal must, therefore, be decreed with costs, hearing fee one gold *mohur*.

Appeal allowed.

(1) 25 C. 109.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 5 of 1914.

September 30, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

Musammam SHAHUL—PLAINTIFF—

APPELLANT

versus

ALLAH BACHAYO AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Muhammadan Law—Guardianship—Unequal marriage contracted by paternal guardian for ward—Power of Court to control—Profligacy of guardian—Presumption of continuance—Evidence Act (I of 1872), s. 114.

A Muhammadan father married his minor daughter

SHAHUL U. ALLA BACHAYO.

aged 10 years to an infant of 12 months. The father was known to be a profligate. In a suit by the mother of the girl to declare the marriage invalid:

Held, (1) that the Court had power to, control such an abuse of the parental authority and that the marriage was invalid; [p. 505, col. 2; p. 506, col. 1.]

(2) that proof of the general profligacy of the father raised the presumption under section 114 of the Evidence Act that it continued during his life-time and that he was, therefore, a profligate when he contracted the marriage, and unfit to act as guardian for marriage. [p. 505, col. 2.]

Appeal from the decree of the Joint Judge, Hyderabad.

Mr. Fatehchand Asudomal, for the Appellant.

JUDGMENT.—The first defendant has married his daughter, a girl of 10 years of age, to the second defendant, an infant of 12 months. The plaintiff is the mother of the girl and sues to set aside the marriage as being manifestly prejudicial to her daughter.

The disparity of age is admitted. It was also admitted that the first defendant had squandered the whole of his patrimony in a life of debauchery. It was also not denied that the provision in the marriage contract for a payment of cash as deferred dower was unusual in the caste to which the parties belong.

On these facts the Sub-Judge of the original Court, Thawardas Dayaram, in a careful and well-considered judgment held that the first defendant had wickedly contracted a marriage which was prejudicial to his daughter, and made a decree setting it aside.

The Assistant Judge reversed this decree on three grounds: (1) that the first defendant was not proved to have been a profligate at the time of the marriage contract, (2) that even if he were then a profligate that fact has not affected his selection of a husband and (3) that the disparity of age is not such as to be prejudicial to the girl.

These are apparently findings of fact, but are nevertheless not binding on us for they are either based on no evidence or proceed on a misapplication of the law to the facts found. The finding that the marriage is not prejudicial to the minor girl rests on no evidence at all. It is in fact opposed to the evidence, for it is surely a cruel and abominable thing to bind in wedlock a girl of 12 who is approaching puberty to an infant in arms.

As to the profligacy of the husband and its effect on his conduct in contracting this marriage, the Assistant Judge has overlooked the presumption of continuance enacted in section 114, Indian Evidence Act, illustration (d). The character and habits of the defendant No. 1 being once proved they are presumed to continue during his life-time. The presumption is rebuttable, but the defendant gave no evidence to show that he had reformed. The presumption, therefore, is that he was a profligate at the time he contracted the marriage. The marriage was a wicked marriage and the further presumption arises that in contracting this marriage he was acting in accordance with his known bad character. These presumptions are fortified by the unusual provision as to dower and by the conduct of the defendant who did not venture to come to the Court and justify the marriage.

We entirely concur in the conclusion of the Court of first instance.

There are no decided cases as to power of the Court to rectify such an abuse of the paternal authority as appears in this case. Not having access to the original texts we must have recourse to the standard works on Muhammadan Law.

Baillie in his Digest states that all the original authorities agree that a marriage contracted by a father of a minor "to one who is not an equal" is not lawful, when it is known that "the father acted carelessly or wickedly in the matter". Six considerations are stated as affecting the equality of a marriage and it is not clear whether inequality is limited to these six items. Ameer Ali in his work refers to a text from the Raddul Muhtar that a marriage contracted by a profligate father of a minor child is invalid if it is "manifestly to the disadvantage of the child". We cannot tell whether the original text refers only to disadvantage on the ground of inequality. But even if that were so, these considerations of equality have not as yet been recognised by the Courts in India and if they were recognized, we do not think they would be considered as being exhaustive. It is clear that the Muhammadan Law does subject the paternal guardian for marriage to the control of the Courts and the present is clearly a fit case for the exercise of that control.

BISESWAR SINGH v. PARBHOO NATH PATHUK.

We reverse the decree of the lower Appellate Court and declare the marriage of the 2nd defendant Mahomed Ismail with the plaintiff's daughter Ghulam Fatma to be invalid. Appeal allowed with costs in both Courts.

Appeal allowed; Decree reversed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2045 OF 1914.

April 25, 1916.

Present:—Mr. Justice Mullick.

BISESWAR SINGH—DEFENDANT—
APPELLANT

versus

PARBHOO NATH PATHUK AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103—Record of Rights, entry in, as to occupancy rights of tenant—Presumption—Burden of proof.

An entry in the Record of Rights showing a person to be an occupancy tenant creates a presumption in favour of such person, and the onus is on the landlord to establish the contrary. [p. 506, col. 2.]

Mr. Chander Sekhar Persad Singh, for the Appellant.

JUDGMENT.—The plaintiff is the landlord; defendant No. 1 is the tenant and defendants Nos. 2 to 10 are plaintiff's co-sharer landlords.

In his plaint the plaintiff alleged that the lands in suit had been entered in *Patti* No. 1037 and that the defendant No. 1 had been entered as an occupancy *raiyat*. The plaintiff complains that this entry as to the status of the defendant is wrong, that defendant is a trespasser and that the Record of Rights is incorrect. He asks for a declaration of title and recovery of possession.

The defendant No. 1 contends that the lands have been recorded in *Patti* No. 1038 and that the plaintiff has no title thereto.

The Munsif appears to have been at great pains to determine whether or not the lands were in *Patti* No. 1037 or 1038, but I am unable to understand why he went into this matter seeing that the Record of Rights itself shows the lands to be in No. 1037. It was for the defendant if he

challenged that to prove it to be incorrect, but the learned Munsif appears to have thought that the onus was upon the plaintiff to show that the Record of Rights was incorrect. Possibly the learned Munsif was under the impression that the Record of Rights showed the lands to be in No. 1038; if so, that was an inexcusable error on his part, because a moment's perusal would have satisfied him that the lands were entered in No. 1037. Finding that the lands had not been shown to be in No. 1037 the Munsif dismissed the suit.

On appeal the learned Subordinate Judge has correctly thrown the onus upon the defendant in the matter, as to whether the lands are or are not within No. 1037. He finds that the defendant has not discharged that onus and he accordingly finds the plaintiff's title as landlord established. But the learned Subordinate Judge has gone wrong in throwing the onus upon the defendant in the matter of the entry which shows him to be a tenant under the plaintiff. He says that it is for the defendant to show that he is a tenant. This clearly cannot be correct, because the Record of Rights creates a presumption in the defendant's favour which it is for the plaintiff to rebut. If, therefore, it had been shown that this error in placing the onus has vitiated the finding of the Subordinate Judge as to the defendant's status I would have remanded the appeal; but the subsequent part of the learned Subordinate Judge's judgment makes it clear that the question of onus is purely academical and that the error in placing the burden has not in any way vitiated his finding. He says that he believes the plaintiff's evidence to the effect that the defendants are not tenants and that the defendants have not been able to show that they are tenants. That is to say, the learned Subordinate Judge upon a consideration of the evidence on both sides has come to the conclusion that the defendant's claim of tenancy has not been proved and that the plaintiff by his evidence has been able to rebut the presumption created in the defendant's favour by the Record of Rights. That being so, I consider it unnecessary to remand the case. The appeal will, therefore, be dismissed with costs.

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

This judgment will govern Appeal No. 3692 of 1914 which also is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT No. 235 OF 1914.

December 21, 1915.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Srinivasa Aiyangar.

CHINNU PILLAI AND OTHERS—

DEFENDANT No. 2's LEGAL REPRESENTATIVES
—APPELLANTS

versus

VENKATASAMY CHETTIAR AND
OTHERS—PLAINTIFFS AND DEFENDANTS No. 1—
RESPONDENTS.

*Mortgage—Property subject to several mortgages—
Suit for sale by prior mortgagee—Puisne mortgagee not
made party—Decree and Court sale—Purchaser,
rights and liabilities of—Puisne mortgagee, whether can
sue for sale subject to prior encumbrance.*

A certain property was subject to three simple mortgages. The 3rd mortgagee sued for sale subject to the prior mortgages. It appeared that the 2nd mortgagee had already obtained a decree for sale on the footing of his mortgage and had sold the property and that the purchaser at the Court sale had redeemed the 1st mortgage:

Held, that the plaintiff was entitled to a decree for sale of the property subject to the prior mortgages and could not be obliged to redeem the prior mortgages before bringing the property to sale. [p. 508, col. 1; p. 509, col. 1.]

Per *Coutts Trotter, J.*—What passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of his mortgage, subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. [p. 507, col. 2.]

Of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent. [p. 507, col. 2.]

Per *Srinivasa Aiyangar, J.*—A puisne mortgagee who is not made a party to a suit for sale by a prior encumbrancer, is entitled to insist on a decree for sale subject to the previous mortgage. [p. 509, col. 1.]

Case-law on the subject discussed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 81 of 1913.

Mr. T. M. Krishnaswami Aiyar, for the Appellants.

Messrs. C. V. Ananthakrishna Aiyar and
K. B. Ranganatha Aiyar, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—In a recent case my brother Spencer, J., and I had occasion to consider a question analogous to that which arises for determination here. All the decisions were cited before us, and having regard to their conflicting nature it is not surprising that we had very great difficulty in coming to a conclusion. No judgments were delivered, as the parties came to terms. But during the course of a careful and lengthy examination of cases, I came to the conclusion that *Venkatagiri Aiyar v. Sadagopachariar* (1) was in conflict with the Full Bench decision in *Mulla Veetil Seethi v. Achuthan Nair* (2) and that if the former case was wrongly decided, then *Venkatanarasammah v. Ramiah* (3) could not stand either. My brother in the judgment which he is about to read and which I have had the advantage of perusing has exhaustively reviewed the cases; and I assent entirely both to his conclusions and the reasoning by which they are reached. Speaking for myself, I think the matter is made plain when two fundamental principles, which I will endeavour to formulate in my own words, are grasped. The first is, that what passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of his mortgage, subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is, that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent. Apply these principles to the present case and what is the result? The plaintiffs have a right to sell their mortgagor's interest as it stood at the date of their mortgage. At the date of their mortgage, it was subject to the two prior encumbrances; therefore, they can only sell subject to these encumbrances. The fact that there had been a previous sale by a prior

(1) 10 Ind. Cas. 83; 14 Ind. Cas. 449; 22 M.L.J. 129.

(2) 9 Ind. Cas. 513; 21 M. L. J. 213 (F. B.); 9 M. L. T. 431; (1911) 1 M. W. N. 165.

(3) 2 M. 108.

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

encumbrancer does not affect their rights, as they were not made parties to that suit. In that suit the 2nd mortgagee could have sold the property as it stood at the date of his second mortgage, i.e., subject only to the 1st mortgage, but he did not comply with the condition that in order to effect this he must join subsequent encumbrancers. The result is, as I have said, that the 3rd mortgagee can sell the property subject to the prior mortgages. The prior encumbrancers cannot redeem the later; the later can, but need not, redeem the earlier. It follows that the decree made in this case was right and the appeal must be dismissed.

The necessary result of our decision is to dissent from *Venkatagiri Aiyar v. Sadagopachariar* (1) and *Venkatanarasammah v. Ramiah* (3), and I have considerable difficulty in distinguishing *Rangayya Chettiar v. Parthasarathi Naicker* (4) from those cases. In my opinion all these cases are inconsistent with the principles embodied in the Full Bench judgment in *Mulla Veetil Seethi v. Achuthan Nair* (2) and as I am bound by the Full Bench judgment, to which I respectfully give my complete concurrence, I am unable to treat them as authorities binding upon me.

SRINIVASA AIYANGAR, J.—This is an appeal by the 2nd defendant. There were three simple mortgages on certain premises. The plaintiffs' is the 3rd. The 2nd mortgagee sued for sale on his mortgage, obtained a decree and sold the properties; the 2nd defendant is the purchaser at the Court sale. After his purchase he has redeemed the 1st mortgage. To the suit of the 2nd mortgagee the plaintiffs were not made parties. The 2nd defendant's position is, therefore, that of an assignee of the first two mortgages and of the equity of redemption subject to the charge of the plaintiffs. The plaintiffs now sue for sale subject to the two prior mortgages and the question is, whether they are entitled to the relief. The 2nd defendant says that the plaintiffs cannot get a decree for sale subject to the two prior mortgages, but must first redeem them and then bring the properties to sale, unless the 2nd defendant redeems them as the ultimate owner of the equity of redemption; while the plaintiffs insist that they are not bound to redeem, as they are not affected by the previous decree,

(4) 20 M. 120.

but are entitled to bring the properties to sale subject to the prior mortgages. The actual decree passed is one for sale free of all encumbrances, unless the 2nd defendant redeemed the plaintiffs. The learned Pleader for the appellants says that, 'if we decide that the plaintiffs are entitled to a decree for sale subject to the previous mortgages, he is content to leave the decree as it is. The learned Pleader for the appellants raised a further point in appeal which was not raised in the first Court, viz., that he is in a position to prove that the plaintiffs' mortgage was granted when the suit of the 2nd mortgagee was pending, and they were affected by *lis pendens*. As this point, if allowed, would necessitate a fresh plea and investigation on facts, we have declined to hear him on this point. The only question, therefore, for determination is, whether a puisne mortgagee who is not made a party to a suit for sale by a prior encumbrancer, is entitled to insist on a decree for sale subject to the previous mortgage. The rights and liabilities of a puisne encumbrancer not made a party to a suit for sale by the senior encumbrancer were elaborately discussed and all the cases were reviewed by a Full Bench of this Court and the conclusions arrived at were formulated in the shape of four propositions at the end of the judgment, *Mulla Veetil Seethi v. Achuthan Nair* (2). If those propositions are correct the answer to the question in this case must be in the affirmative. The learned Pleader for the appellants, however, contends that these propositions are really *obiter* and, therefore, not binding on us; that they were so treated in *Venkatagiri Aiyar v. Sadagopachariar* (1); that the present case is on all fours with *Cangayam Venkataramana Iyer v. Henry James Colley Gompertz* (5), which is referred to and not dissented from in the Full Bench case. I may say at once that I do not consider that the propositions of law deduced by the Full Bench from a review of the previous authorities are merely *dicta*; they are the principles on which the actual decision in the case depended and are binding on us. Further, as I think (if I may say so without presumption) that these propositions correctly lay down the law, I do not think it necessary to discuss the authorities cited therein. The decision in

(5) 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298,

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

Rangayya Chettiar v. Partharasathi Naicker (4), which is approved of in the Full Bench case and followed in *Congayam Venkataramana Iyer v. Henry James Colley Gompertz* (5) on another point, is on all fours with the present case and is conclusive against the appellants.

The later case of *Venkatagiri Aiyar v. Sadagopachariar* (1), however, appears to be in conflict with the Full Bench decision and I, therefore, propose to examine it, more especially ■ there are *dicta* in some of the cases cited therein which appear to me to be incorrect.

Under the Indian practice a mortgagee who sues to realise his security by sale of the mortgaged properties must make all persons, who have acquired an interest in the properties subsequent to his mortgage, parties to the suit, but a puisne encumbrancer need not make prior encumbrancers parties (Order XXXIV, rule 1, of the Code of Civil Procedure). I do not pause to consider what will be the effect of ■ covenant not to alienate (*pactum de non-aliendo*) on the duty of a mortgagee to make subsequent alienees parties. *Venkata v. Kannam* (6), *Shields v. Schiff* (7). A mortgagee obviously cannot foreclose or sell without making the ultimate owner of the equity of redemption a party and a senior mortgagee cannot, therefore, foreclose and sell merely the interest of ■ junior encumbrancer in the mortgaged property. If he obtains ■ decree for sale in the absence of the ultimate owner of the equity of redemption, it had been doubted whether even the plaintiff mortgagee's right passed to the purchaser (Ghose on Mortgages, page 620). It has, however, been held in America, where the usual decree is for sale, that ■ junior encumbrancer is not a necessary, though a proper, party to a mortgagee's suit for sale. 'See Jones on Mortgages, section 134 and 135.) Under the Statute in India he is a necessary party, though if he is not made a party and ■ decree is obtained, the decree would not be void, but ineffective to affect the rights of the encumbrancer not joined; and the purchaser in an execution sale held under that decree would be in no better position than if he had obtained an assignment of the rights of the encumbrancers who were

(6) 5 M. 164 at p. 186.

(7) 124 W. S. 357 at p. 358.

parties to the suit and a transfer from the owner of the equity of redemption. The puisne mortgagee, unless he disputes the senior mortgage or its priority, or desires to ascertain the amount due, or redeem or obtain a sale of the mortgaged property free of his encumbrance [which can only be done with his consent, *Wickenden v. Raysan* (8)], should not make a previous mortgagee a party. The puisne mortgagee has the right to bring to sale the property ■ it stood at the time of his mortgage and that right which is secured to him under section 67 of the Transfer of Property Act cannot be taken away by a proceeding to which he was not a party. In *Moulton v. Cornish* (9), decided by the New York Court of Appeals, it was said: "The right to a judicial sale of the mortgaged property to pay the mortgage-debt is in this State one of the incidents of the mortgage contract; and if the mortgagor is in default, the mortgagee is entitled to the enjoyment of this right unimpaired. It can only be secured to him by a sale, in an action or proceeding to which he is ■ party; for in all such cases the sale is made for the benefit of all the parties interested, and the proceeds are distributed among them in the order of the priority of their respective liens. The 2nd mortgagee possessed the right to maintain an action upon it for the foreclosure of so much of the equity of redemption as remained in the mortgagor at the time when it was recorded, and for ■ satisfaction of the debt secured by it, by ■ sale of the mortgaged premises. This right is so important in these cases that the holder of the mortgage cannot be deprived of it without at the same time...impairing and depreciating the security created by the mortgage. Where it is a 2nd mortgage and the mortgagee is made a party to the foreclosure of a prior mortgage, full effect is given to this power of sale, by means of the sale directed in the action or proceeding which, ■ we have seen, is made for the benefit of all the parties served with process or notice". Again speaking of the 1st mortgagee purchaser who sued to compel the puisne encumbrancer (who was not a party to the previous suit) to redeem or to be foreclosed, it was said: "But she

(8) (1855) 6 De G. M. & G. 210; 43 E. R. 1212; 25 L. J. Ch. 162; 4 W. R. 39; 26 L. T. (o. s.) 192; 106 R. 82.

(9) 138 N. York 133; 20 L. R. Annotated 370.

CHINNU PILLAI v. VENKATASANY CHETTIAR.

occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor, and an assignment of the other encumbrances, and had gone into possession. As to the defendant, her mortgage is still unforeclosed, and the estate which the mortgagor had when he executed the defendant's mortgage is still subject to its lien. The plaintiff may at any time foreclose her mortgage, as against the defendant, notwithstanding the former defective foreclosure. It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of the defendant's mortgage." As the plaintiff in that suit had not made purchasers of other portion of the mortgaged estate parties to the suit, the Court, after holding that if the plaintiff desired she might be allowed to amend the plaint by making them parties, proceeded to observe: "If the plaintiff obtains leave to amend by bringing in all the necessary parties, she may have a decree for a foreclosure of her mortgage as against the defendant, and a sale of the mortgaged premises. This is the extent of the relief to which she is entitled." I have made this long extract, as I think it expresses precisely what I wish to say. The rights and liabilities of senior and junior simple mortgagees under the Transfer of Property Act are exactly the same as stated in the above opinion. In order to avoid misapprehension I should say that, except in a very few States in America, the theory of the mortgagee being the legal owner is discarded, and foreclosure as understood in English practice called "strict foreclosure" is not the ordinary remedy, but the ordinary remedy of a mortgagee is sale which is sometimes called "ordinary foreclosure" or "foreclosure sale," though in exceptional cases strict foreclosure is awarded. The mortgages referred to are what are known as English mortgages as defined by the Transfer of Property Act. I need hardly point out that in the case of simple mortgages under the Transfer of Property Act sale is the only remedy and the Courts have no jurisdiction to order strict foreclosure in any case.

Applying the above principles, the puisne mortgagees in this case, who have made the present owner of the equity of redemp-

tion, viz., the 2nd defendant a party, are entitled to a decree for the sale of the security as it stood at the date of their mortgage, i. e., the properties subject to the 1st and 2nd mortgages. The fact that the 2nd defendant happens also to be the assignee of the 1st and 2nd mortgagees cannot in any way affect or prejudice the plaintiffs.

It is, however, contended that if the senior mortgagee is in fact made a party, though the plaintiff does not seek any relief in respect of the prior mortgages, the plaintiff must redeem; on what principle this argument is based I am unable to see. It will be observed that the plaintiffs have no choice in the matter of making the 2nd defendant a party and why any action of third parties behind their back should prejudice their rights it is impossible to understand. The case of *Cangayam Venkataramana Iyer v. Henry James Colley Gompertz* (5) is, as pointed out in the Full Bench case, no authority for that position. In that case the plaintiff asked in the alternative for redemption of the previous mortgages and sale. That of course he was entitled to ask, though he was not bound to. The decision proceeded on the basis that as the plaintiff had asked for the relief, though in the alternative, the Court for finally adjusting the rights of all parties can make a decree in that form. If the decision goes further, and was intended to decide that the defendant who happens to be also a prior mortgagee can compel the plaintiff to redeem in the sense that unless he so redeems his suit must be dismissed, I am unable to agree. Even if the defendant had instituted an action to compel the puisne mortgagee to redeem (and no such action can be instituted, as I have said above, without making the owner of the ultimate equity of redemption a party), the only relief which the senior mortgagee can have in default of redemption is sale of the property free of all liens and payment of his mortgages in priority, then payment of the mortgage of the junior encumbrancer and the payment of the balance, if any, to himself as the owner of the equity of redemption. In no case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

fact, when it is said that the junior mortgagee is bound to redeem, or his only right is to redeem or that the senior mortgagee can compel redemption.

In the Full Bench case the actual decision was that ■ senior simple mortgagee who had purchased in execution of a decree for sale against the mortgagor, had no right to recover possession of the property from ■ puisne usufructuary mortgagee who was not a party to the previous suit. The senior mortgagee had the right to compel the junior mortgagee to redeem, but if he did not, his mortgage cannot be extinguished so ■ to enable the 1st mortgagee purchaser to obtain possession as if the 2nd mortgage had been satisfied: he might be entitled to sell the property, in which case both his and the 2nd mortgage will have to be paid out of the sale-proceeds. So also in the present case if the 2nd defendant had instituted a suit against the plaintiffs (and he would, I think, be entitled to do so though he had already sued the mortgagor) he could have obtained a decree for sale of the property free of all encumbrances and all the mortgages would be paid out of the sale-proceeds in the order of priority. He certainly cannot have a larger right as a defendant. If he wants to keep the property as purchaser he can only do so by redeeming the plaintiffs.

In *Venkatagiri Aiyar v. Sadagopachariar* (1) the 1st mortgagee first sued without making the 2nd mortgagee a party, ■ he ought to have done, and obtained a decree for sale. The 2nd mortgagee next brought his action for sale and obtained ■ decree for sale subject to the 1st mortgage. The 1st mortgagee was a party to this suit, but he need not have been made a party. The mortgagor was a party to both the suits. Both the decrees were executed and the mortgaged properties were purchased by different persons. The question was, which purchaser was entitled to possession as owner. It is to be observed that at the time of the institution of the second suit the 1st mortgagee had not brought the properties to sale, and the mortgagor was still the owner. The 2nd mortgagee's suit was, therefore, properly constituted to entitle him to sell the property subject to the lien of the 1st mortgagee. The 1st mortgagee's suit was

improperly constituted and ■ purchaser in execution of that decree cannot, I think, have ■ better or larger right than if he was ■ private assignee of the equity of redemption from the mortgagor during the pendency of a suit for sale against his vendor. I should, therefore, hold that the purchaser at the sale in execution of the 2nd mortgagee's decree was entitled to the possession of the property as the owner of the ultimate equity of redemption. The purchaser under the 1st decree, who is practically in the position of an assignee of the rights of the 1st mortgagee, may be entitled to bring a suit for sale against the purchaser in the 2nd mortgagee's sale, but the latter would be entitled to the balance of the sale-proceeds after satisfying the 1st mortgage, which shows that the purchaser at the 1st mortgagee's sale does not really acquire the ultimate equity of redemption. This, I think, is perfectly right on principle. Take a case in which the 1st mortgagee obtains a decree for sale without making the 2nd mortgagee ■ party and brings the property to sale, which is purchased either by himself or a stranger. If after this the 2nd mortgagee brings his suit for sale, he must make the previous purchaser party; but can obtain a decree for sale, and the purchaser at that sale would be entitled to possession from the previous purchaser. If that would be the result if the purchase had been made before the second suit was instituted, the same result must follow if the purchase was made during the pendency of the second suit. The principle of *lis pendens* would apply. No doubt the purchaser at the first sale, if he buys after the institution of the 2nd mortgagee's suit, may be entitled to redeem standing in the shoes of the mortgagor, or he may join as ■ party in the 2nd suit and apply for a sale of the property free of encumbrances or if there be a sale subject to his own first mortgage may claim to be paid the balance of the sale-proceeds after satisfying the plaintiff's 2nd mortgage. His previous purchase by itself does not entitle him to have or to keep possession of the mortgage premises as against the purchaser in the second sale. If the second sale was subject to the 1st mortgage, he can no doubt bring ■ fresh action for sale against the 2nd purchaser. The doctrine of *lis pendens* cannot

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

of course affect titles or rights acquired prior to the institution of a suit, nor rights acquired from or through persons not parties to a suit. The difficulty arises from the fact of the mortgagor, as the owner of the ultimate equity of redemption, being a party to two different suits for sale, instituted by the 1st and 2nd mortgagees respectively without making the other a party. But a moment's consideration will show that the right of the 1st mortgagee to sell the equity of redemption is a right to sell it as it stood at the date of his mortgage, which he can enforce only in a proceeding to which the 2nd mortgagee is a party; otherwise the sale at the best can convey to the purchaser only the equity of redemption subject to the 2nd mortgage. The 2nd mortgagee is left free to enforce his security. As the first mortgagee is not a party to the 2nd mortgagee's suit, the right of the purchaser in his sale to sue as a first mortgagee may not be affected, but his right to hold as a purchaser of the equity of redemption would.

In the case of *Venkatagiri Aiyar v. Sadagopachariar* (1) (and similar observations occur in several other cases) it is said that "as both of them (i. e., the 1st and 2nd mortgagees) are entitled to bring to sale (the equity of redemption), the first sale puts an end to the mortgagor's interest and conveys it to the purchaser. If, therefore, the 1st mortgagee sells the property, before the puisne mortgagee, then there is nothing for the latter to sell"; but this ignores the fact that the first purchaser purchases it subject to the right of the 2nd mortgagee to sell. The judgment is also vitiated, if I may respectfully say so, by the erroneous assumption that the puisne mortgagee has only a right to redeem in the sense that unless he so redeems, his mortgage-interest becomes extinct. In other words, a simple mortgagee who does not conform to the provisions of the law, by not making a puisne mortgagee a party, becomes entitled to a right of strict foreclosure, a wholly unreasonable result. It is said that "each mortgagee might go on *ad infinitum* without making the other a party." If the view which I have set forth is correct, in the case where the 1st mortgagee had omitted to make the 2nd mortgagee a party and proceeded to sale, the purchaser, whether himself or another, can bring a

fresh suit for sale making the 2nd mortgagee a party; or he can as a defendant, when the 2nd mortgagee instituted a suit for sale, insist on a sale of the property free of his mortgage, or if he had not proceeded to sale before the 2nd mortgagee's sale, he can, though not made a party, get the necessary relief by applying for sale free of encumbrances in the mortgagee's suit. If finally a sale takes place in the 2nd mortgagee's suit the 1st mortgagee can again sue or if he sells under his decree, the purchaser can. There cannot be more than three suits at the most and if the 1st mortgagee's action had been properly constituted there cannot be more than one suit. They cannot go on *ad infinitum*. The principle should be that the purchaser in the properly constituted suit is entitled to the ownership of the properties and if these two suits by the 1st and 2nd mortgagees respectively are both properly constituted, the purchaser in the 1st mortgagee's suit is so entitled.

I shall now briefly refer to the cases cited in *Venkatagiri Aiyar v. Sadagopachariar* (1).

The first is *Venkatanarasammah v. Ramiah* (3), which is similar to the principal case. One learned Judge was of the opinion that the 2nd mortgagee's right still subsisted and that the first purchaser took the property subject to the second mortgage which, it was said, can be enforced in a separate suit. The other learned Judge, though he did not express any final opinion, thought that the second mortgagee's right was practically extinguished. Nobody now contends that the latter view is correct. Taking the former, viz., that the 2nd mortgagee can assert his right in a separate suit, there is no indication in the judgment that such right is only a right to redeem, in default of exercise of which the mortgage becomes extinguished. Therefore it comes to this: though the 2nd mortgagee is entitled to bring a fresh suit against the purchaser in the 1st sale to sell the property for the satisfaction of the 2nd mortgage-debt subject to which the first purchaser took (that I think necessarily follows from the Full Bench decision), yet the whole of the proceedings taken by the 2nd mortgagee to realise his security, which proceedings

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

were regularly and properly constituted, in which he obtained the decree which he was entitled to get, viz., the sale of the premises subject to the 1st mortgage, becomes wholly infructuous not owing to any fault of his, but because a purchaser comes into existence *pendente lite*, whose purchase is in execution of a decree in a suit improperly constituted. I say it with all humility, but I am not able to see either the logic or the justice of it. It may be said that the 2nd mortgagee may apply to be made a party in the 1st mortgagee's suit, so also the 1st mortgagee can make himself a party in the 2nd mortgagee's suit. Further, the 2nd mortgagee may not know of the existence of a suit by the 1st mortgagee, as there is no system of registration of *lis pendens* here. So far as the 1st mortgagee is concerned, there is generally no excuse for his not making a puisne mortgagee a party, for in a large majority of cases a search of the register of immovable properties would show the existence of all incumbrances, and in the few cases in which mortgages for less than Rs. 100 may be made by delivery of possession, such possession would be sufficient to give notice to the 1st mortgagee. Why then should the 2nd mortgagee or the purchaser in his sale be driven to another suit, when the 1st mortgagee who had omitted to make the 2nd mortgagee a party can and ought to sue again? I am, of course, dealing with the case of two simple mortgages. If the 1st mortgage was an English mortgage and if without negligence the 1st mortgagee obtains a decree for sale without making the 2nd mortgagee a party and there is a sale, the purchaser may in some exceptional cases obtain an order for foreclosure against the 2nd mortgagee in default of redemption, though even in such cases the proper order ordinarily should be sale. [*Moulton v. Carnish* (9).] Though this decision [*Venkatanarasammah v. Ramiah* (3)] had not been dissented from in the Full Bench case, it is really inconsistent with the principles laid down therein and ought not to be followed.

The next case is *Krishan v. Chaldayan Kutti Haji* (10). There the 2nd mortgagee

set up his rights in certain claim proceedings and there was an adverse order against him. He did not challenge it by a regular suit within the time limited and was, therefore, disentitled to claim his rights as 2nd mortgagee thereafter. The case is also otherwise distinguishable.

Rangayya Chettiar v. Parthasarathi Naicker (4) is, as I have already said, on all fours with the present case. There, in this, at the time when the suit of the 2nd mortgagee was instituted, had been a sale in execution of the 1st mortgagee's decree, and the purchaser who became the owner of the ultimate equity of redemption was made a party and a sale of the property subject to the 1st mortgage was directed.

Muhammad Usan Rowthan v. Abdulla (11) seems to be *ad idem* with the case in *Rangayya Chettiar v. Parthasarathi Naicker* (4) but a contrary conclusion was arrived at. One of the learned Judges who was a party to both the decisions was able to distinguish the previous case; I confess I do not understand the differences, though as suggested in the Full Bench case the decision in *Rangayya Chettiar v. Parthasarathi Naicker* (4) probably rested on the interpretation of the decree in the 2nd mortgagee's suit.

Akatti Moidin Kutty v. Chirayil Ambu (12) purports to follow the decision in *Venkatanarasammah v. Ramiah* (3) and does not require any detailed consideration; but the actual decision seems to be quite right as the purchaser in the 2nd mortgagee's sale was held to be the owner.

The decision in *Kutti Chettiar v. Subramania Chettiar* (13) gives effect to the principle I have formulated, though the decision appears to have been based merely on the priority of sales.

The decisions in this Court purport to follow the decisions in *Nanack Chand v. Teluckdye Koer* (14), and *Dirgopal Lal v. Bolaker* (15). At that time the practice in

(11) 24 M. 171.

(12) 26 M. 486.

(13) 32 M. 485.

(14) 5 C. 255; 4 C. L. R. 358.

(15) 5 C. 269.

CHINNU PILLAI v. VENKATASAMY CHETTIAR.

mortgage suits was not settled, and decrees were executed as if they were mere decrees for money by attachment and sale. The statement in the judgments that the purchaser was holding as a trustee for the mortgagor subject to redemption shows that the previous decrees, in execution of which the sales took place, were mere money decrees, and not decrees for sale in suits by a mortgagee to enforce his right to realise the security. To a suit on the covenant to pay, none but the mortgagor need be made a party, and if a sale of the equity of redemption is permitted in execution of such a decree it is obvious that the 1st purchaser would be entitled to possession. These decisions are not authorities for the position that in a mortgage sale the 1st purchaser is always entitled to possession.

Taking then two simple mortgagees, their rights and liabilities will be as follows:

1. If the 2nd mortgagee sues first, he can, without making the 1st mortgagee a party, sell the property subject to the 1st mortgage; the purchaser will become the owner of the equity of redemption instead of the mortgagor, but subject only to the 1st mortgage as the 2nd mortgage is extinguished, by the sale. The 1st mortgagee can sue to recover his mortgage-money by sale without making the 2nd mortgagee or the mortgagor a party but only the purchaser. If he wants a personal decree against the mortgagor, he can also be joined in the same suit.

2. If the 2nd mortgagee sues first, he can join the 1st mortgagee and redeem him and sell the property and realise the amount due on both the mortgages.

3. If the 2nd mortgagee sues first, he can join the 1st mortgagee, and with his consent ask for a sale of the property free of all encumbrances. The sale-proceeds will be distributed according to priority.

4. If the 2nd mortgagee sues first without making the 1st mortgagee a party, the 1st mortgagee may in execution of the 1st decree require the property to be sold free of his mortgage and if the amount due to him is admitted, the Court can order a sale free of all encumbrances.

5. If the 2nd mortgagee sues first without making the 1st mortgagee a party

the 1st mortgagee can, while the 1st suit is pending, sue for sale making the 2nd mortgagee and the mortgagor a party, in which case there can be no sale in the first suit and if there had been a sale pending the 1st mortgagee's suit, the purchaser will be affected by *lis pendens*. He can redeem the 1st mortgagee, in which case there will be no sale in the 1st mortgagee's suit or if there is a sale, can claim the balance of the sale-proceeds after payment to the 1st mortgagee, as both the 2nd mortgagee and the mortgagor must be presumed to have obtained the value of their interests in the property out of the sale-proceeds in the first sale. In this case, the purchaser under the second sale gets the property and is entitled to possession against the 1st purchaser.

6. If the 1st mortgagee sues first, making the 2nd mortgagee a party he ought, there cannot be a trial of a further action.

7. If the 1st mortgagee sues first without making the 2nd mortgagee a party, the 2nd mortgagee is not affected and can bring his own action for sale making the mortgagor a party, if there had been no sale in the 1st mortgagee's suit or if there had been a sale, making the purchaser a party in his capacity of the ultimate owner of the equity of redemption; and the purchaser in the 2nd mortgagee's execution sale gets a good title to the property. He is not affected by any *lis pendens*, while any purchaser in the 1st mortgagee's sale would be.

I, therefore, think the appeal fails and must be dismissed with costs.

Appeal dismissed.

ISMAIL ALLARAKHIA v. DATTATRAYA R. GANDHI.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 59
OF 1915.

February 1, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.ISMAIL ALLARAKHIA—PLAINTIFF—
APPELLANT

versus

DATTATRAYA R. GANDHI—

DEFENDANT—RESPONDENT.

*Contract Act (IX of 1872), ss. 20, 65—Contract—
Parties under material mistake of fact—Mortgage
by person personating real owner—Transfer of mortgage
rights by mortgagee—Covenant for good title—Recission
of contract—Right of transferee to refund of considera-
tion—Caveat emptor, rule of, whether applies.*

C executed a mortgage-deed to D falsely per-
sonating M, the real owner of the mortgaged pro-
perty. D transferred his mortgage right to A for a
consideration and in the deed of transfer both C
and D covenanted good title. C forged M's signature
in both the deed of mortgage and its transfer. A,
having discovered the fraud, instituted the present
suit against D, for refund of the consideration paid
by him to D:

Held, (1) that, as both plaintiff and defendant
were under a mistake as to an essential fact, viz.,
that the real owner M made himself liable on the
mortgage and confirmed the covenant as to title,
the transfer-deed was void under section 20 of the
Contract Act and the defendant was bound to repay
the transfer money to plaintiff under section 65 of
the Act; [p. 516, cols. 1 & 2.]

Clare v. Lamb, (1875) 23 W. R. 389; 10 C. P. 334;
44 L. J. C. P. 177; 32 L. T. 186 and *Bree v. Holbeck*,
(1781) 2 Dougl. 654; 99 E. R. 415, explained.

Johnson v. Johnson, (1802) 3 B. & P. 162; 127 E. R.
89; 6 R. R. 736, referred to

(2) that the maxim *caveat emptor* did not apply
the real owner of the property never, in fact,
joined in the transfer. [p. 516, col. 1.]

Appeal against the decree of Mr. Justice
Macleod, sitting on the Original Side.

Mr. Jinnah, for the Appellant.

Mr. Kanga, for the Respondent.

JUDGMENT.

SCOTT, C. J.—Under the Will of Louis
Mary Valladares two of his three sons,
namely, Joseph Francis and Louis Mary,
became entitled as tenants-in-common to
equal moieties of the testator's house at
Mazagaon. The third son Calisto was,
by the Will, given a right of residence in
the house so long as he lived in harmony
with his brothers and sisters.

On the 13th of June 1914, Calisto,
fraudulently representing himself to be
his brother Louis Mary and as entitled

to an equal moiety in the house, purported
to mortgage such moiety in favour of
Abdul Latif Sumar.

On the 10th of September 1914, Calisto,
again fraudulently representing himself to
be his brother Louis Mary, purported to
create a second mortgage of the said
moiety in favour of the defendant
Dattatraya R. Gandhi.

Both the first and second mortgages were
registered, Calisto fraudulently represented
himself to be Louis Mary before the
Sub-Registrar.

On the 19th of July 1915, Calisto again
fraudulently representing himself to be the
said Louis Mary purported, Louis Mary,
to join in a transfer executed on that date by
the defendant to the plaintiff in consideration
of the sum of Rs. 1,770. By the transfer Calisto
personating Louis Mary purported to con-
sent to the transfer for the sum of Rs. 1,770,
agreed to be the amount owing to the de-
fendant by the mortgagor under the second
mortgage of the 10th September 1914.
Under the transfer the transferee was
expressed to get the full benefit of the
covenants contained in the second mort-
gage and to the transfer of the moiety and
all the estate, right, title and interest of the
mortgagee and the mortgagor therein.
The mortgagee covenanted expressly that
he had not incumbered. The covenants
of which the transferee was expressed to get
the benefit with the consent of the mortgagor
included the mortgagor's covenant for title
that he had power to transfer.

The intention of the transferee was clearly
to have the settlement of the mortgage-debt
and the mortgagor's covenants for title in
the second mortgage confirmed by the mort-
gagor. For this purpose the mortgagor was
a necessary party. The transfer was, how-
ever, never executed by him but by a forger
in his name.

The result was that the transferee had no
recourse against the mortgagor after discover-
ing that the second mortgage was a mere
fictitious security.

He now sues the defendant as transferor
for return of the purchase-money as on a
total failure of consideration.

The learned Judge, being of opinion that
the case could be disposed of on the authori-

UMESH CHANDRA GHOSE v. KALA CHAND GUHA.

ty of *Clare v. Lamb* (1) and *Bree v. Holbeck* (2), applied the maxim "*caveat emptor*" and dismissed the suit. We are unable to agree in the conclusion arrived at by the lower Court.

In *Clare v. Lamb* (1) the Court recognized the correctness of the following statement of the law in Sugden's Vendors and Purchasers: "Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by all the necessary parties he may recover the purchase-money in an action for money had and received," and in Dart on Vendors and Purchasers* that—"Until the conveyance is executed by all necessary parties the vendor remains liable in respect to all defects in title. He must, for instance, refund the purchase-money, if the purchaser having paid it, even though he has taken possession, is evicted by an adverse claimant."

In *Johnson v. Johnson* (3), where a conveyance of property of a testator required execution by three trustees under the Will and was only executed by two, the purchaser on eviction under a superior title for one of the parcels conveyed was held entitled to recover the purchase-money in respect of that parcel.

In the case before us the supposed Louis Mary was rightly deemed a necessary party to the transfer and the deed was prepared upon that footing, but the transfer was never executed by Louis Mary. The defendant cannot successfully rely upon the transfer till it has been executed as drawn. The purchaser cannot be made liable on the maxim of *caveat emptor* if the owner, from whom he believed he was to get a confirmation both of the covenant for title and of the transfer of the mortgagor's estate in the premises, never in fact joined in the transfer.

If the stage of complete execution by all necessary parties is not reached there is no reason for not applying the rule of the Indian Contract Act, section 20, "Where both the parties to an agreement are under mistake as to a matter of fact essential to the

agreement, the agreement is void." Here both plaintiff and defendant believed that Louis Mary was agreeing to the amount due on the mortgage and confirming the covenants contained therein, and agreeing to the transfer of the mortgagor's estate in the mortgaged premises, whereas in fact he was no party to the negotiations. The defendant is, therefore, under section 65, bound to repay the transfer money.

It is unnecessary in the view we take to discuss the arguments addressed to us on the covenants for title implied under section 55 (2) of the Transfer of Property Act.

We set aside the decree dismissing the suit and pass a decree for the plaintiff for the sum claimed with interest and the costs of suit throughout.

Appeal allowed; Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2803
OF 1913.

April 4, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Beachcroft.

UMESH CHANDRA GHOSE AND ANOTHER
DEFENDANTS NOS. 3 AND 11—
APPELLANTS

versus

KALA CHAND GUHA AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Lease, covenant against transfer in—Proviso for re-entry after notice on breach of covenant—Transfer by lessee of major portion of property—Ejectment, suit for, without notice to quit—Maintainability—Transfer of Property Act (IV of 1882), ss. 10, 12, 106, 110 (g).

A covenant in a lease forbidding transfer by the lessee is valid and enforceable even when the lessee has not transferred the whole of the property leased but reserved a fraction for himself. But if the lessor has undertaken to determine the lease on breach of the covenant by the lessee only after giving him notice in accordance with law, the lease cannot be determined without a notice under section 106 of the Transfer of Property Act. [p. 518, col. 1.]

Appeal against the decree of the Subordinate Judge, First Court, Backergunge, dated the 19th of May 1913, affirming that of the Munsif, First Court, Perajpur, dated the 17th of June 1912.

FACTS material to the report will appear from the arguments and the judgment of the Court.

(1) (1875) 10 C. P. 334; 44 L. J. C. P. 177; 32 L. T. 196; 23 W. R. 389.

(2) (1781) 2 Dougl. 654; 99 E. R. 415.

(3) (1802) 3 B. & P. 162; 127 E. R. 89; 6 R. R. 736.

*7th Edition, page 612—Ed.

UMESH CHANDRA GHOSE V. KALA CHAND GUHA.

Babu Mohendra Nath Ray, (with him Babu Gunada Charan Sen), for the Appellants.—The lessee sold the land to defendant No. 3 retaining a small portion. The plaintiffs are twelve-annas landlords, while defendant No. 8 represents the four annas. The lessee is not entitled to transfer, but if the lady should transfer, the landlord would get *khas* possession after service of notice. The plaintiff said that by this alienation by defendant No. 1 to defendant No. 3, defendant No. 1 has lost the right to notice and defendant No. 3 is a trespasser. In order to get *khas* possession, no notice was served on defendant No. 1 as provided in the lease. My contention is that the lease was intended to be a heritable one, though there is provision against alienation. The plaintiff says that the defendant No. 1 having sold the said *karsha* and cut down trees, defendant No. 3 is a trespasser and the leasehold interest has ceased, so the plaintiff is entitled to recover a twelve-annas portion on partition. Ordinarily under section 108 (j) of the Transfer of Property Act, all leasehold interest is transferable and section 10 reserves the right against alienation. Under section 110 (g) the lessor must do some act to show that he wants to determine the lease. Until notice is served, the transferee is entitled to hold. So the plaintiff has not acquired right to eject the defendant without service of notice upon the lessee.

The covenant against alienation is not void being for the benefit of the lessor and the lessor can evict on service of notice, ■ section 110 (g) of the Transfer of Property Act will apply. Even if there be a covenant against alienation and if alienation is made, the lease does not become determined *ipso facto*, unless determined by some act of the lessor.

Here the act agreed upon by the parties ■ the service of notice. Until notice is served, the transferee does not become a trespasser, *vide Padmanabhaya v. Ranga* (1).

Babu Joges Chandra Roy (with him Babu Prakash Chandra Mazumdar), for the Re-

spondents.—This is an appeal by transferees, the original tenant is not before your Lordships, nor have his representatives appealed on the ground that they could not be ejected without notice. Where the original lessee has died, the condition as to notice is gone. The lessee is restrained from transferring to anybody, my client is not bound to serve ■ notice on ■ stranger. The Transfer of Property Act does not say ■ notice has to be given to ■ transferee. Here the original lease is at an end by the lessee's death. As regards the point of "doing some act," intimation in this case was sent for *khas* possession. Where the original tenant does not appeal, the Court cannot entertain the plea of the trespasser, *vide Satara Begum v. Syed Faiz Ali Khan* (2).

There is a condition against alienation, so the appellant is a trespasser. The suit itself shows that my client wants to determine the lease.

[D. CHATTERJEE, J.—It is a limited covenant.]

The transferee gets no title.

[D. CHATTERJEE, J.—Your right of ejection is a limited one?]

The question of notice is immaterial in the case of a trespasser. A trespasser cannot raise that point now. The heirs of the original tenant submitted to the decrees of the lower Courts. They have not appealed. The right to eject accrues ■ soon as there is an alienation. Under section 10 too he is a trespasser ■ he takes in violation of the condition of the lease. Even if section 110 (g) applies, there ■ demand for *khas* possession, so that what was necessary to be done has been done by the landlord.

Babu Gunada Charan Sen, in reply.—Notice must be given "according to law." This must be taken to be a yearly tenancy, so six months' notice is necessary. If it is from month to month, 15 days' notice ■ necessary. Incurring of forfeiture is not simultaneous with the determination of the lease, for which some overt act has to be done to signify the intention to determine ■ lease. Until and unless the lessor completes his right of

(1) 6 Ind. Cas. 447; 34 M. 161; ■ M. L. T. 110; 20 M. L. J. 930; (1910) M. W. N. 462.

(2) 9 Ind. Cas. 994; 13 C. L. J. 677.

ACHAMA NAIDU v. KRISHNASWAMI NAIDU.

re-entry, the lease is transferable. The transferee takes the property subject to defeasance by notice. The transferee is in the position of a tenant-at-will. He has purchased the outstanding interest of the original lessee which can be defeated by notice.

[BEACHCROFT, J.—It is a non-transferable lease.]

All property is transferable except under certain special circumstances. Under section 110 some act must be done to determine the lease and the act here is provided in the *kabuliyat*, viz., service of notice according to law.

JUDGMENT.—One Kheroda Peshakar took a lease of some homestead land under a *kabuliyat*, by which she agreed that she would not transfer the property and if she did she would be liable to be ejected after giving her a notice in accordance with law, if she did not go out herself. She did sell the major portion of the property leaving a slight fraction for herself. The landlord brought a suit for ejectment and died pending suit. His heirs have got a decree for ejectment in both the Courts below and this appeal is by the transferee defendant No. 3 and defendant No. 11. It appears that the original lessee Kheroda also died pending suit.

The covenant against transfer is no doubt valid, but the manner in which the resultant right of the landlord to evict was to be worked out under the terms of the covenant has not been followed. It has been found that the landlord did not serve any written notice upon Kheroda, as he was bound to do by the terms of the lease read by the light of section 106 of the Transfer of Property Act. The lease, therefore, has not been determined in the only manner in which it could be determined and the landlord, who limited his right of re-entry to a particular mode, cannot be heard to complain if he is not allowed to enlarge the covenant. We think the appeal ought to be allowed and we do allow it with costs.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL SUIT No. 201 OF 1907.

APPEALS AGAINST ORDERS NOS. 115 AND 116 OF 1909.

CIVIL MISCELLANEOUS PETITIONS
Nos. 2921 AND 2922 OF 1914.

October 19, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.

IN A. S. No. 201 OF 1907

ACHAMA NAIDU AND OTHERS—DEFENDANTS
Nos. 3, 4 AND 6—APPELLANTS

versus

KRISHNASWAMI NAIDU AND OTHERS—
DEFENDANTS Nos. 1, 2, 8 TO 10 AND
PLAINTIFFS Nos. 1 TO 3—RESPONDENTS.

IN A. A. O. No. 115 OF 1909

PRAKASA NAIDU AND OTHERS—
DEFENDANTS Nos. 9 TO 11—APPELLANTS

versus

ARUMUGA CHETTY AND ANOTHER—
PLAINTIFF AND DEFENDANT No. 1—

RESPONDENTS.

IN A. A. O. No. 116 OF 1909

SUBRAYULU NAIDU—DEFENDANT No. 8
—APPELLANT

versus

ARUMUGU CHETTY AND ANOTHER—
PLAINTIFF AND DEFENDANT No. 1—

RESPONDENTS.

IN C. M. P. No. 2921 OF 1914

SANJIVA NAIDU AND ANOTHER—
APPELLANTS Nos. 2 AND 3—PETITIONERS

IN C. M. P. No. 2922 OF 1914

RAGHAVULU NAIDU, MINOR, BY HIS
GUARDIAN A. RANGAPPA NAIDU

—APPELLANT No. 3—PETITIONER

versus

KRISHNASWAMI NAIDU AND OTHERS—
RESPONDENTS IN C. M. P. Nos. 2921 AND
2922 OF 1914.

Compromise—Suit for partition of family properties
—Parties coming to settlement on appeal—Com-
promise not signed by one party to decree, whether
binding on signatories.

Where a suit for partition of family properties was, on appeal to the High Court, compromised, but one of the parties to the decree of the lower Court, who was the son of the managing member, did not sign the *razinamah*:

Held, that as the compromise did not in terms modify the decree, but only altered the mode of payment of the decretal amount, it was binding on those who were parties to it. [p. 520, col. 1.]

Lakshmana Chetti v. Chinnathambi Chetti, 24 M., 326, distinguished.

ACHAMA NAIDU v. KRISHNASWAMI NAIDU.

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 31 of 1903; appeals against the orders of the District Court of Chingleput in Civil Miscellaneous Petitions Nos. 435 and 434 of 1908, in Execution Petition No. 46 of 1908, in Original Suit No. 45 of 1901, and petitions praying that in the circumstances stated in the affidavit therein a decree may be passed in Appeal No. 201 of 1907 in terms of the compromise arrived at.

Mr. V. C. Seshachariar, for the Appellants in Appeal Suit No. 201 of 1907 and Civil Miscellaneous Appeals Nos. 115 and 116 of 1909 and, for the Petitioners in Civil Miscellaneous Petitions Nos. 2921 and 2922 of 1914.

Messrs. V. Purushothama Aiyar, T. V. Muthukrishna Aiyar and A. Swaminatha Aiyar, for the Respondents in Appeal Suit No. 201 of 1907 and Mr. T. V. Muthukrishna Aiyar, for the Respondents in Civil Miscellaneous Appeals Nos. 115 and 116 of 1909.

These appeals and the petitions coming on for hearing on the 30th October 1914, the Court (Sankaran Nair, J., and Spencer, J.,) delivered the following

JUDGMENT.—The petitions and the affidavit will be forwarded to the District Judge. It is contended that the 1st defendant is not bound by the compromise as his consent was conditional on the other member of his branch, the 2nd defendant, agreeing to it, and that the 2nd defendant is not bound because the 1st defendant was not authorised by him, and in no way represented him. It will be open to the District Judge to receive such evidence as the parties may adduce.

He will submit findings on the following issues:—

(1) Is the compromise binding on the 1st and 2nd defendants?

(2) If not, is it binding on the 1st defendant?

The findings should be submitted within two months, and seven days will be allowed for filing objections.

These appeals and the petitions coming on for final hearing, after the return of the finding of the lower Court on the

issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—In this case, the District Judge has found that the compromise effected between the 1st defendant and defendants Nos. 4 and 6 in the matter of the appeal pending here was not made conditional upon the 2nd defendant joining in the compromise. We have no hesitation in confirming this finding. Our attention has been drawn to the evidence in the case, but we hold that the District Judge was clearly right in his conclusion. If as a matter of fact the compromise was conditional as contended, there would not have been any difficulty in the way of the 1st defendant's insisting that this stipulation should be entered in the *razinama* itself, and no satisfactory explanation is given why it was not.

Then it was argued by Mr. Muthukrishna Aiyar, who appeared for the 1st defendant, that since the 2nd defendant who is his client's son is not a party to the compromise, it must be treated as of no effect, the suit being one for partition of the family properties. For this contention he relies upon *Lakshmana Chetti v. Chinnathambi Chetti* (1). But that is a case which is quite distinguishable from the present case. In that case, there was a minor party to the suit and no sanction was given for reference to arbitration and it was held that the suit being one for partition, it was not possible in a case of that sort to give effect to a partial compromise. The case before us is very different. Here so far as the immoveable properties are concerned, namely, those which have been the subject of the decree of the lower Court, which again it may be mentioned was based on a compromise between the parties, it is not alleged before us that that decree is modified by the compromise effected in this appeal. The appeal was with respect to certain sums of money, which were alleged to have been paid by the 1st defendant on account of family debts. The 1st defendant was the manager of the family properties and by the compromise, it is arranged that the 1st defend-

GANI LATIF V. MANILAL MULJI.

ant should pay a certain amount to the branch of defendants Nos. 4 and 6. No doubt our attention has been drawn to a statement by a witness of defendants Nos. 4 and 6 that the amount was to be paid out of the 1st defendant's family fund, but that has not been embodied in the *razinama*. From what source the money is to come cannot be said to be of any importance. There are certain other terms in the *razinama* as regards certain properties which are left in common and which are not dealt with by the decree in the lower Court. No question was raised before the District Judge ■ regards these properties and all that we are concerned with in this petition is, whether the compromise ought to be recorded so far ■ it relates to the appeal before us. The appeal relates to the question of money payable by the 1st defendant. The compromise is evidently for the benefit of the minor 6th defendant. The 4th defendant who was originally ■ minor has now attained majority. There is a certificate of the learned Vakil who appeared for the guardian of the minor and we are satisfied that the compromise is for the benefit of the minor. There will be ■ decree in the terms of the compromise so far as it relates to this appeal. The 2nd defendant appeared before us and he asked for costs. The compromise was not pressed against him either before the District Judge or before us, ■ he was not a party to it. He had to appear on this application to guard his interests and is, therefore, entitled to his costs. As he had to appear because of the existence of the *razinama* which is signed by defendants Nos. 4 to 6 on one side and the 1st defendant on the other, they will bear his costs in equal shares, that is to say, the 1st defendant will bear one moiety of the costs and defendants Nos. 4 and 6 the other moiety. In the appeal itself each party will bear his own costs.

The Appeals against Orders Nos. 115 and 116 of 1909 are dismissed.

Appeals dismissed; Petitions allowed.

V. R. P.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 52
OF 1915.

January 20, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

GANI LATIF AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

MANILAL MULJI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Contract, construction of—Sale of goods, contract for—Covenant to supply goods ordered—Omission to fix the maximum limit of purchases—Indefiniteness—Discretion of vendor to withhold any article ordered—Failure to comply with order—Breach of contract—Damages.

Plaintiffs, a firm carrying on business in Bombay and Ellichpur, contracted with defendants, merchants in Bombay, for the purchase of alizarine dyes. On April 25th 1914, the plaintiffs executed ■ document whereby they agreed to place all their orders with defendants for alizarine dyes at a specified rate. A varying scale of discount was allowed up to ■ purchase of 300 drums. On the back of the document were noted the defendants' conditions signed by their agent. One of them was that the defendants were responsible for the immediate despatch of goods ordered which were in their godown and ■ to the balance, intimation was to be given to plaintiffs of their probable arrival who should not refuse to purchase on the ground of delay. The last condition was that the goods were to be credited according to the date of despatch mentioned in the railway receipt and the vendors were to have the discretion to send or not to send every single article out of those comprised in the order. In pursuance of this agreement the plaintiffs ordered from the defendants on various dates 36 casks of alizarine paste which were all duly despatched. Subsequently, further orders were placed for large quantities of the same commodity. The defendants expressed their inability to comply with these orders owing to conditions created by the War. Plaintiffs thereupon instituted the present suit for Rs. 71,400 for damages, being the difference between the contract rate and the market price of the goods. The Trial Judge, Mr. Justice Macleod, held that the omission to fix in the contract the maximum limit of purchase rendered the contract indefinite and unenforceable and that the condition giving the vendors freedom to send or not to send any articles out of those ordered was fatal to the plaintiffs' claim. On appeal:

Held, (1) that, on a proper construction of the written document, as soon as the plaintiffs placed an order with defendants, there was a binding contract for the supply of goods mentioned in the order, but, until such order was received, it was open to the defendants to withdraw from the transaction by giving notice to the plaintiffs; [p. 521, col. 2.]

Offord v. Davies, (1862) 12 C. B. (N. S.) 748; 31 L. J. C. P. 319; 9 Jur. (N. S.) 22; 6 L. T. 579; 19 W. R. 758; 142 E. R. 1336; 133 R. R. 491; *Great Northern Railway Company v. Witham*, (1877) 9 C. P. 16; 43 L. J. C. P. 1; 29 L. T. 471; 22 W. R. 48 and *Bengal*

GANI LATIF V. MANILAL MULJI.

Coal Co. Ltd. v. Homee Wadia & Co., 24 B. 97, referred to.

(2) that the contract was not indefinite by reason of the omission of the maximum limit of purchase and that it was open to Courts to reject dishonest claims for damages based on alleged failure to comply with large and unreasonable orders; [p. 522, col. 1.]

In re Gloucester Municipal Election Petition, Ford v. Newth, (1901) 1 K. B. 683; 70 L. J. K. B. 459; 65 J. P. 391; 49 W. R. 345; 84 L. T. 354; 17 T. L. R. 325; *Reg. v. Demers*, (1900) A. C. 103; 81 L. T. 795; 69 L. J. P. C. 5, referred to.

(3) that the last condition of the contract was not applicable to the order for hermetically sealed drums of one uniform quality, and that it did not empower the defendants to refuse altogether to perform an order which they had received. [p. 522, col. 2.]

Appeal against the judgment of Macleod, J., in the exercise of the Ordinary Original Jurisdiction of the High Court.

Mr. Setalvad (with him Messrs. Jinnah and Kanga), for the Appellants.

Mr. Desai (with him Mr. Inverarity), for the Respondents.

JUDGMENT.

SCOTT, C. J.—The claim made by the plaintiffs is for damages for non-delivery of 254 casks of alizarine dyes which the plaintiffs at Ellichpur had ordered from the defendants in Bombay.

Exhibit A and Exhibit B are signed by the plaintiffs' and the defendants' agent respectively and sufficiently evidence the terms agreed to by the parties. The plaintiffs agreed to purchase goods on the conditions at the back of Exhibit A, and the defendants by their agent agreed to the transaction, or *sauda* as it is called in Exhibit B. The plaintiffs in Exhibit A agree not to purchase alizarine goods from any other person nor to sell to any other person, while the defendants agree not to send their sun brand goods of alizarine to any merchant at Ellichpur other than the plaintiffs. The conditions include ■ shifting scale of commission or discount to be allowed upon the agreed rate of 7 annas and 9 pies per pound, net rate, Bombay godown delivery, the discount varying according to the amount which should be purchased up to 300 drums in the course of a year. On the back of the document, which is a printed form filled in certain parts in manuscript, the conditions are stated upon which the defendants are prepared to supply the goods. The

first condition is that on an order reaching the office as to the goods out of the ■■■■ which may be ready in the godown the same will be sent, and as to the remaining goods, intimation will be given of their arrival. On receiving the order, as to the goods which may not be ready, the merchant is to be responsible for taking the whole of such goods, notwithstanding the period which may have elapsed, provided he does not ask after twenty days that the goods should not be sent. The last condition provides that the goods will have to be credited according to the date of despatch mentioned in the railway receipt and the sellers shall have discretion or liberty to send or not to send every single article out of those comprised in the order.

The document, Exhibit A, even when read with Exhibit B, does not impose any obligation upon the plaintiffs to take any specific quantity of goods and the quantity to be sent could only be ascertained ■■ soon ■■ the plaintiffs had sent an order for some of the goods. As soon as the order was received by the defendants, there would be a binding contract for the supply of goods mentioned in the order, but until such an order was received, it would be open to the defendants to withdraw from the transaction by giving notice to the plaintiffs. That we take to be clear upon the authority of *Offord v. Davies* (1), *Great-Northern Railway Co. v. Witham* (2) and *Bengal Coal Co. Ltd. v. Homee Wadia & Co.* (3).

The learned Judge of the lower Court has, however, apparently taken a different view, for in his judgment he states:

"If the writing of the 25th April had stated that the plaintiffs agreed during twelve months to purchase from the defendants up to 300 casks of this particular dye, it might be said that the defendants by accepting the document had created ■ continuing offer whereby they pledged themselves to accept any order from the plaintiffs up to 300 casks during the twelve months at the rate mentioned, and it has been contended that that is

(1) (1862) 12 C. B. (N. S.) 748; 31 L. J. C. P. 319 9 Jur. (N. S.) 22; 6 L. T. 579; 10 W. R. 758; 142 E. R. 1336; 133 R. R. 491.

(2) (1877) 9 C. P. 16; 43 L. J. C. P. 1; 29 L. T. 471; 22 W. R. 48.

(3) 24 B. 97.

GANI LATIF V. MANILAL MULJI.

the effect of the documents. As far as I can see, one important item which should have been mentioned in the document of the 25th of April, viz., the actual number of casks up to the limit of which the plaintiffs might send orders, has been omitted...It may be that the parties thought that they specified in the writing the limit up to which the plaintiffs might send orders, but the Court is not concerned with what the parties thought they were doing. It is only concerned with what the parties have actually done. So owing to these omissions the writing is so indefinite in its terms that no effect can be given to it."

It does not appear to us that the omission of the maximum which might be ordered is any reason for not giving effect to the terms of Exhibit A, provided any order has in fact been given. It might be that an order on a document not limited as to amount, as the learned Judge held this document to be, might be so large as to be utterly unreasonable, and have been sent merely for the purpose of creating a dishonest claim for damages, but such a case could easily be disposed of by the Court if it arose and the fact of such a possibility would be no reason for not giving effect to any *bona fide* orders sent according to the terms of the document.

It may be observed that in the cases of tender, for instance, *Great Northern Railway Co. v. Witham* (2), *In re Gloucester Municipal Election Petition*, *Lord v. Newth* (4), and *Reg. v. Demers* (5), the tender which created a continuing offer was in no case limited in amount, but that was not held to be a reason for not giving effect to the terms of the document.

The learned Judge, having come to the conclusion that Exhibit A was so indefinite, for the reasons stated, that it could not be given effect to, dismissed the suit, and, if that reason is good, it was sufficient to justify the dismissal. Consequently, the proceeding upon which the trial had taken place came to an end. That proceeding was a summons for inspection in order that the plaintiffs might be able to ascertain from the documents in the possession of the defendants the amount of the different orders which

they had sent for execution to the defendants under the document of the 25th of April, subsequent to the first order of 36 drums which had been executed, and the extent to which the defendants were able to comply with such orders.

The learned Judge also held that the plaintiffs' case must fail by reason of the terms of the fifth clause of the conditions on the back of Exhibit A. He held that that condition enabled the defendants to say on receipt of the order that they do not choose to send the goods. It appears to us that that is reading a condition inserted for the benefit of the defendants far too strictly against their opponents. The conditions must, if possible, be read as a whole and reconciled, and such a reading of condition 1, which is that on the order reaching the office the goods which are ready in the godown are to be sent.

Again, it would be difficult for us to adopt the sweeping interpretation of the lower Court with regard to condition 5, even if it stood alone, for the first line of the condition is that the goods will have to be credited according to the date of despatch in the railway receipt, so it assumes a performance of the order at all events to some extent. Then it proceeds to mention the discretion or liberty which is retained by the defendants, and the words indicating the discretion commence: "Order me se" (* * * *), i. e., "out of the order" the defendants are to have a discretion to send or not to send "*Hur ek chij*" (* * *) "every single thing." The condition appears to us to be more appropriate to an order for alizarine dyes put up in tins and packed in boxes from which certain tins might be abstracted or certain tins of a particular colour might not be inserted and to be less appropriate to a contract for hermetically sealed drums of alizarine paste of one uniform colour, such as the goods the subject of the document of the 25th of April. But, however that may be and even conceding that in a proper case the condition 5 might apply to an order for drums of alizarine paste, we do not think that it can be read as importing a power in the defendants to refuse altogether to perform an order which they have received.

It is also to be observed that the defendants have undertaken to perform the plaintiffs'

(4) (1901) 1 K. B. 683; 70 L. J. K. B. 459; 65 J. P. 391; 49 W. R. 345; 84 L. T. 354; 17 T. L. R. 325.

(5) (1900) A. C. 103; 81 L. T. 795; 69 L. J. P. C. 5.

LABHA v. TULSI.

iffs' order or orders of August as soon as the goods arrive. That appears from their letter of the 13th of August, and again from their letter of the 29th of August. With reference to the order of the 8th they say: "We shall send the goods when the steamer arrives." Again in their letter of the 29th of August, referring to a letter of which the date is not given, they say: "On arrival of the steamer we will send the casks to you." They could hardly, after making that promise on the receipt of the order, refuse execution on the ground that although they had the casks arrived freshly from Europe, they did not ~~will~~ to perform the order.

We are, therefore, of opinion that the grounds upon which the suit was dismissed cannot be supported, and the decree must be set aside ~~and~~ also the order discharging the summons. We remand the case for disposal to the lower Court.

Defendants must bear their own costs of the hearing before Mr. Justice Macleod and of this appeal. Plaintiffs' costs costs in the cause.

Decree set aside; Suit remanded.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 11
OF 1915-16.

February 21, 1916.

Present:—Mr. Diack, F. C.

LABHA—DEFENDANT—APPLICANT

versus

TULSI AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 120, 144
—*Suit by landlord to dispossess alienee of occupancy rights—Period of limitation.*

A suit by a landlord to dispossess a person to whom occupancy rights in the land in suit have been sold is governed by Article 120 and not Article 144 of the Limitation Act, and may be brought within six years from the date of the sale. [p. 524, col. 2.]

Har Lal v. Musammatt Gohri, 6 Ind. Cas. 942; 3 P.R. 1910 Rev., dissented from.

Revision from the order of the Commissioner, Jullundur, dated the 20th August 1915.

Mr. Umar Bakhsh, for the Petitioner.

Mr. D. R. Sahni, for the Respondents.

ORDER.—In this case the landlords (the proprietary body of the village) sued under section 77 (3) (h), Punjab Tenancy Act, to dispossess a person to whom the occupancy rights in the land in suit had been sold. The Court of first instance and the first Court of Appeal held that in respect of limitation the case was governed by Article 120 of the Second Schedule to Act XV of 1877, but the former admitted the case to a hearing on the ground that the right to ~~sell~~ accrued only from the date on which the mutation was sanctioned, which was less than six years before the institution of the suit, while the latter considered that time ran from the date of the registered-deed of sale which was more than six years before institution, and accepting appeal dismissed the claim. The second Court of Appeal, that of the Commissioner, following the ruling in *Har Lal v. Musammatt Gohri* (1), held that Article 144 of the Schedule applied to the case and limitation being 12 years, the case was within time and he referred the case back for disposal on the merits. The Commissioner, Mr. Fagan, in his judgment remarked as follows of the ruling quoted: "Whether the view of the Financial Commissioner taken in it is sound or not is not for me to say. If it is not,

(1) 6 Ind. Cas. 942; 3 P. R. 1910 Rev.

LABHA v. TULSI.

it is open to the Financial Commissioner to revise his former ruling." In admitting the case to a hearing on revision Sir Michael Fenton observed ■ follows:—

"I am inclined to think that Sir James Douie's decision in No. 3 Revenue of 1910 [*Har Lal v. Musammatt Gohri* (1)] is wrong and that Article 144 does not govern limitation in suits by landlords to set aside alienation by occupancy tenants. The time from which the period begins to run under Article 144 is 'when the possession of the defendant becomes adverse to the plaintiff.' Now the possession of the vendee of occupancy rights is possession ■ a tenant. It never can become proprietary possession so long ■ the tenant does not set up any claim to proprietorship. Accordingly I am inclined to hold that Article 144 is applicable only when proprietary possession is concerned."

I have now heard Counsel on the question but have heard nothing to lead me to doubt the correctness of the above view. It is urged that in certain contingencies the landlord may become entitled to possession, but that is certainly not the case here, as the decree of the Court of first instance shows, for it provides that defendants Nos. 2 and 3, the original occupancy tenants who sold their rights, will not be affected but will get possession of the land. The position is very similar to that dealt with in *Asa Ram v. Paras Ram* (2), where ■ temple worshipper sued for the dispossession of the assignee of the temple manager and in which the Chief Court held that Article 120 and not Article 142 or Article 144 was applicable. It is also urged that paragraph II of Standing Order No. 2 expressly lays down that in a suit like the present the plaintiff is entitled to a decree for possession. The object of the paragraph, however, is to make clear that the plaintiff is entitled to ■ decree against the alienee alone and not against the alienating tenants; in other words, that he is not entitled to possession at all; and the word "possession" appears to have been used by inadvertence for "dispossession." In *Har Lal v. Musammatt Gohri* (1) Sir James Douie considered that the mere fact of the word "dispossession"

being used in section 77 (3) (h) of the Tenancy Act and the word "possession" in Article 144 of Schedule II of the Limitation Act made no manner of difference. There is, however, the important difference that dispossession of the alienee does not necessarily connote the possession of the landlord. It was pointed out in that judgment that the above subsection gives the landlord a choice between three kinds of suits, and it may be remarked that it would be anomalous if the period of limitation were not the same for each. If the suit takes the form of a claim to set aside the transfer it has been repeatedly held, by the Chief Court in *Ram Chand v. Muhammad Khan* (3), and by this Court in *Jiwan Singh v. Maharaja Jagat Singh* (4) and *Kuria v. Nanak* (5), that Article 120 applies. It is logical that the same Article should apply to the alternative claim for dispossession of the alienee, and this supports the conclusion drawn from the argument that the dispossession of the alienee does not necessarily involve the possession of the landlord. It is true that in the judgment of this Court reported as *Nihal v. Lakhna* (6) a decree for possession was passed in similar circumstances, but that was ■ case in which the lower Court had decreed possession against both the occupancy tenants and the mortgagees and the whole intention of the Financial Commissioner's judgment was to modify the decree so as to make it operative only against the mortgagees. In other words, it was for dispossession rather than possession. And the question of limitation of course did not arise.

Differing, therefore, from the decision in *Har Lal v. Musammatt Gohri* (1) I hold that the present suit is governed by section 120 and that the period of limitation is six years. And I agree with the first Court of Appeal that the right to sue accrued from the date of the sale and as that was more than six years before the institution of the suit, the claim is barred by limitation.

Accordingly I direct under section 84

(3) 135 P. R. 1888,

(4) 1 P. R. 1898 Rev.

(5) 7 P. R. 1905 Rev. 68 P. L. R. 1906.

(6) 6 P. R. 1893 Rev.

(2) 9 P. R. 1904.

BOMBAY ■ AFRICA STEAM NAVIGATION CO., LTD. v. AJUM GOOLAM HOOSEIN.

(5), Punjab Tenancy Act, that the suit be dismissed. Parties to bear their own costs throughout.

Revision accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 54
OF 1915.

January 26, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

THE BOMBAY & AFRICA STEAM
NAVIGATION CO., LTD.—DEFENDANTS—
APPELLANTS

versus

Haji AJUM GOOLAM HOOSEIN

AND OTHERS — PLAINTIFFS — RESPONDENTS.

Contract—Carriage by sea—Charter party, terms of, conflicting with bill of lading—Dominant contract—Liability for shortage, stowage, dunnage and sweepings—Nomination of stevedores by charterer, effect of—Duty of stevedores—Servants of shipowner—Charterer sub-leasing cargo space—Relations between shipowner and charterer's lessees.

Under the general law, and apart from special conditions in ■ charter party, the shipowner is liable to the charterer for the damage to cargo occasioned by bad stowage or improper and insufficient dunnage, and this *prima facie* liability is not modified by the nomination of the stevedores by the charterer or by a clause in the charter party that stevedores are to be employed at current market rates not exceeding the owners' contract rate. [p. 525, col. 2.]

Where a charter party contains the above provision, stevedores chosen by the charterers are to be the agents and paid servants of the shipowner in loading the cargo. [p. 526, col. 1.]

Harris v. Best-Ryley & Co., (1892); 68 L. T. 76; 4 R. 222; 7 Asp. M. C. 272, referred to.

Where there is ■ difference or conflict between the terms of the charter party and the bill of lading, the former prevails. [p. 526, col. 2.]

Where the charter party provides that the charterer shall be entitled to all sweepings and shortage occasioned by escape from the bags at the port of discharge, effect must be given to it, and the shipowner cannot seek protection in a condition in the bill of lading which renders the ship immune against loss or damage caused by insufficient packing and torn, weak or fragile bags and say in defence that the shortage was caused by the charterer's negligence. [p. 526, col. 2.]

Where, under the terms of a charter party, all the sweepings are to be delivered to the charterer, the shipowner cannot apportion them between the charterer and other shippers to whom the former had let out cargo space in proportion of the quantity owned by each of them. Their contract is with the charterer who is entitled to all the sweepings. [p. 527, col. 1.]

Appeal from ■ decree of Beaman, J., in the exercise of Ordinary Original Civil Jurisdiction of the High Court.

Messrs. *Jinnah* and *Davar*, for the Appellants.

Messrs. *Kanga* and *Moos*, for the Respondents.

JUDGMENT.

SCOTT, C. J.—This is an appeal from the judgment of Mr. Justice Beaman in ■ suit in which the plaintiffs are the charterers and the defendants are the owners of the steamer *Abydos*, which was chartered to carry ■ cargo of rice from Burma to Bombay. In the main there ■■ two questions which have to be decided. The *first* is the question of dunnage and the alleged damage caused by insufficient or improper laying of dunnage, and the *other* is the question of shortage and sweepings.

Dealing, *first*, with the question of dunnage, the charter party provides: "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or certain other specific causes," and at the end of the charter party it is expressly provided that the charterers' stevedores at the loading port are to be employed at current market rates but not exceeding the owners' contract rate, and all mats and requisite dunnage to be provided by the steamer.

The question is, in the first place, as a matter of law, who is to be responsible for improper or insufficient dunnage for the protection of the cargo upon the voyage. Apart from the concluding clauses of the charter party to which I have just referred, there can be little doubt that the shipowners would be liable to pay for the damage to cargo occasioned by bad stowage or improper or insufficient dunnage, and the question is whether their *prima facie* liability has been modified by the clause ■■ to the charterers' stevedores at the loading port who are to be employed at rates not exceeding the owners' contract rate.

The learned Judge upon the authority of *Harris v. Best-Ryley & Co.* (1) has come to the conclusion that upon the terms of the charter party stevedores chosen by the

(1) (1892) 68 L. T. 76; 4 R. 222; 7 Asp. M. C. 272.

BOMBAY AND AFRICA STEAM NAVIGATION CO. LTD. v. AJUM GOOLAM HOOSEIN.

charterers were to be the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo, and in this conclusion we agree.

The question of fact remains whether the damage was or was not caused by improper laying of dunnage as found by the learned Judge. Now upon that question there is a conflicting evidence of two marine surveyors, and we also have the evidence of the Parsi purser of the ship who only speaks as to the cargo stowed under his personal supervision. The learned Judge has come to the conclusion that damage to a certain specified extent was caused by the improper laying of the dunnage at the port of loading, and after considering the evidence and the arguments of the learned Counsel for the appellants, we have come to the conclusion that the learned Judge is right. Therefore, with regard to the dunnage the appeal fails.

The *remaining* question regarding shortage and sweepings is not so simple. The facts are that rice was shipped at the port of loading not only by the charterers, but by other shippers to whom the charterers in pursuance of the terms of the charter party to that effect leased out a portion of the cargo space. The rice shipped was mostly Nakranji rice shipped *F. O. B.* at the rate of Rs. 7-15-6 per bag, while a certain portion of the rice shipped was Larool rice shipped *F. O. B.* at the rate of Rs. 6-15-0 per bag. The bags of rice shipped by the charterers, as the bills of lading state, were in apparently good order and condition and were to be delivered, subject to the exceptions and conditions specified, in the like good order and condition from the ship's tackles, showed upon discharge at the port of destination ■ shortage amounting to between 383 cwts. and 400 cwts. The sweepings of rice lying loose in the ship after discharge amounted to about 575 cwts., and it is, therefore, obvious that a certain portion of the sweepings cannot have escaped from the bags shipped by the charterers and must be attributable to other bags shipped by persons to whom the charterers had let cargo space. The bills of lading contain two provisions which are material. The *first* is the general

exception which includes, among other conditions, insufficiency of wrappers and package and all injury to the same and all damage arising from other goods by stowage. There is also a special condition that the ship is not responsible for loss or damage caused by insufficient packing, torn, mended, charfed, weak or fragile bags and bagging wrappers nor for usual and reasonable ~~W~~ and tear of packages.

If, therefore, the bills of lading were the only test of the liability of the shipowners, it can hardly be doubted that on proved facts the shipowners would not be liable to any shippers in respect of shortage occasioned by an escape from the bags. But the prevailing contract, where there is ■ conflict of provisions as between the shipowner and the charterer, is, it is conceded by Counsel for the appellants, the charter party.

The charter party has two provisions which are relevant to the question. It provides that the steamer is to be responsible for any proved shortage. We take the proved shortage to be 383 to 400 cwts., and apparently at the trial it was stated that it might be taken to be 400 cwts. The charter party also provides that all sweepings are to be delivered to the charterers at the port of discharge and, therefore, although the shipowners might, ■ against the shippers who could only rely on the bills of lading, appeal to exception 28 to absolve themselves from liability for shortage, they could not successfully plead it as against the charterers in respect of the goods shipped by them, for by the charter party they are to be responsible for any proved shortage.

It is contended that if both the provisions of the charter party are applied in favour of the charterers as was done in the lower Court, the result is that charterers in effect are paid twice over. *First* of all, they get the value of all the sweepings in the steamer, and, *secondly*, they get the value of the goods found short. The argument was that the shipowners ought to be allowed to collect the sweepings and when it is found that certain bags do not contain the quantity shipped, they should be allowed to allocate to the bags which contain ■ short quantity a proportionate part of the sweepings

RATAN BIPARI v. HIRA LAL.

collected and in this way justice would be done. Manifestly, however, such a procedure would give rise to great difficulties in any case where sweepings were not of one quality of rice and where they were not, in almost every case they could not be, uncontaminated or undeteriorated by lying on the deck during the voyage. Therefore, a rough and ready arrangement appears to have been made in the charter party that all sweepings are to be delivered to the charterers at the port of discharge. That is the agreement and if the argument on behalf of the appellants were correct, the shipowners would be allowed to say: "We will not deliver all the sweepings as we have agreed to deliver them but we will only deliver a proportionate part of the sweepings, namely, 400 cwts., and the other sweepings we will appropriate for compensation to the other shipowners, and we will not be responsible to you as we have agreed in the charter party for any proved shortage because we will have made up the shortage by sweepings." The answer is that that is not the contract.

It appears to us for that reason that the learned Judge is right and that the judgment of the Court below must be affirmed and the appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 6 OF 1916.

May 8, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

Sheikh RATAN BIPARI—PLAINTIFF

versus

HIRA LAL SAKAR AND OTHERS—

DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XLVI, r. 7, s. 115—Reference by District Judge on findings of Small Cause Court—Reference on questions of fact—Provincial Small Cause Courts Act (IX of 1887), s. 25.

The Court of Small Causes is a Court subordinate to the District Judge, so the District Judge is competent to make reference of cases tried by the Small Cause Court to the High Court under Order XLVI, rule 7, Civil Procedure Code. [p. 528, col. 1.]

Where the Court of Small Causes, upon evidence, came to the conclusion that the defendant was a servant remunerated by a part of the proceeds of the land and the District Judge, holding that the conclusion of the Small Cause Court as regards the nature of the suit was erroneous and that the defendant ought to have been held to be a tenant against

whom the plaintiff's suit in the Small Cause Court could not have been entertained, made a reference under Order XLVI, rule 7, Civil Procedure Code, to the High Court, the High Court refused to accept the reference on the ground that no case was made out for its interference on a question of facts. [p. 529, col. 1.]

Civil reference made from the Court of the District Judge of Dacca.

FACTS material to the report will appear from the following extracts from the letter of reference of the District Judge, Mr. Smither, I. C. S.:—

"* * * * The plaintiff alleges that the defendant's father executed a 'kabuliat' for one year in 1307 *Fasli* and that since that year the defendant's father and after his father the defendant himself have been cultivating the land and delivering half the produce to the plaintiff and keeping half as remuneration for their labour. Then the plaintiff alleges that the defendant is a mere servant of the plaintiff and not a tenant of the land.

"* * * * And the defendant says (W. S., paragraph 9) that he has kept half the produce under his right as *bargadar*, not admitting that he was ever a mere servant of the plaintiff.

"* * * * The Small Cause Court Judge has held that the defendant was a mere labourer on the land, to be remunerated with half the produce. The plaintiff did not supply seed or ploughs or plough cattle. The defendant supplied them.

In my opinion the defendant was a tenant on the land and not a mere servant and the case was, therefore, not triable by the Small Cause Court Judge.

It was urged that the finding of fact of the Small Cause Court Judge must be accepted and that, therefore, there can be no reference. If this were so, then if the Small Cause Court has before it a suit which, on a right determination of facts, cannot be tried by it, it may yet, by wrongly deciding the facts, take jurisdiction. I do not think this contention can stand. In cases dealt with in High Court rulings, I find this very question, as to whether a party is a mere servant or a tenant, gone into and decided by the High Court and the decision then given accordingly as to whether the Small Cause Court had jurisdiction."

The District Judge, then, after discussing the cases reported as *Biroj Mahammad v.*

RATAN BIPARI v. HIRA LAL.

Muhatut Mahammad (1), *Kade Mandal v. Ahadali Molla* (2), *Shyama Churn Ghosh v. Mahomed Ali* (3), concluded by recommending that the decision of the Small Cause Court Judge ought to be set aside as made without jurisdiction.

Babu Monmotha Nath Roy, in opposing the reference, contended that the reference did not lie ■ the Small Cause Court Judge had found ■ ■ fact that the defendant was a labourer and not a tenant. The District Judge could not under the circumstances ask the High Court to interfere under Order XLVI, rule 7, Civil Procedure Code, which must be read along with section 115, Civil Procedure Code, and section 25 of the Provincial Small Cause Courts Act. Rule 7 of Order XLVI has not, in any way, enhanced the High Court's power of interference over and above that possessed by the High Court under section 115, Civil Procedure Code, and section 25, Provincial Small Cause Courts Act, has only provided for a convenient procedure for correcting errors of Small Cause Court Judges. Otherwise this would lead to an evident anomaly—the unsuccessful litigant in the Small Cause Court could ask the High Court to enter into questions of law alone whereas if he came through the District Judge, he could get the decision on a question of fact revised by the High Court.

He also contended that the District Judge had no power to make the reference, as the Small Cause Court was not subordinate to the District Court.

He also compared the language of section 115, Civil Procedure Code, with that of Order XLVI, rule 7, Civil Procedure Code, and argued that the similarity in language shows that Order XLVI, rule 7, applied to cases which could be treated under section 115, Civil Procedure Code.

He also referred to the cases mentioned in the letter of reference and also to the cases reported as *Lalji Panday v. Barhamdeo Panday* (4) and *Shoma Mehta v. Rajani Biswas* (5).

He then read the pleadings and the

judgment and submitted that the question that the defendant was a tenant, was neither specifically alleged in the written statement nor proved by evidence either oral ■ documentary.

Lastly, he asked the High Court to deal with the case on the merits instead of sending it back for a trial in the Munsif's Court, as that would put the parties to additional expense and trouble: *Ram Coomar Coondoo v. Chunder Cantoo Mookerjee* (6).

JUDGMENT.—This is ■ reference from the District Judge of Dacca under Order XLVI, rule 7.

A suit was brought in the Small Cause Court for recovery of damages against the defendant, who is said to have held some land under a contract to take half the proceeds ■ remuneration for his labour and expense. That was the case of the plaintiff. The defendant said that the case could not be tried by the Small Cause Court but he did not set up any special plea as to his being a tenant and, therefore, not amenable to the jurisdiction of the Small Cause Court. Upon the evidence, the learned Small Cause Court Judge found that the defendant was ■ servant who was remunerated by the receipt of half the produce. Upon that finding he gave a decree to the plaintiff.

There was an application to the District Judge for making ■ reference and he has made this reference. According to the learned Judge, the finding of the Trial Court as regards the nature of the suit is erroneous and the defendant ought to have been held to be a tenant against whom the present suit could not be entertained.

It has been contended by the learned Vakil who appears against the reference, *first*, that the reference is incompetent, and *secondly*, that the reference ought not to have been made under the circumstances of the case.

As regards the *first* point, we do not think it can be maintained that the Court of Small Causes was not ■ Court Subordinate to the District Judge, and Order XLVI, rule 7, contemplates a reference, of cases tried by the Small Cause Court, by the District Judge.

As regards the *second* point, we see that the Trial Court, upon evidence, came to the

(1) 11 Ind. Cas. 32.

(2) 6 Ind. Cas. 594; 14 C. W. N. 629.

(3) 3 Ind. Cas. 466; 13 C. W. N. 835; 10 C. L. J. 30.

(4) 13 Ind. Cas. 29; 16 C. W. N. 89.

(5) 1 C. W. N. 55.

(6) 2 C. 233; 4 I. A. 23.

MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD.

conclusion that the defendant was a servant remunerated by a part of the proceeds of the land. That was a finding of fact upon evidence before him, and unless we deem it expedient and proper to set aside that finding, we do not see our way to accept the reference by the learned District Judge. In cases of revision under section 115, Civil Procedure Code, or under section 25 of the Small Cause Courts Act, we do not generally interfere with findings of fact arrived at by the first Court if those findings are supported by evidence before the Court, and in this particular case, we do not think that any case has been made out for our interference on a question of fact.

In this view of the case, we discharge the reference with costs, one gold *mohur*.

Reference discharged.

BOMBAY HIGH COURT

ORIGINAL CIVIL JURISDICTION APPEAL No. 44
OF 1915.

January 18, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

THE MADHAVJI DHARAMSEY
MANUFACTURING, CO., LTD.—DEFENDANTS
—APPELLANTS

versus

THE CENTRAL INDIA SPINNING,
WEAVING AND MANUFACTURING CO.,
LTD.—PLAINTIFFS—RESPONDENTS.

Trade-mark, infringement of—Trade-mark consisting of number and pictorial design—Dominant characteristic, test to determine—Copying of number on manufacturer's goods—Actual deception not necessary—Nature of relief—Injunction—Damages.

A numeral or a number may be as much a trade-mark as any other design. [p. 530, col. 1.]

A manufacturer can use one device or a combination of devices to denote any particular article manufactured by him. In the latter case, the question as to what is the dominant trade-mark is a question of evidence, depending on which device has caught the attention of the buyers and has come to be associated with the goods of the manufacturer. [p. 533, cols. 1 & 2.]

It is an infringement of a trade-mark to copy the number assigned by a manufacturer to any article made in his factory, when the article has acquired a reputation in the market and orders have been placed for it by description of the said number. It makes no difference that the person infringing adopts a different drawing or picture along with the number. [p. 532, col. 2; p. 533, col. 2.]

Where goods have acquired, by a particular fancy description, combination or device a reputation in the market, it is immaterial that the customers do not know who the maker is. [p. 532, col. 2.]

The questions for determination, therefore, in a case of an alleged infringement of a trade-mark—(1) whether the defendant has pirated the dominant device of the plaintiff and (2) whether the defendant's conduct is such as to deceive ultimate purchasers. Proof of actual deception is not necessary. [p. 533, cols. 1 & 2.]

A Court may grant both an injunction and damages to the plaintiff in a suit for infringement of a trade-mark. The injunction should be wide enough to cover all possible channels of approach to ultimate buyers and damages should be awarded on the result of an enquiry as to profits made by the defendant by the unlawful use of plaintiff's number. [p. 533, col. 2.]

Plaintiffs manufactured twill cloth in their mill at Nagpur which was put on the market marked as No. 2051 with the device of a serpent. This cloth was sold from 1904. The defendants, who owned a mill in Bombay, also manufactured twill of similar pattern in 1913 and affixed the same number on every piece of their cloth and a label representing the image of the sun. Plaintiffs sued to restrain defendants from affixing No. 2051 to their twill cloth and for damages:

Held, (1) that No. 2051 was plaintiff's trade-mark and that the defendants infringed it by copying the number; [p. 533, cols. 1 & 2.]

(2) that an injunction restraining the defendants from using the said number on their cloth anywhere in India and award of damages to the plaintiffs on the amount of the profits made by defendants by sale of their twill cloth were appropriate reliefs. [p. 533, col. 2.]

Barlow v. Gobindram, 24 C. 364; 1 C. W. N. 281, distinguished.

Singer Manufacturing Company v. Loog, (1880) 18 Ch. D. 395 at p. 412 and *Lever v. Goodwin*, (1887) 36 Ch. D. 1 at pp. 3, 7; 57 L. T. 583; 36 W. R. 177, referred to.

Appeal from the following judgment of Macleod, J., in the exercise of Original Civil Jurisdiction of the High Court:—

"The plaintiffs are manufacturers of cloth which they manufacture in their Mill, in Nagpur, in the Central Provinces. In 1904 they commenced to manufacture a certain quality of black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the Mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill was distinguished by No. 10. The number 2051 was in no way descriptive of the twill cloth. On each piece of cloth was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill. This twill was put on the market in the North-West Frontier Provinces, Sindh and the Punjab where the plaintiffs have got their selling agents at

MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD.

Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants, who were a company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051" with the number 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants, put in as an exhibit in this case, and there was also a white ticket bearing the defendants' name and other particulars.

"The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its number alone, so that anybody who wanted to buy the plaintiffs' black twill would not write an order 'a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051', but would simply order 'a bale of black twill No. 2051'."

"The plaintiffs contend that they have established this by their evidence and that they are, therefore, entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights.

"I think there can be no doubt that a manufacturer can establish the right to the use of a particular number as a trade-mark, as well as a right to use a particular device, or he may use the two in conjunction. Therefore, it does not matter much what the particular drawing or number on the manufactured goods consists of, provided that the goods become known in the market by that particular device or number. Then if there is a device as well as a number, it depends on the evidence in each case as to what is the dominant part of the manufacturer's mark, whether the device or the number or the two in conjunction, and if the plaintiffs establish the fact on their evidence that goods have become known in the market and are sold by that

particular number, then it is not necessary for them to prove that the purchasers have actually been deceived by the defendants using this particular number. But it is for the plaintiffs to satisfy the Court that the similarity between the respective marks of the plaintiffs and the defendants is such as to be calculated to mislead purchasers. It is permissible for the plaintiff to ask for an injunction against a rival trader, as soon as he knows that other goods bearing his mark and stamp are found placed on the market. When the plaintiffs' black twill was placed on the market it was probably known either as Serpent Chap or Naug Chap, No. 2051 of the Empress Mills or perhaps by the description Empress Mill Naug Chap; but the evidence adduced now proves conclusively that, as time went on, purchasers, whether retail or wholesale, and wholesale dealers may be purchasers only of a single bale or a large number of bales, sent their orders for black twill No. 2051, without referring either to the plaintiffs' name or the serpent device. And there can be no doubt that what they expected to get when they gave that order was plaintiffs' black twill, because there was no other black twill on the market at that time bearing No. 2051, except the plaintiffs'. It has been suggested that purchasers must have associated the plaintiffs' name with the number. That in a sense is correct, but it does not mean that a shop-keeper on the frontier village, when asking for a bale of black twill No. 2051, was bound to have in his mind the personality of the plaintiff Company. All he would require to have in his mind was that he bought this particular kind of cloth before with the plaintiffs' mark on it, and he wanted to have it again. If the purchaser has to be actually acquainted with the personality of the manufacturer, it is clear that manufacturers in the export trade would never have any chance of establishing their right to any particular trade-mark. It is obvious that the purchaser of a particular kind of cloth, bearing a particular device manufactured in Manchester, if he happens to be on the other side of the globe, will have no idea whatever of the manufacturer except as a person who has sent out the particular goods which he wants to buy.

MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD.

"There is no necessity for me to go through the evidence taken on commission at length, because the general effect of it is clear, namely, that these various dealers have shown and have produced in each case particulars of orders from their constituents, for this particular black twill, by the No. 2051. Nor is it necessary, ■ is usually argued in this class of cases, for the plaintiffs to prove that the purchaser has been deceived or will be deceived if he had both kinds of cloth placed before him. This would not, in any event, be the case when the actual purchase is made. It is sufficient if the Court is satisfied that a purchaser when wanting to buy the plaintiffs' cloth may be misled into buying the defendants'." Now the defendants say that they protect themselves by placing other marks totally different from the plaintiffs' marks on their twill. That would only be effective if they had proved that the purchasers knew the plaintiffs' goods by some other portion of the device than the number. That a practice exists amongst the Bombay Mills of copying numbers appertaining to goods of rival Mills which have attained ■ certain popularity in the market, is clear from the circular defendants have put in, which has been sent round by the Mill Owners' Association to its various members. In that they refer to the objectionable practice current among Mills of copying each other's numbers. And, however much the defendants may protest that their multi-coloured ticket distinguishes their goods from the plaintiffs' so that there can be no possibility of deception, the fact remains, ■ I pointed out in the argument, that the defendants without any reason whatever—for none has been called to show why this number was assigned to their black twill—copied this number, which the plaintiffs have been using since 1904. If there was no importance attached to the number, there ■ no possible reason why they should have fixed upon it rather than on any of the other hundreds and thousands of numbers, one of which they might have attached to this particular kind of twill. The only reason the Court can give for their having fixed upon this particular number, must be that the purchasers of this kind of cloth attached considerable importance to the number and bought the plaintiffs' cloth by that number, and the defendants thought,

if they used this particular number, they might induce the purchasers to buy their cloth instead of the plaintiffs'. Their cloth is somewhat heavier and somewhat cheaper than the plaintiffs' cloth. Not content only with copying the No. 2051, they have also added the 10 which has nothing to do, in their sense, what colour. It has been suggested that it describes weight. That cannot be the case, because it has been proved that each piece of the defendants' cloth weighs from $11\frac{3}{4}$ to 12 lbs. Therefore, it is quite clear that the defendants thought there was some magic in the 10 ■ well as in the 2051 which induced the purchasers to buy the plaintiffs' cloth. Again it may be said that if no importance was attached to the number, the defendants, when the plaintiffs gave them notice, could easily have changed the number of this particular kind of twill rather than run the risk of litigation, in order to defend their alleged right to use it."

Mr. *Setalvad* (with him Messrs. *Kanga* and *Vakil*), for the Appellants.

Mr. *Desai* (with him Messrs. *Inverarity*, *Strangman* and *Jinnah*), for the Respondents.

JUDGMENT.

SCOTT, C. J.—As to the main facts there is no dispute. They are concisely stated in the first paragraph of the judgment of the lower Court as follows :—

"The plaintiffs are manufacturers of cloth which they manufacture in their Mill, in Nagpur, in the Central Provinces. In 1904 they commenced to manufacture a certain quality of black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the Mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by ■ series of numbers commencing from 1. The black twill was distinguished by No. 10. The number 2051 was in no way descriptive of the twill cloth. On each piece of cloth was also woven the device of ■ serpent surrounded by ■ scroll containing the name of the Empress Mill. This twill was put on the market in the North-West Frontier Provinces, Sindh and the Punjab where the plaintiffs have got their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be dis-

MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD.

tributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants, who were a company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051" with the number 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants, put in an exhibit in this case, and there was also a white ticket bearing the defendants' name and other particulars.

"The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its number alone, so that anybody who wanted to buy the plaintiffs' black twill would not write an order 'a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051', but would simply order 'a bale of black twill No. 2051.'

"The plaintiffs contend that they have established this by their evidence and that they are, therefore, entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights."

The learned Judge held that the No. 2051 was the dominant characteristic of the plaintiffs' goods among purchasers in the Indian markets in which it had an extensive sale, and that it was under this designation that the constituents of up-country middlemen were in the habit of ordering the plaintiffs' twill of that description; and, being of opinion that the defendants had copied the plaintiffs' number in order to induce purchasers to buy the defendants' cloth, which was rather heavier and cheaper than the plaintiffs', instead of the plaintiffs' cloth, passed the decree for an injunction and damages which is now under appeal.

The main contention of the appellants is that the learned Judge erred in assuming that purchasers ordering twill No. 2051 or 2051/10 expected to get the plaintiffs' particular manufacture bearing that mark and that on the evidence the plaintiffs

had failed to prove that purchases of black twill No. 2051 or 2051/10 were made on account of special preference for the plaintiffs' particular cloth and that the number or combination of figures was merely a manufacturer's number or quality number, to which the defendants had much right the plaintiffs.

It will be convenient to deal with the question of quality numbers first. The argument that numbers on goods are merely manufacturers' quality numbers may be perfectly correct in a state of facts such as was proved to exist in *Barlow v. Gobindram* (1), relied upon by the appellants' Counsel, where the Court found that the same importers imported into India cloth of identically the same quality, kind and measurement, under different numbers as well as different object designs. But that contention is inappropriate where the cloth of a particular factory when of a particular kind invariably bears not only a trade device but also a fancy combination of figures designed for that particular cloth. The number not only represents no other cloth but that particular cloth never bears any other number—so that as far as quality is concerned (*i. e.*, the ultimate result of the material and processes employed in that factory for the production of that cloth) there is no standard of comparison but another piece of the same cloth of the same manufacture. The simple question, then, in such circumstances is, whether the defendant in the passing-off case is doing something calculated to deceive purchasers into the belief that they are buying the particular article which they know as bearing the particular number. It is not a case of a known quality of one manufacturer indicated, for reasons of convenience, by various numbers, as in *Barlow v. Gobindram* (1) but of the particular mark in dispute being an invariable indication of the cloth of the plaintiffs' manufacture. It is, however, contended that the plaintiffs cannot claim an exclusive right to the user of the particular combination of figures, unless it is shown that the purchasers consciously associate the figures with the plaintiff company. But where goods have acquired, by a particular fancy description, combination or device, a reputation in the market, it

(1) 24 C. 364; 1 C. W. N. 281.

MADHAVJI DHARAMSEY MFG. CO., LTD. v. CENTRAL INDIA SPINNING, WEAVING AND MFG. CO., LTD.

is immaterial that the customers do not know who the maker is. In *Wotherspoon v. Currie* (2) Lord Hatherley said:

"...The name of the article again, if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the name in this sense, that his goods have acquired by that description a name in the market, that whenever that designation is used he is understood to be the maker, where people know who the maker is at all—or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer."

So also Lord Halsbury in *Birmingham Vinegar Brewery Company v. Powell* (3) said:

"It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

The evidence appears to us to be convincing that the plaintiffs' twill cloth had by or before 1911 (the year in which the defendants claim to have introduced the marks complained of) acquired in the Northern India markets a reputation under the designation of 2051 and, when black, of 2051/10, and that purchasers desiring that cloth ordered it rather by those figures than by any other designation and that the figures had become by use the dominant designation. It is said that the witnesses for the plaintiffs were middlemen or commission agents and not the ultimate buyers and that the witnesses would not be deceived. To this the answer is that

their testimony as to the form in which order for the plaintiffs' cloth is usually given is good proof of the association formed in the minds of ultimate buyers between the figures and the article produced by the plaintiffs.

It is also contended that no proof of actual deception has been proved, but this is not necessary. It is sufficient to justify relief if the Court is satisfied, as we are here, that the defendant is putting into the hands of middlemen a means whereby ultimate purchasers are likely to be defrauded: see *Singer Manufacturing Company v. Loog* (4) and *Lever v. Goodwin* (5). It has been contended that the plaintiffs and defendants affix to their cloth distinctive trade marks no importance should be attached to the figures; but it is a matter of common experience that the attention of buyers is often not attracted by the most prominent design. Experience alone shows which device has caught the attention of buyers. Here there can be no doubt that far more importance is attached to the figures than to the pictorial representations and the conclusion is almost irresistible that the defendants, knowing the importance attached by buyers to the plaintiffs' combination of figures, adopted that combination in the hope of securing for their cloth some of the plaintiffs' customers.

In our opinion the judgment of the lower Court is right and should be affirmed.

As regards the form of injunction objection has been raised as to its local extent, and as regards the form of the inquiry as to damages that it is sweeping.

In our opinion the injunction must be wide enough to cover all possible Indian channels of approach to the ultimate buyers and should not be limited as contended by appellants, and as regards the form of inquiry as to damages it appears to us that it would be neither reasonable nor practicable to restrict the inquiry as suggested. The wide form of inquiry was adopted after argument in *Lever v. Goodwin* (5) and has been rightly applied in the present case.

The appeal must be dismissed with costs.

Appeal dismissed.

(2) (1872) 5 H. L. 508 at p. 514; 42 L. J. Ch. 130; 27 L. T. 393.

(3) (1897) A. C. 710 at p. 713; 66 L. J. Ch. 763; 76 L. T. 792.

(4) (1880) 18 Ch. D. 395 at p. 412.

(5) (1887) 36 Ch. D. 1 at pp. 3, 7; 57 L. T. 583; 36 W. R. 177.

KANGALI MOLLA v. BENI MADHAB BISWAS.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 13
OF 1913.

May 24, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

KANGALI MOLLA—PLAINTIFF—
APPELLANT

versus

BENI MADHAB BISWAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 18, 32 (3)—Sale—Statement by vendor as to ownership of lands mentioned as boundaries—Admissibility—Statement against interest—Evidence, failure to object to relevancy, effect of, in appeal.

Evidence admitted without any objection in the Trial Court cannot be objected to being on the record in the Appellate Court; but an erroneous omission to object in the primary Court to the admissibility of a certain piece of irrelevant evidence does not make it relevant in the Appellate Court. [p. 534, col. 2.]

Shahzadi Begum v. Secretary of State, 34 C. 1059 (P. C.); 2 M. L. T. 439, 9 Bom. L. R. 1192; 6 C. L. J. 678; 34 I. A. 194; *Miller v. Babu Madho Das*, 19 A. 76 at p. 92; 23 I. A. 106; 7 Sar. P. C. J. 73; *Girindra Chandra Ganguli v. Rajendra Nath Chatterjee*, 1 C. W. N. 530, referred to.

The statement of the vendor in a deed of sale as to the ownership of a land described as a boundary of the land sold is relevant under section 32, clause (3), of the Evidence Act as a statement against interest and is evidence against the vendee and strangers. But such a statement cannot be proved against the vendee as an admission under section 18 of the Evidence Act. [p. 535, col. 1.]

Leclanund Singh v. Musammat Lakhputtee Thakoorain, 22 W. R. 231; *Abdullah v. Kunja Behari Lal*, 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252, referred to.

Appeal against the decree of the District Judge, Faridpur, dated the 5th December 1913, reversing that of the Additional Munsif, Faridpur, dated the 20th March 1914.

Babu Surendra Nath Guha, for the Appellant.

Babu Gunada Charan Sen, for the Respondents.

JUDGMENT.—The plaintiff purchased a piece of land in 1898 by Exhibit L, and his vendor described the land sold as bounded on the west by the land of Jagat Biswas, the predecessor of the defendants. In 1902 the plaintiff purchased the *jote* of Ramdhupi in execution of a rent-decree. The plaintiff says the land appertains to Ramdhupi's *jote* and is within his purchase, the defendant says it is his land in another *jote*. The Record of Rights being in favour

of the defendants, the plaintiff had to rebut the presumption in favour of the record. The Trial Court held that the plaintiff had succeeded in rebutting the presumption. But the lower Appellate Court says the plaintiff has failed to rebut the presumption. This is obviously a question of fact and would ordinarily be final. It is contended, however, that in arriving at this finding the lower Appellate Court has made use of evidence which is not relevant and otherwise erred in applying the law of evidence, and we cannot say how far or how much the lower Court has been influenced by this piece of evidence in arriving at its finding. This piece of evidence is Exhibit L. That document contains a statement of the plaintiff's vendor who is not a party to this suit, a statement which was made before the plaintiff had any interest in the *jote* of Ramdhupi. Any statement made by his vendor as to the ownership of the land on the west of the land sold would be a matter of the utmost indifference to the plaintiff. It would not matter to him whether this land belonged to A or B or C. The question is, whether this statement of his vendor is either admissible or relevant in this suit. As regards admissibility it has been said that it was admitted without any objection in the Trial Court and the plaintiff cannot now object to its being on the record. That is a correct view of the position as to admissibility: see *Shahzadi Begum v. Secretary of State* (1). But is it relevant? In the case of *Miller v. Babu Madho Das*, (2) their Lordships of the Privy Council say that the erroneous omission to object to the admission of a certain piece of evidence in the lower Court did not make it relevant. That was, however, in respect of a document which could not have been proved by the party who was allowed to prove it, the document was *per se* irrelevant under the Evidence Act. See *Girindra Chandra Ganguli v. Rajendra Nath Chatterjee* (3). We have to see, therefore, whether

(1) 34 C. 1059 (P. C.); 2 M. L. T. 439; 9 Bom. L. R. 1192; 6 C. L. J. 678; 34 I. A. 194.

(2) 19 A. 76 at p. 92; 23 I. A. 106; 7 Sar. P. C. J. 73.

(3) 1 C. W. N. 530.

SECRETARY OF STATE v. GULAM RUSUL.

Exhibit L is *per se* irrelevant or could it have been proved against the plaintiff if he had objected to it. The learned Judge has in one place referred to it as an admission. Statements of a person from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions under section 15 of the Evidence Act. But the land conveyed by Exhibit L is not the subject-matter of this suit and, therefore, the statement of the plaintiff's vendor cannot go in as an admission. The statement though not relevant as an admission may, however, be relevant under section 32, clause 3, as a statement against interest which has been held to be evidence against strangers. It was so held in the case of *Leelanund Singh v. Musammatt Lakhputtee Thakoorain* (4) and lately in the case of *Abdullah v. Kunja Behari Lal* (5). If it is relevant we have no concern in second appeal with the question of the weight to be attached to the document. It is true the learned Judge in one part of his judgment says of the document that it "proves conclusively that this land was never Ramdhupi's" etc., but later on he says "which goes a very long way in disposing of the plaintiff's case." The use of the words "proves conclusively", therefore, must be considered as a wrong use of a legal expression which is defined in the Evidence Act.

In this view of the matter, we would dismiss the appeal but without costs in this Court, as the misuse of the words "conclusive" and "admission" may have encouraged the appeal.

Appeal dismissed.

(4) 22 W. R. 231.

(5) 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 187 OF 1913.

January 24, 1916.

Present.—Mr. Justice Batchelor and
Mr. Justice Shah.

THE SECRETARY OF STATE FOR INDIA
— DEFENDANT— APPELLANT

versus

GULAM RUSUL GAYASUDIN KUWARI
— PLAINTIFF— RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 80, object of

—Suit against Secretary of State.—Notice.—Defendant's agent threatening injury before expiry of notice.—Institution of suit during currency of notice period.

The object of section 80 of the Civil Procedure Code is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice. [p. 536, col. 2.]

A plaintiff, however, will be justified in filing his suit before the expiry of the period of notice where the agents of the Secretary of State, during the currency of the notice, threaten to demolish the property which is the very subject-matter of the intended suit [p. 536, col. 2.]

The right of suit, which is expressly granted by the Legislature, cannot in reason be deferred until its exercise has become illusory. [p. 537, col. 1.]

Secretary of State v. Gajanan Krishna Rao, 10 Ind. Cas. 639; 35 B. 362 at p. 365; 13 Bom. L. R. 273, followed.

First appeal from the decision of the District Judge of Thana, in Suit No. 2 of 1912.

Mr. S. S. Patkar, Government Pleader,
for the Appellant.

Mr. M. R. Bodas, for the Respondent.

JUDGMENT.

BATCHELOR, J.—This is an appeal by the Secretary of State who was the defendant in the original suit. That suit was brought by the plaintiff for a declaration that a piece of land forming an open space in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it.

Of the three points urged in appeal by the learned Government Pleader, the first is the question of fact whether the plaintiff had proved his title. Now the evidence in favour of the plaintiff upon this point is, it is not disputed, sufficient and convincing, unless the effect of it can be removed by the consideration which formed the basis of Sir Charles Sargent's decision in *Framji Cursetji v. Goculdas Madhooji* (1), where the learned Chief Justice pointed out that in this country slight acts of user were insufficient to give a title to land by adverse possession. That, however, was a very different case from the one which we are now considering. For it was a case where a private plaintiff complained that his land had been encroached upon and the private defendant justified the encroachment by pleading that adverse possession had given

(1) 16 B. 338.

SECRETARY OF STATE V. GULAM RUSUL.

him title to the property. Here we are dealing with the claim to a piece of land situated in a village which has not been surveyed or measured. The only evidence open to the plaintiff to establish his title would be such evidence of user as he has given, and the acts of user are, in my opinion, of a far more significant and important character than those which were before Sir Charles Sargent. I agree with the learned District Judge in thinking that the evidence adduced by the plaintiff on the question of title proves the plaintiff's case on that point.

That being so, the *second* objection raised by the appellant seems to me also to fail. The objection is based upon Article 14 of the Indian Limitation Act and section 202 of the Bombay Land Revenue Code. But admittedly the order made by the Assistant Collector under section 202 of the Bombay Land Revenue Code was made without jurisdiction and was in law and in fact a nullity, if the land was—as we now hold that it was—the private property of the plaintiff. Since, therefore, the Assistant Collector's order was a nullity, it was not incumbent on the plaintiff, suing for this declaration, to pray also that that order should be set aside: see the case of *Surannanna Devappa Hegde v. Secretary of State for India* (2) and the observations of Mr. Justice Batty in the case of *Balvant Ramchandra v. Secretary of State for India* (3).

There remains only the *third* point taken on behalf of the appellant by the learned Government Pleader, and that point turns upon section 80 of the Civil Procedure Code, which requires a plaintiff suing the Secretary of State to give two months' notice before the suit is instituted. The plaintiff gave the notice required on the 2nd May 1912. But, on the 19th June 1912, i. e., before the expiry of the two months, he filed this present suit. At first sight, therefore, the suit would seem to be bad for want of due legal notice. But the plaintiff justifies his suit on the ground that during the currency of his notice he was compelled to precipitate the institution of his suit by reason of the fact that the defendant's agent,

the *mamlatdar*, threatened to demolish the property which is the subject-matter of the suit. It is not denied in appeal that, as a matter of fact, the *mamlatdar* did threaten this action. In that state of the facts I think that the suit is not bad under section 80. I agree with what was said in *Secretary of State v. Kalekhan* (4) to this extent that the words of section 80 countenance no distinction based only on the class or character of the suit filed, when it is filed, here, against the Secretary of State. But, in my judgment, the section is inapplicable on the present facts not by reason of the particular character of the suit, but by reason of circumstances which would equally apply to any kind of suit. For, following Mr. Justice Cunningham's exposition of section 424 of the Code of 1877 which corresponds with our present section 80, I am of opinion, as I said in *Naginal Chunilal v. Official Assignee*, (5), that the object of section 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice.

If, then, that is the object of the section which in terms allows a private litigant to sue the Secretary of State for redress, it appears to me undesirable to extend the meaning and scope of the section so as to produce this result that although a private person is empowered to sue the Secretary of State after two months' notice, yet the Secretary of State's agent during the currency of the two months is to be permitted to destroy the material object which is the very subject-matter of the suit. In my opinion to place this construction upon section 80 is to attribute to the Legislature an inconsistency which ought to be avoided. In reading the section, as I now read it, it appears to me that full effect is given to its object and intent, while the opposite construction leads directly to inconsistency and injustice. It is small gain to a private person to enact that he may have redress against a defendant after two months' notice

(2) 24 B. 435; 2 Bom. L. R. 261.

(3) 29 B. 480 at pp. 488, 489; 7 Bom. L. R. 497.

(4) 16 Ind. Cas. 947; 37 M. 113; (1912) M. W. N. 786; 23 M. L. J. 181; 12 M. L. T. 224.

(5) 17 Ind. Cas. 876; 37 B. 243; 14 Bom. L. R. 1146

KALI CHANDRA V. KALI KUMAR MAJUMDAR.

if, during the currency of the two months, the defendant is allowed to make redress impossible. The right of suit, which is expressly granted by the Legislature, cannot in reason be deferred until its exercise has become illusory. This view has the support of the observations recorded by Mr. Justice Chandavarkar and Mr. Justice Heaton in the case of *Secretary of State v. Gajanan Krishna Rao* (6).

No other point has been taken in this appeal by the appellant, and I am, therefore, of opinion that the appeal fails and should be dismissed with costs.

SHAH, J.—I am of the same opinion.

Appeal dismissed.

(6) 10 Ind. Cas. 639; 35 B. 362 at p. 365; 13 Bom. L. R. 273.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1621
OF 1914.

April 18, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

KALI CHANDRA CHAKRAVARTY AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI KUMAR MAJUMDAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 155—
Landlord and tenant—Misuse of land by tenant—
Breach of covenant—Notice demanding unconditional
surrender—Ejectment, suit for.*

The object of a notice to quit given under section 155 of the Bengal Tenancy Act is to give the tenant an opportunity of remedying the breach (if it is capable of being remedied); so that on remedying the breach and on payment of a reasonable compensation he may avoid ejectment. [p. 538, col. 1.]

A notice, therefore, requiring the tenant to remedy the breach, to pay compensation for misuse or breach of contract and to surrender the land is not legally valid to support an action for ejectment. [p. 538, col. 1.]

Pennell v. City of London Brewery Co., (1900) 1 Ch. 496; 69 L. J. Ch. 244; 28 W. R. 264; 82 L. T. 53; 16 T. L. R. 152; *Lock v. Pearce*, (1893) 2 Ch. 271; 62 L. J. Ch. 582; 2 R. 403; 68 L. T. 569; 41 W. R. 369; *Pershad Singh v. Ram Pertab Roy*, 22 C. 77, distinguished.

Appeal against the decree of the District Judge, Noakhali, dated the 14th March 1914, confirming that of the Munsif, Noakhali, dated the 26th January 1914.

FACTS of the case appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Bepin Chandra Bose), for the Appellants.—The

notice in the present case is a perfectly valid notice and the clause requiring the tenant to quit the land is merely a surplusage and does not vitiate the notice. Section 155 of the Bengal Tenancy Act is taken from the Conveyancing Act of 1881. Reads section 14 of the Conveyancing Act. It is not necessary to demand compensation in the notice, cites *Lock v. Pearce* (1), *Piggott v. Middlesex County Council* (2), *Fletcher v. Nokes* (3), *In re Serle*, *Gregory v. Serle* (4), *Pennell v. City of London Brewery Company* (5)

Babu Surendra Nath Das, for the Respondents.—The notice is bad and is not a valid notice under section 155 of the Bengal Tenancy Act. The notice required the tenant to quit the land unconditionally and the demand for compensation made only in the alternative. Such a notice is quite inconsistent with the provisions of section 155, and the plaintiffs cannot eject the defendants unless and until they have strictly complied with the provisions of the law.

JUDGMENT.—This appeal arises out of a suit for ejectment of a *kaimi raiyat*, on the ground that he had broken a condition of the contract on breach of which he was under the terms of a contract between him and the landlord liable to ejectment, after service of a notice purporting to have been given under section 155 of the Bengal Tenancy Act.

The Courts below concurred in dismissing the suit on the ground that the notice was not valid, and the plaintiff has appealed to this Court.

Section 155 of the Bengal Tenancy Act lays down that a suit for ejectment of a tenant on the ground that he has broken a condition of the contract under which he is liable to be ejected, shall not be entertained, unless the landlord has served a notice on the tenant specifying the particular breach complained of, and where it is capable of remedy requiring the tenant to remedy the

(1) (1893) 2 Ch. 271; 62 L. J. Ch. 582; 2 R. 403; 82 L. T. 569; 41 W. R. 369.

(2) (1909) 1 Ch. 134 at p. 147; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 6 L. G. R. 1177.

(3) (1897) 1 Ch. 271; 66 L. J. Ch. 177; 76 L. T. 107; 45 W. R. 471; 61 J. P. 232.

(4) (1898) 1 Ch. 652; 67 L. J. Ch. 344; 78 L. T. 384; 46 W. R. 440.

(5) (1900) 1 Ch. 496; 69 L. J. Ch. 244; 48 W. R. 264; 82 L. T. 53; 16 T. L. R. 152.

ZIADA v. JOWAI.

same, and in any case to pay reasonable compensation for the breach, and the tenant has failed to comply within a reasonable time with that request.

The notice in the present case required the defendant to remove the houses, etc., within a month, to give up the land and to pay Rs. 100 as damages. It is contended that the requisition to quit the land is merely a surplusage and does not vitiate the notice. But the notice to give up the land was not even conditional on the failure of the tenant to remove the houses, etc., and pay compensation but unconditionally called upon the tenant to quit the land after removing the houses, etc., and pay Rs. 100 as damages. The object of a notice to quit given under section 155 is to give the tenant an opportunity of remedying the breach (if it is capable of being remedied); so that on remedying the breach and on payment of a reasonable compensation he may avoid ejectment. Under the notice given in the present case, the tenant was required to quit the land even if he remedied the breach. Under the circumstances we are of opinion that the Courts below are right in holding that it was not a proper notice under section 155 of the Bengal Tenancy Act.

Our attention was called by the learned Pleader for the appellants to section 14 of the English Conveyancing Act, 1881, and to the cases of *Pennell v. City of London Brewery Company* (5) and *Lock v. Pearce* (1) decided under it. The words of the first portion of section 155 of the Bengal Tenancy Act are practically the same as those of the first portion of section 14 of the English Statute, but the latter portion of section 14, as pointed out by Trevelyan, J., in *Pershad Singh v. Ram Pertab Roy* (6), is wholly different and is intended for an entirely different purpose from the latter portion of section 155, which provides for the nature of the decree. In the case of *Lock v. Pearce* (1) it was held under the English Statute that the notice was not bad merely because it did not require payment of compensation in money, whereas in the case of *Pershad Singh v. Ram Pertab Roy* (6) cited above, it was held by this Court that a notice under section 155 not containing a requisition to the tenant to pay compensation was insufficient to support a suit for ejectment brought under the section. In the other case,

6) 22 C. 77.

Pennell v. City of London Brewery Company (5), it was merely held that a notice under section 14 of the Conveyancing Act, 1881, referring to several distinct alleged breaches of covenant, is not invalidated *in toto* because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely on them.

The cases cited do not support the contention that a notice which is virtually to quit the land after removal of the houses and to pay damages, is a valid notice under section 155 of the Bengal Tenancy Act.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1046 of 1913.

December 11, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie Jones.

ZIADA—PLAINTIFF—APPELLANT

versus

Musammatt JOWAI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Restitution of conjugal rights—Discretion of Court—Plaintiff's neglect in asserting his marital rights, effect of.

The grant of a decree for restitution of conjugal rights is discretionary with the Court. [p. 539, col. 1.]

Dhani v. Narain Singh, 82 P. R. 1808; 147 P. W. R. 1908; *Moonshee Buzloor Ruheem v. Shumsoon-nissa Begum*, 11 M. L. A. 551; 5 W. R. 3 (P. C.); 2 Suth. P. C. J. 59; 20 E. R. 208; 2 Sar. P. C. J. 259, followed.

Where, therefore, the girl was a minor at the time of the marriage and consummation had not taken place and moreover the plaintiff had neglected to assert his marital rights for a long time:

Held, that the plaintiff was not entitled to restitution of conjugal rights. [p. 539, col. 1.]

Kalawati v. Bukhan, 17 Ind. Cas. 254; 215 P. L. R. 1912; 187 P. W. R. 1912, referred to.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Lyallpur, dated the 17th of April 1913.

Mehta Bahadur Chand, for the Appellant.

Lala Tirath Ram, for the Respondents.

JUDGMENT.

SHADI LAL, J.—In this suit for the restitution of conjugal rights, the learned

DEVARAJA NAICKEN v. AMMANI AMMAL.

Divisional Judge has concurred with the Court of first instance in holding that the factum of the marriage between the appellant Ziada and the respondent Musammatt Jowai has been established, but he has dismissed the suit on the ground that the girl was, at the time of the marriage, a minor, and consequently a decree for restitution should not, in view of *Kalawati v. Bukhan* (1), be passed.

The plaintiff has preferred a second appeal to this Court and after hearing arguments on both sides, we do not consider that there are adequate grounds for setting aside the decree appealed against. The learned Divisional Judge has not discussed the evidence as to the factum of marriage, but, even accepting the correctness of his decision on that point, we find that the girl was undoubtedly a minor at the time of the marriage which, according to the plaintiff, took place at least twelve years before suit. It is further clear that the marriage has not been consummated and the girl has never been to the plaintiff's house. It appears that she attained puberty at least eight years ago, and there is no satisfactory explanation to account for her continual residence at her father's house. It may be, as asserted by her, that no marriage, as a matter of fact, took place, but the law of second appeal precludes us from going behind the finding of fact arrived at by the lower Appellate Court.

The proposition of law is firmly established, and indeed it is not disputed by the learned Pleader for the appellant, that the grant of a decree for restitution of conjugal rights is discretionary with the Court [*vide, inter alia, Dhani v. Narain Singh* (2) and *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (3)] and considering Musammatt Jowai's minority at the time of the marriage, the fact of its non-consummation, and the plaintiff's neglect in asserting his marital rights we hold that the lower Appellate Court was right in declining, after this lapse of time, to exercise its discretionary jurisdiction.

(1) 17 Ind. Cas. 254; 215 P. L. R. 1912; 187 P. W. R. 1912.

(2) 82 P. R. 1908; 147 P. W. R. 1908.

(3) 11 M. I. A. 551; 5 W. R. 3 (P. C.); 2 Suth. P. C. J. 59; 20 E. R. 208; 2 Sar. P. C. J. 259.

For these reasons we affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 468 OF 1913.

December 16, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Kumaraswami Sastri.

DEVARAJA NAICKEN—DEFENDANT No. 3
—APPELLANT

versus

AMMANI AMMAL—PLAINTIFF—
RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 107—
Agricultural lease—Lease for planting casuarina trees
—Registration.*

A lease for planting casuarina trees is not one for an agricultural purpose and is consequently invalid if not in writing and registered. [p. 540, col. 2.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 264 of 1912, preferred against that of the Additional District Munsif, Chingleput, in Original Suit No. 19 of 1912.

FACTS.—The suit was for a declaration of plaintiff's title to the plaint properties and for a confirmation of his possession thereof, on the ground that he had purchased the same from defendants Nos. 1 and 2 and had planted casuarina trees thereon but that the 3rd defendant unlawfully trespassed upon the same and cut and carried away casuarina twigs therefrom. The plaintiff also prayed for an injunction to restrain the 3rd defendant from interfering with plaintiff's possession. The 3rd defendant denying the trespass contended that a portion of the lands in suit was not comprised in the plaintiff's sale but had been sold to him by defendants Nos. 1 and 2 subsequent to plaintiff's sale, that the plaintiff was not entitled to the same nor was he in possession thereof, and that the suit for a bare declaration was not maintainable.

The first Court dismissed the suit but the lower Appellate Court reversed that decree and gave the plaintiff a decree. The 3rd defendant appealed to the High Court,

DEVARAJA NAICKEN v. AYMANI AMMAL.

This second appeal first came on for hearing on the 14th August 1914.

Mr. T. R. Krishnaswami Iyer, for the Appellant.

Mr. O. P. Venkataraghavachariyar, for the Respondent.

JUDGMENT.—We agree with the findings of the Courts below that the whole of plot A was sold to the plaintiff. The second appeal must fail with regard to that item. As regards plot B the District Judge has not come to any definite conclusion. If the 3rd defendant was a lessee to plant casuarina trees under defendants Nos. 1 and 2 before they sold the land to the plaintiff, his rights should be safeguarded. We must ask the District Judge to give a finding upon the following issues:—

(1) Whether there was a valid and subsisting lease to the 3rd defendant when the property was sold to plaintiff?

(2) What were the rights which the 3rd defendant has under the said lease?

The finding must be submitted on the evidence on record.

The finding should be submitted within four weeks from this date and one week is allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted a finding that there was an oral lease to defendant No. 3 subsisting at the time of sale to plaintiff, the terms of which were that the defendants Nos. 1 and 2 were to plant casuarina trees on the land in dispute, that they were to get half the produce and that the defendant No. 3 was to retain the other half, and that the same was invalid for want of a registered instrument in writing as a lease of land for planting casuarina trees is not an agricultural lease to which section 107 of the Transfer of Property Act does not apply.]

The second appeal then came on for further hearing on the 8th April 1915.

Mr. T. R. Ramachandra Iyer, for the Appellant, contended that the lease was for an agricultural purpose.

[Mr. Venkataraghavachariyar, for the Respondent, pointed out that the matter was covered by *Murugesu Chetti v. Chinnathambi Goundan* (1).]

(1) 24 M. 421 at p. 423.

The finding as to possession is unsatisfactory and ought not to be accepted.

Mr. O. P. Venkataraghavachariyar argued that the finding was perfectly clear and ought not to be disturbed.

JUDGMENT.—We accept the finding of the District Judge that there was a lease in favour of the 3rd defendant but that it was invalid for want of registration. Mr. Ramachandra Aiyar has rightly conceded that in the face of the ruling in *Murugesu Chetti v. Chinnathambi Goundan* (1), he cannot successfully contend that the lease is one for agricultural purposes. The lease is for planting casuarina trees and the observations of Mr. Justice Shepherd in *Murugesu Chetti v. Chinnathambi Goundan* (1) exactly cover this case. We must, therefore, hold that there was no valid lease when defendants Nos. 1 and 2 sold the property to the plaintiff.

A further question was raised that the suit for a bare declaration is not maintainable. The District Munsif found that the 3rd defendant was in possession at the date of the suit: and he referred to a certain admitted act of possession by the 3rd defendant in September 1910. The District Judge has not considered this evidence. Moreover, he speaks of exclusive possession in one portion of his judgment. It is not clear whether the last sentence in paragraph 6 refers to such exclusive possession. We think it desirable that a fresh finding should be called for on the question as to whether the plaintiff was in possession at the date of the suit on the evidence on record.

The finding will be submitted in four weeks and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted a finding that the plaintiff was not in possession.]

This second appeal came on for final hearing on 16th December 1915.

Mr. O. P. Venkataraghavachariyar, for the Respondent.—The order calling for the finding was *ultra vires*. *Peria Krishnasami Naik v. Aiyappa Naik* (2). It is quite competent to this Bench to go behind the order

(2) 24 Ind. Cas. 924; 1 L. W. 376.

MUKKOOSA NAIR VEETIL v. SECRETARY OF STATE.

calling for finding. *Durga Chowdhrahi v. Jewahir Singh* (3); *Lukhi Narain Jagarleb v. Jodu Nath Deo* (4); *Shivabasava v. Sangappa* (5); *Bhola Nath Nundi v. Midnapore Zemindary Company* (6). In any event, this is ■■■ in which the plaintiff ought to be allowed to amend the plaint by inserting ■ prayer for possession. Nothing will be gained by driving the parties to a fresh suit, to which the appellant will have absolutely no defence as all the other points have been decided against him.

JUDGMENT.—We accept the finding. The appeal must be allowed ■ regards plot B on the sole ground that plaintiff, having been out of possession at the date of the suit, was not entitled to ■■ for a bare declaration. The decree of the District Judge is reversed and that of the District Munsif is restored with costs in this and in the lower Appellate Court.

Appeal allowed.

V. R. P.

(3) 18 C. 23; 17 I. A. 122.

(4) 21 C. 504; 21 I. A. 39.

(5) 29 B. 1 at p. 12; ■ C. W. N. 865; 1 A. L. J. 637; 6 Bom. L. R. 770.

(6) 31 C. 503 at p. 509; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 58 OF 1914.

August 25, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

MUKKOOSA NAIR VEETIL AND ANOTHER
—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17 - Plaint, amendment of—Declaration of easement to take water by erection of dam across river, suit for—Proof of permissive user—Conversion of suit into one for title to river-bed, whether can be allowed.

Plaintiff sued for ■ declaration that he had acquired prescriptive right to take water by building a dam across a river. It was proved that the dam was erected by permission of the defendant. Plaintiff then prayed for permission to amend the plaint and convert the suit into one for a declaration of his title to the river-bed:

Held, that the amendment prayed for was inconsistent with the plaint and should not be allowed.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble

Mr. Justice Sadasiva Aiyar, in Appeal Suit No. 39 of 1911, dated the 3rd February 1914, reported in 24 Ind. Cas. 547, preferred against the decree of the District Court of South Malabar, in Revised Appeal No. 537 of 1906 (after reversal and remand by the High Court in Second Appeal No. 606 of 1907) preferred against that of the Court of the District Munsif of Mangiri, in Original Suit No. 472 of 1905.

Mr. K. P. M. Menon, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—The plaint seeks for a declaration of the plaintiff's right of easement and damages for interference therewith. The first issue raised the question whether the plaintiff had acquired a prescriptive right to take water by building ■ dam across the river. The order of remand of Sankaran Nair and Sadasiva Aiyar, JJ., only directed the Judge to return findings on the issues and on any other issues he might frame and did not alter the nature of the suit, and no other issues were framed nor was the plaint amended. The District Judge found that no easement had been acquired by the plaintiff as the dam was erected by permission of the defendant and there is evidence to support the finding. He only discussed the question of title to the bed of the river with reference to the period in which a prescriptive right could be acquired. On the finding that the dam was erected by permission there was no question of easement and the suit must fail, unless we are prepared to treat it ■ a suit for declaration of title to the river-bed and consequential relief. This is quite inconsistent with the plaint, and moreover the Jenmi, who is the party most interested in the question, is not ■ party to the suit and our decision would not be binding on him. Lastly, although the question is admittedly one of great importance, there is very little evidence about it on record. In these circumstances we are not prepared to allow the plaint to be amended and framed as ■ suit on title. We accept the finding that no easement was proved, ■ the enjoyment was permissive, and dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

BEVAN PETMAN v. GANESH DAS.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 1270 of 1913.

December 13, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie Jones.

C. BEVAN PETMAN—PLAINTIFF—
APPELLANT

versus

GANESH DAS AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Unregistered lease of coal mine reciting conveyance of moveable property also for Rs. 12,500—Admissibility in evidence with regard to moveable property—Document admissible for collateral purpose, whether can be used to establish title.

Defendant No. 2 obtained from Government a lease of a coal mine for 15 years and then in lieu of an advance of Rs. 12,500 from the plaintiff assigned to him a half share in the lease and also conveyed to him the moveable property including plant, etc., for the same consideration. It was agreed that if the representation of defendant No. 2 concerning the quality of coal, etc., proved incorrect, the assignee could terminate the arrangement and would be entitled to recover his money with interest and that in case of non-payment, he could both sell the moveable property and continue as joint lessee until the advance was recovered and even dispose of his share in the lease of the mine in order to recoup himself. This lease was not registered. Subsequently defendant No. 1, in execution of a decree against defendant No. 2, attached part of the moveable property conveyed to plaintiff, who thereupon sued for a declaration that the property was not liable to attachment or sale:

Held, (1) that the whole document was one and indivisible, there being no separate or distinct transaction concerning the moveable property and being unregistered it was not admissible in evidence even in regard to the moveable property; [p. 543, col. 1.]

Martha Pool v. Secretary of State for India, 68 P. R. 1886; *Thandavan v. Valliamma*, 15 M. 336 at p. 341; 2 M. L. J. 130, followed.

(2) that even though an unregistered document may be admissible for a collateral purpose it cannot be used to establish directly title in a part of the property conveyed. [p. 543, col. 2.]

Bachoo Hurkisondas v. Khushaldas, 4 Bom. L. R. 883; *Bai Gulabbai v. Shri Datgarji Mohangarji*, 9 Bom. L. R. 393, distinguished.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 11th April 1913.

Mr. B. Bevan Petman, for the Appellant.

Mr. Labhu Ram, for the Respondents.

JUDGMENT.

LESLIE JONES, J.—Defendant No. 2 obtained from Government a lease of the Mela Khel coal mine for a period of 15 years.

Finding himself in financial difficulties he made certain representations to the plaintiff concerning the quality of the coal, facilities for working the mine, and the value of certain moveable property, including plant, etc., etc., to the plaintiff. The latter, while reserving to himself the right to repudiate the bargain in the event of the representations proving incorrect, agreed to become joint lessee with the defendant No. 2. They then executed a lease by which defendant No. 2 assigned to the plaintiff a half share in the lease obtained from Government in lieu of an advance of Rs. 12,500 which the plaintiff advanced and also conveyed to him the moveable property, including plant, etc., for the same consideration. It was further agreed that if the representations of the defendant No. 2 proved incorrect, the assignee could terminate the arrangement and would be entitled to recover the sum of Rs. 12,500 with interest, and that if repayment was not made, he could both sell the moveable property and continue as joint lessee until the advance was recovered, and even dispose of his share in the lease of the mine in order to recoup himself.

This lease was not registered. Subsequently, in execution of a decree against defendant No. 2, defendant No. 1 attached what must be assumed to be a part of the moveable property conveyed to the plaintiff, who has instituted the present suit for a declaration that the property in question is not liable to attachment or sale. He obtained a decree in the Court of the District Judge, but on appeal the Divisional Judge dismissed the suit on the ground that as the lease was not registered, it was inadmissible in proof of the plaintiff's title to the property in dispute.

The plaintiff has now preferred a second appeal to this Court. The only question before us is whether the lease is admissible for the purpose for which the appellant seeks to employ it. It is no longer urged that the lease as a whole did not require registration, but it is contended that the terms of the agreement as regards the lease of the mine and the conveyance of the moveable property are readily separable and that accordingly the case does not come within the purview of *Martha Pool v. Secretary of*

CHIDAMBARAM CHETTY v. KARUTHAN CHETTY.

State for India (1), the ruling on which the Divisional Judge relied.

There are, of course, numerous rulings in which it has been held that where a document, which as a whole requires registration, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immovable property of the value of Rs. 100 or upwards. But the question whether any particular document is so separable is one which depends on the terms of the document, and if in dealing with the question of divisibility we apply the test expounded in *Thandavan v. Vallamma* (2), one of the principal rulings on which Counsel for the appellant relies, we think that the plea of divisibility must fail. It is true that at various places in the body of the document the references to the conveyance of the moveable property and the ensuing rights of the plaintiff are put in separate paragraphs, a point on which Counsel for the appellant lays great stress, but such separation of paragraphs is, in our opinion, immaterial. We must look to the essence of the agreement, and when that is done, we find ourselves unable to hold that there was any separate or distinct transaction concerning the moveable property. If indeed the plaintiff had acquired the moveable property absolutely and for separate consideration that would be a different matter, but here not only is the consideration the same, but also the future of the moveable property is made dependent on the future of the lease of the mine. It is sufficiently obvious that the plaintiff would never have taken, or contemplated taking, the plant unless at the same time he obtained the lease of the mine, and we have no doubt that the parties themselves regarded the whole transaction as one and indivisible. At all events, that is how we regard the transaction, and we are accordingly unable to distinguish *Martha Pool v. Secretary of State for India* (1).

Counsel for the appellant has a further argument that, even if there is but one inseparable transaction, the deed is still admissible for any purpose other than that

of creating or extinguishing rights in immovable property. Most of the rulings which he cited before us related to cases in which the transaction was held to be divisible, and the only two which can be said to be at all relevant to this argument are *Bachoo Harkissondas v. Khushaldas* (3) and *Bai Gulabbai v. Shri Datgarji Mohangarji* (4). But both of these were cases in which an unregistered document was allowed to be used for a collateral purpose only, and even if we were prepared to dissent from *Martha Pool v. Secretary of State for India* (1), and we are not, there is a clear difference between the use of a document for a collateral purpose, and its use to establish directly title in a part of the property conveyed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 4 Bom. L. R. 883.

(4) 9 Bom. L. R. 393.

MADRAS HIGH COURT.

APPEALS Nos. 197, 198, 245 AND 289
OF 1914.

April 14, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Srinivasa Aiyangar.

IN A. S. No. 197 OF 1914

T. KR. CT. CHIDAMBARAM CHETTY
AND OTHERS—DEFENDANTS NOS. 8 TO 10—
APPELLANTS

versus

V. R. KR. KARUTHAN CHETTY
AND OTHERS—PLAINTIFFS AND DEFENDANTS
NOS. 1 TO 7—RESPONDENTS.

IN A. S. No. 198 OF 1914

T. KR. CT. CHIDAMBARAM CHETTY—
DEFENDANT No. 8—APPELLANT

IN A. S. No. 245 OF 1914

V. R. CT. RAMAN CHETTY—
DEFENDANT No. 10—APPELLANT

IN A. S. No. 289 OF 1914

K. A. CT. CHIDAMBARAM CHETTY—
DEFENDANT No. 9—APPELLANT

versus

V. R. KR. KARUTHAN CHETTY
AND OTHERS—PLAINTIFFS—RESPONDENTS
IN A. S. Nos. 198, 245 AND 289 OF 1914.

*Partnership—Sub-partners, rights of—Dissolution of
partnership, suit for—Sub-partners, whether necessary
parties—Civil Procedure Code (Act V of 1908), O. I,*

(1) 68 P. R. 1886.

(2) 15 M. 336 at p. 341; 2 M. L. J. 130.

CHIDAMBARAM CHETTY v. KARUTHAN CHETTY.

r. 3—Contract Act (IX of 1872)—Partnership Act (1890) (53 § 54 Vic. c. 39), s. 31.

There is nothing in the Indian Contract Act regarding the relations between sub-partners and partners but the provisions of section 31 of the English Partnership Act may be taken as the law in India. [p. 545, col. 1.]

The assignee of a share in a partnership is only entitled to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of profits agreed to by the partners. In case of a dissolution, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account from the date of the dissolution. [p. 545, col. 1.]

Ex parte Barrow, 2 Rose 252; *Brown v. De Testet*, (1821) Jac. 284; 37 E. R. 858; 23 R. R. 59; *Bray v. Fromont*, 6 Madd. 5; 22 R. R. 224; 56 E. R. 990; 1 Gl. & Jam. 74; *Williams v. Poole*, 21 W. R. 252; 28 L. T. 292, followed.

Watts v. Driscoll, (1901) 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R. 101; *Whetham v. Davey*, (1885) 30 Ch. D. 574; 53 L. T. 501; 33 W. R. 925 *Harrison v. Delhi and London Bank*, 4 A. 437; A. W. N. (1882) 87, distinguished.

Where in a suit for dissolution of partnership, sub-partners also were made parties and the preliminary decree made them also liable for the losses of the firm:

Held, that neither under Common Law nor under the provisions of Order I, rule 3, of the Code of Civil Procedure, nor on the ground of avoidance of multiplicity of proceedings, were they necessary parties to a suit for dissolution of partnership as between the partners, and the provision in the preliminary decree making them liable for the losses of the firm must be expunged. [p. 544, col. 2.]

Appeal against the preliminary decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 293 of 1912, Appeal Suits Nos. 198, 245 and 289 of 914 against the final decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 293 of 1912.

Messrs. T. Rangachariar and T. Narasimha Iyengar, for the Appellants.

Messrs. T. R. Ramchandrier, C. S. Venkatacharair and V. K. Srinivasa Iyengar, for the Respondents.

JUDGMENT.

OLDFIELD, J.—These appeals all raise the same question. Original Suit No. 293 of 1912 for dissolution of partnership and an account was brought against the 1st to 7th defendants partners and against the 8th to 10th defendants on the allegation that they were either partners or sub-partners and that in the latter event "after dissolving suit partnership firm accounts should be

taken in the manner binding them also". The preliminary decree passed decided that they were sub-partners and far no objection has been taken to it. It went on, however, to direct [vide paragraphs 'c) and (d)] that (1) plaintiffs, a father and his minor sons, and 1st to 7th defendants, the partners, should file accounts, and apply for the appointment of a Commissioner and an account of the assets and liabilities of the firm should be taken and (2) an account should be taken between 1st plaintiff and 8th to 10th defendants for ascertaining the amount due from the latter to the former. In Appeal No. 197 of 1914 against this preliminary decree the 8th to 10th defendants contend that the accounts of the sub-partnership should not have been dealt with in a suit relating to dissolution of the partnership. The same point is again raised with others in the remaining appeals by these defendants severally against the final decree afterwards passed, by which they were called to contribute towards the firm's losses. The argument for the 8th to 10th defendants is shortly that, having no rights or liabilities in connection with the firm or any of its members except the 1st plaintiff, they have no concern with the taking of the account between its members and cannot be bound by it: and they should, therefore, have been dismissed from the suit as soon as the decision against their position as partners was reached.

Treating the question first one only of procedure, plaintiffs have contended that the frame of the suit is justified by Order I, rule 3, of the Code of Civil Procedure, since if separate suits were brought by the 1st plaintiff against his partners and 8th to 10th defendants, the common portion of the amount of his share in the partnership would arise. But even so, the earlier portion of the rule must receive effect and it has not been shown how the right to relief alleged is in respect of or arises from the same act or transaction. What is the act or transaction? It is not the formation and dissolution of the sub-partnership, since they afforded no right of relief against the 1st defendant to 7th defendants; nor is it the dissolution of the partnership, since though it would entail the dissolution of the sub-partnership and confer on the plaintiffs right to relief against the 8th to 10th defendants, it had not taken place

CHIDAMBARAM CHETTY v. KARUTHAN CHETTY.

at the date of, and was in fact the object of the institution of, the suit.

It is urged next that the 8th to 10th defendants were either necessary or proper parties because multiplication of proceedings would be avoided, if the 1st plaintiff's rights or liabilities in the partnership were determined ~~in~~ for all in a manner which would be binding on the 8th to 10th defendants as well as on the 1st to 7th defendants, since whether or no the 8th to 10th defendants were directly liable for any proportion of the partnership liabilities, such determination would be necessary in the adjustment between them and 1st plaintiff. This is not, in my opinion, sustainable. There is nothing regarding the relations between the sub-partners and partners in the Indian Contract Act. Section 31, however, of the English Partnership Act provides that the assignee of a share in a partnership is entitled "only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners." The assignee is "in case of a dissolution of the partnership....entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and for the purpose of ascertaining that share to an account as from the date of the dissolution." And this may be taken as the law in India, since it is well supported by authority. In the language of the civilians, "*socii mei socius meus socius non est*" (Pothier, Partnership 391); and in *Ex parte Barrow* (1), it was held that an assignee of a share of the profits of a partner "was no partner in that partnership; had no demand against it; had no account in it; and must be satisfied with a share of the profits given to" his assignor. See also *Brown v. De Testet* (2) and *Bray v. Fromont* (3).

The result is that sub-partners must ordinarily accept the account taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which it is taken. The cases relied on by the plaintiffs do not affect this conclusion, but show only that the sub-partners ~~are~~ entitled in the subsequent suit for dissolu-

tion of their sub-partnership to prove that the account was taken wrongly or *mala fide*. Thus in *Williams v. Poole* (4) it was no doubt, said that in any future suit relating to the assignee's rights, the account taken in the suit for dissolution of the partnership might be treated as *prima facie* correct. But the Court, in what was merely an *obiter dictum*, did not say that the previous account would be treated as absolutely correct; it referred explicitly to the assignee's right to surcharge and falsify it: and it refused to make the assignee a party to the partnership suit in which it was taken. In *Watts v. Driscoll* (5) the account between the partners was represented by a private agreement and there was no question of the taking of an account for the partnership in Court or of enabling the sub-partner to take part in any proceedings. The case assists the plaintiffs only because it recognises that the account agreed on or taken between the partners will ordinarily bind the sub-partner. It is against them inasmuch as it authorises the sub-partner to dispute such an account on the ground of *mala fides*. In *Whetham v. Davey* (6) the partnership had been dissolved out of Court and it was said that, if the account was to be taken as claimed from the date of the assignment, it must in consistency go back even further. But the Court in fact declined to go back further than the dissolution and there was nothing to support the assignee's right or duty to take part in any accounting for the period prior to it. Lastly in the only Indian case cited, *Harrison v. Delhi and London Bank* (7), the Bank claiming as assignee was no doubt impleaded in proceedings for a dissolution and account. But so far as the decision was based on the Bank's obligation to account, and not on its denial of the partnership's right to the property in its possession or its allegation that its assignor, a co-defendant, could convey it on behalf of the partnership, that appears to have been on the ground that it stood in its assignor's shoes and was not merely a sub-partner or assignee from a partner. The cases, therefore, relied on by the plaint-

(1) 2 Rose 252.

(2) (1821) Jac. 284; 37 E. R. 858; 23 R. R. 59.

(3) 6 Madd. 5; 22 R. R. 224; 56 E. R. 990; 1 Gl. & Jam. 74.

(4) 21 W. R. 252; 28 L. T. 292.

(5) (1901) 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R. 101.

(6) (1885) 30 Ch. 574; 53 L. T. 501; 33 W. R. 925.

(7) 4 A. 437; A. W. N. (1882) 87.

KALU KHAN v. UMDA.

iffs in no way enable or require sub-partners to concern themselves with the account to be taken at the dissolution of the partnership.

When the law is clear it is unnecessary to consider the extent to which the lower Court's departure from it has prejudiced the 8th to 10th defendants. It may, however, be observed that the form in which its decree was framed, though appropriate as between the plaintiffs and the 1st to 7th defendants, did not recognise that the 8th to 10th defendants had separate interests to be safeguarded. For it did not provide for their being heard when the Commissioner, who was to take the account between the plaintiffs and the 1st to 7th defendants and the 1st plaintiff and themselves, was nominated or enable them to apply for his nomination in case the plaintiffs and the 1st to 7th defendants did not do so, or give them the right to take objections to the accounts which the plaintiffs and the 1st to 7th defendants might put forward. The preliminary decree would in any case require amendment in these respects.

In the result, the appeals are allowed, the suit against the 8th to 10th defendants being dismissed with costs in both Courts and clause (d) being expunged from the preliminary decree, the subject of Appeal No. 197 of 1914.

SRINIVASA AIYANGAR, J.—I agree and have nothing to add.

Appeals allowed;

Suit dismissed as against 8th to 10th defendants.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1171 OF 1913.

December 11, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie Jones.

KALU KHAN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

UMDA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 14, 120—
Application for partition of shamilat rejected—Subse-
quent suit for declaration of title to proportionate
share in shamilat—Limitation.*

The ancestors of the defendants sold a part of
their estate to the plaintiffs' ancestors in 1863 and

put them in possession. Having sold the remaining
estate to other persons in 1884-85 they left the
village.

In 1908 the plaintiffs applied for partition of the
shamilat but the Revenue Officer rejected the appli-
cation in 1909. Thereupon they brought the present
action in 1912 for a declaration of their title to a
proportionate share of the shamilat area:

Held, that the suit was governed by Article 120
and not Article 14 of the Limitation Act. [p. 540,
col. 2.]

Ahmad v. Karamdad, 11 P. W. R. 1908; *Anup Pande
v. Sadho Pande*, A. W. N. (1888) 119; *Shyama Sundari
Dasya v. Mahomed Zarip*, 3 Ind. Cas. 693; 9 C. L. J. 91,
followed.

Second appeal from the decree of the
Divisional Judge, Hissar Division, dated the
25th February 1913.

Mr. Raghu Nath Rai, for the Appellants.

Mr. Kishen Chand, for the Respondents.

JUDGMENT.

SHADI LAL, J.—The facts relevant to the
points in controversy in this second appeal
are simple and may be stated in a few
words. The ancestors of the defendants
sold a part of their estate by a sale-
deed, dated the 29th August 1863, to the
plaintiffs' ancestors, and put the latter
into possession of the property alienated.
They sold the remaining estate to other
persons in 1884-85 and left the village.
In 1908 the plaintiffs applied for partition
of the shamilat and the Revenue Officer
rejected their application in 1909. Thereupon
they brought the present action in 1912
for a declaration of their title to a
proportionate share of the shamilat area,
and the Courts below have concurred in
decreeing this suit.

The defendants have preferred a second
appeal to this Court and the first question
for determination is whether the suit, not
having been instituted within one year
from the date of the order refusing
partition, is barred under Article 14 of
the Limitation Act. Now it is quite
clear that the Revenue Officer had no
jurisdiction, and did not profess, to decide
the question of title which arises in this
case and it is futile to urge that the
present suit is one for setting aside his
order. The learned Counsel for the appel-
lants is unable to cite a single authority
in support of his contention, and it is
abundantly clear that a suit of this kind
is governed by Article 120, *vide, inter alia*,

MURUGA PILLAY v. KRISHNAMOORTHY CHETTY.

Ahmad v. Karamdad (1) *Anup Pande v. Sadho Pande* (2) and *Shyama Sundari Dasya v. Mahomed Zarip* (3).

On the merits we have no hesitation in confirming the decision of the lower Courts. The sale took place nearly fifty years ago, and all the circumstances point to the conclusion that both the parties intended that the *khewat* land with the proportionate share of the *shamilat* should pass to the alienees. The expression used in the deed, *jumla haquq-o-murafiq dakhli wa kharji*, appears to be sufficiently wide; and it is manifest that the vendees have all along been receiving a *pro rata* share of the *shamilat* income and that the vendors ceased to have any share therein. As observed above, the latter sold the residue of their estate more than twenty-five years ago and left the village altogether. During this long period they have not asserted their title, and in fact their claim against the second set of vendees was rejected by the lower Court in 1910, and the finding then arrived at has not been challenged by them.

In view of the terms of the deed, the subsequent conduct of the parties and other circumstances of the case, we think that the Courts below have rightly decreed the suit. We accordingly uphold the decree of the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 11 P. W. R. 1908.

(2) A. W. N. (1888) 119.

(3) 3 Ind. Cas. 693; 9 C. L. J. 91.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 627 OF 1915.

February 2, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

MURUGA PILLAY AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

KRISHNAMOORTHY CHETTY—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—
Practice—Taking up big original suits after 5-30 p.m.
—Prejudice—Appeal, second.

A District Munsif called a big original suit pending on his file after 5-30 P.M. one day, and as the defendants were absent he examined one witness for the plaintiff and gave him a decree. This decree was upheld on appeal. In second appeal it was contended by the defendants, on the strength of an affidavit filed by them, that they were ready to go on with the case that day and waited in Court till 5-30 P. M., that they were then told by their Vakil that there was no likelihood of their case being taken up that day and that they might go home, that on the strength of that assurance they went home, that in their absence the case was called, that their Vakil then represented the above facts to the Court as also his inability to cross-examine the plaintiff's witness and an adjournment was prayed for but it was refused and that in consequence they were prejudiced in the conduct of the case. The plaintiff filed a counter-affidavit by his Vakil in the Court of first instance that it was usual for the District Munsif to take up big original suits only after 5-30 P.M., that the defendants had no witnesses ready that day and had told him at an earlier hour of the day that they were going to apply for an adjournment, but that he was not aware of the circumstances under which the defendants left the Court-house that day:

Held, that, though it was very irregular on the part of a Court to take up for trial and dispose of heavy original suits at that late hour and though such a practice was neither fair to the parties nor to the witnesses nor to the Court itself or anybody else and a Court in doing so would not be acting in the best interests of justice, in the present case, having regard to the fact that the defendants were not ready to go on with the case and had not instructed their Vakil to cross-examine the plaintiff's witnesses and having further regard to the circumstance that they had not filed any affidavit before the lower Appellate Court explaining the facts and showing how they were prejudiced, this was not a matter in which the High Court would interfere in second appeal. [p. 548, col. 1.]

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 218 of 1913, dated 2nd December 1914, preferred against that of the District Munsif, Dindigul, in Original Suit No. 396 of 1911.

Mr. S. Varadachariar for Mr. T. M. Krishnaswamy Iyer, for the Appellants.

Mr. V. C. Seshachariar, for the Respondent.

JUDGMENT.

COUTTS TROTTER, J.—We cannot interfere in this case. It is quite clear that the appellants were not ready with their case. They had not instructed their Vakil about it and he was not in a position to cross-examine and counted upon getting an

DINABANDHU NANDI v. CHAMIRADDI MIJI.

adjournment. The District Munsif not, in my opinion, acting in the best interests of the administration of justice when he took up substantial original suits at that late hour, which was fair neither to the parties nor to the witnesses nor to himself nor to anybody else. But after all, nearly two years elapsed before the hearing of the appeal and yet no affidavit was put in before the Judge explaining the circumstances, and no opportunity was sought to put in this affidavit before him and to explain why and in what manner the appellants were prejudiced. In these circumstances we cannot interfere and the appeal must be dismissed with costs.

SESHAGIRI AIYAR, J.—I agree. I am impressed by the circumstance that there is nothing to show that the appellants were ready to go on with the case. The affidavit of the Vakil on the other side shows that the appellants were not ready and wanted to apply for an adjournment. Therefore, they can have no grievance if the case was taken up at a very late hour though I agree with my learned colleague that it was altogether irregular on the part of the Munsif to take up a big new case at that hour. I agree to the order proposed by my learned colleague.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1037
OF 1914.

April 18, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

DINABANDHU NANDI—PLAINTIFF—
APPELLANT

versus

CHAMIRADDI MIJI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Shebait, power of, to maintain suit in respect of dedicated property without making idol a party.

The right to bring whatever suits are necessary for the protection of property dedicated to an idol is vested in the *shebait* and not in the idol. Hence, the *shebait* is entitled to sue for the rent of the dedicated property without adding the idol as a party. [p. 549, col. 1.]

Jagadindra Nath Roy v. Hemanta Kumari Debi, ■ C. 129; 7 Bom. L. R. 765; 8 C. W. N. 809; 1 A. L. J. 585; 31 I. A. 203, followed.

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 3rd February 1914, reversing that of the Additional Munsif, Chandpore, dated the 14th December 1912.

FACTS material to the report will appear from the arguments and the judgment given below.

Dr. Sarat Chandra Basak (with him Babu Eepin Chandra Basu), for the Appellant, contended that the suit as framed was not bad. The *shebait* had every right to bring the suit; he is the person to protect the dedicated property. Even though the deity had not been established, the *shebait* as plaintiff could maintain the suit. It could not be said that the property would remain without any one to protect it before the establishment of the deity. Referred to *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1). A testator could create a trust for the establishment of a deity and the management of the property dedicated to such deity vests in the *shebait*. Referred to *Bhupati Nath Smrititirtho v. Ram Lal Mitra* (2).

Omission to describe the plaintiff in the cause-title as a person suing in a representative capacity does not vitiate the plaint, although that is a convenient place to state it. If the plaint contains statements showing the character in which the plaintiff is suing, that is sufficient. See *Kuarmani Singha Mandhata v. Wasif Ali Murza* (3).

Babu Jatindra Mohan Ghose, for the Respondent.—The plaintiff by merely taking Probate of the Will, without taking any steps to establish the deity in accordance with the directions in the Will or using the property for any pious or religious purposes, cannot maintain this suit as a *shebait*. There is no knowing whether the idol will be established or not. Before the establishment of the idol, one may very well say that the dedicated property is being

(1) 32 C. 129 (P. C.); 7 Bom. L. R. 765; 8 C. W. N. 809; 1 A. L. J. 585; 31 I. A. 203.

(2) 3 Ind. Cas. 642; 37 C. 128 (F. B.); 10 C. L. J. 355; 14 C. W. N. 16.

(3) 28 Ind. Cas. 818; 19 C. W. N. 1193.

LADHA SINGH v. BHAG SINGH.

used for secular purposes. Cases show that where the Court finds that the *shebait* is using *debutter* property for secular purposes, the Court would not help the *shebait*. The cause-title is not correct and according to prescribed form.

Besides I am not the tenant inducted on the land by the plaintiff, so that I can very well deny his title. Here the plaintiff claims by a testamentary bequest for charitable purposes. The land bequeathed is a *raiyat*-holding, and one of my defences is that the land being non-transferable, the plaintiff or the deity has not acquired any title to the land.

[N. R. CHATTERJEA, J.—How can a tenant raise such a question?]

All this will be decided when the case will be tried on the merits. It has not as yet been tried on all the points involved in it. But I submit your Lordships can decide this question now before directing a remand.

JUDGMENT.—This appeal arises out of a suit for rent. Various defences were raised, and the Court of first instance dismissed the suit. On appeal, that decree was confirmed, but on the ground that the suit was brought by the plaintiff, who was a *shebait* of an idol to whom the property had been dedicated by a Will by the plaintiff's mother, without adding the idol as a party. But the plaintiff as *shebait* was entitled to maintain the suit. As pointed out by the Judicial Committee in the case of *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1), "the possession and management of the dedicated property belong to the *shebait*. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol."

The plaintiff in the present case expressly stated in the first paragraph of his plaint that under a Will executed by his mother the property together with arrears of rent are owned by Ishwar Radha Madhab Deb Thakur as *malik* and held by the plaintiff as *shebait*, although it was not so described in the cause-title.

We think, therefore, that the decree of the lower Appellate Court must be set aside and the case sent back to that Court in

order that the appeal may be decided by that Court according to law.

Costs of this appeal will abide the result.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2262 OF 1915.

December 14, 1915.

Present:—Mr. Justice Rattigan.

LADHA SINGH—INSOLVENT—

APPELLANT

versus

BHAG SINGH AND OTHERS—CREDITORS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 47—Petition of insolvency—Court, whether can refer proceedings to arbitrators—Civil Procedure Code (Act V of 1908), Sch. II—Arbitration.

The provisions of Schedule II of the Civil Procedure Code do not apply to proceedings under the Insolvency Act, and a Court has no power to refer the whole proceedings to arbitrators to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent. [p. 550, col. 2.]

Simla Bank v. Narpat Rai, 88 P. R. 1887, referred to.

First appeal from the order of the District Judge, Jhelum, dated the 23rd of December 1912.

Mr. Roshan Lal, for the Appellant.

Mr. Daulal Ram, for the Respondents.

JUDGMENT.—One Ladha Singh applied to the District Judge, Jhelum, under the provisions of the Provincial Insolvency Act, 1907, to be declared an insolvent and the proceedings took the ordinary course until the 28th June 1912, when the petitioner and his creditors presented a written petition to the Court which runs as follows:—

"We the parties have nominated the following arbitrators for disposal of the case:—On behalf of Ladha Singh, petitioner, Babu Bheri Ram, Pleader of Jhelum, and on behalf of the respondents, Rai Sahib Babu Bishen Das, certificated Mukhtar. We shall abide by the award of the said arbitrators unanimously In case of difference o

LADHA SINGH v. BHAG SINGH.

opinion between the arbitrators, the Court itself shall appoint an umpire. In that case, too, we the parties shall abide by the award delivered by the umpire."

Upon this the Court passed the following order:—

"The parties are present. According to the application filed by the parties this case should be made over to the arbitrators specified in the petition for disposal. In case of difference of opinion between the arbitrators the Court itself will appoint an umpire. Award to be filed in Court by the 24th July 1912. The parties should deposit Rs. 32 as arbitrators' fees and As. 8 as process fee in equal half shares."

The time for filing of award was subsequently enlarged and on the 4th November 1912 the arbitrators filed the following award:—"We the arbitrators made enquiry on the spot. We took down all the evidence produced by the parties. After taking into consideration all the facts, we are of opinion that Ladha Singh has not proved that he filed this application *bona fide* or that he has separated off his sons in good faith. He has alienated his house in favour of his sons simply with a view to cause loss to his creditors. As a matter of fact, he has alienated all the immoveable property belonging to him in favour of his sons, simply with a view to avoid payment of his debts. In our opinion he can pay the debts and does not deserve to be declared an insolvent and our award is to the effect that his petition should be rejected."

(The application, order of the Court, and award are in vernacular and the above are translations thereof).

The District Judge on receipt of this award, passed an order (in English) on the 9th December 1912, to the effect that the arbitrators had found that Ladha Singh was in a position to pay his debts and that any objections to the award which Ladha Singh might have should be preferred within 10 days.

Ladha Singh filed an objection in writing taking exception to the conduct of the arbitrators, but his objection was overruled as having "no sense," and his petition to be declared an insolvent was rejected by the District Judge by order dated the 23rd December 1912.

An appeal was preferred from this order by Ladha Singh to the then Divisional Judge, but remained pending until the 2nd August 1915 when it was rejected on the ground that the Court had since the institution of the appeal been converted into that of a District Judge and as such had no jurisdiction to entertain and determine it. The memorandum of appeal was accordingly presented to this Court on the 9th August 1915 and the hearing of the appeal took place before me on the 13th instant.

The sole ground urged before me by Mr. Roshan Lal on behalf of the petitioner Ladha Singh is that the District Judge acted with material irregularity in practically delegating all his functions under the Act to the arbitrators, and, in my opinion, this contention is well founded. Section 47 of the Provincial Insolvency Act, 1907, no doubt provides that "subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction," but I cannot read these provisions as enabling the Court when dealing with petitions under the Act, to refer the whole proceedings to arbitrators who are to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent.

Proceedings under the Act are of a peculiar character and it is only District Courts and Courts specially empowered by the Local Government, with the previous sanction of the Governor-General in Council, that are given jurisdiction to deal with cases under the Act (section 3), and it would be anomalous if a Court, to which a petition is presented, could delegate the whole of its functions under the Act to a person or persons possessing no special qualifications for dealing with those questions of an intricate and peculiar nature that usually arise in such proceedings and ought in the ordinary course of things to be decided by a judicial officer of experience. An officer who occupies the position of a District Judge is to be assumed to have this experience, but it is significant that no Court other than a District Court

MUTHIAH CHETTI v. PERIANNAN CHETTI.

is to have jurisdiction under the Act unless it has been specially invested with powers under the Act by the Local Government and that even in these cases the previous sanction of the Governor-General in Council is a condition precedent. In *Simla Bank v. Narpat Rai* (1) (a case which was decided under the Punjab Laws Act, 1872), Sir Meredyth Plowden expressed the opinion that the provisions of Chapter XXXVII of the Civil Procedure Code, which dealt with references to arbitration, are not applicable from the very nature of the proceedings "to a proceeding in insolvency as between the creditors on the one side and the insolvent on the other," and I have no hesitation in adding that the provisions of Schedule II of the Civil Procedure Code now in force are equally inapplicable to proceedings under Act III of 1907. These proceedings require the exercise of judicial discretion and it would, I consider, be acting contrary to the whole spirit of the Act for a Court, which has special jurisdiction thereunder, to delegate its powers and duties to an arbitrator. In the present instance the District Judge practically left the whole case in the hands of the arbitrators and without attempting to adjudicate himself upon the evidence given before them, has accepted their award as sufficient justification for rejecting Latha Singh's petition. In so doing he has acted with material irregularity and has failed to exercise the jurisdiction vested in him by the Act. I accordingly accept this appeal and setting aside all proceedings in the District Court subsequent to those which took place on the 31st May 1912, I direct the District Judge to proceed with the case from that stage according to law. Respondents must pay petitioner's costs in this Court.

Appeal accepted; Case remanded.

(1) 88 P. R. 1887.

MADRAS HIGH COURT.

CIVIL APPEAL No. 56 OF 1914.

February 29, 1916.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Phillips.

R. M. P. S. MUTHIAH CHETTI AND
OTHERS—DEFENDANTS NOS 1, 21, 31 AND 33—
APPELLANTS

versus

M. A. R. M. PERIANNAN CHETTI AND
OTHERS—PLAINTIFFS NOS. 2 TO 5, 7 AND 9—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Scheme for settlement of charitable trust—Temple, evidence to prove public character of—Temple used for caste meetings, whether private property—Past user, how far material in framing scheme—Scheme, whether necessary when trustees not guilty of misconduct.

The facts that a temple is open for public worship, that the rites and ceremonies are such as are observed in public temples and that numerous *inam* lands have been granted to the temple, constitute strong evidence of its public character. [p. 552, col. 2.]

Muhammad Jafar v. Muhammad Ibrahim, 24 M. 243; *Peesapati Sitaramanujachari v. Kanduri Vellamma*, 30 Ind. Cas. 822; 18 M. L. T. 543; 2 L. W. 858, followed.

A caste or a section of a caste can own a temple, but a temple which is managed by a certain caste is the subject of a public charitable trust and a scheme can be framed for it under section 92 of the Civil Procedure Code. [p. 553, col. 1.]

Pragji Kalan v. Govind Gopal, 11 B. 534; *Thackersey Dewraj v. Hurbhum Nursey*, 8 B. 432; *Puramathan Somayajipad v. Sankara Menon*, 23 M. 82; *Ramanathan Chetty v. Murugappa Chetty*, 27 M. 192; 13 M. L. J. 341, followed.

The fact that a temple is used for caste meetings and that moneys belonging to the temple have been spent not on the temple itself, but on various objects tending to promote the benefit of the caste, does not of itself prove that the temple is the private property of the caste. [p. 553, col. 2.]

In the absence of evidence of the intention of the founders, institutions like temples should be governed by user and though the past user of an institution is not binding on the Court in framing a scheme under section 92 of the Civil Procedure Code, yet it may well be taken into account and departed from only so far as may be necessary. [p. 554, col. 1.]

Even where no actual misconduct or mismanagement is proved against the trustees, a scheme may be properly framed, if necessary in order to set at rest questions which might give rise to difficulties in the future and to remove any uncertainty as to the right of management in the temple. [p. 554, col. 1.]

Chapsey Cooverji v. Jethabhai Nursey, 9 Bom. L. R. 514, followed.

In framing a scheme a Court need not remove trustees already holding office when no misconduct is proved against them. [p. 556, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madurai, in Original Suit No. 34 of 1912.

MUTHIAH CHETTI v. PERIANNAN CHETTI.

Messrs. T. Rangachariar, M. Patanjali Sastri and A. Krishnaswami Aiyar, for the Appellants.

The Hon'ble Mr. S. Srinivasa Aiyangar, Advocate-General, and Mr. G. S. Ramachandra Aiyar, for the Respondents.

This appeal and the memorandum of cross-objections filed by the respondents Nos. 1, 5, and 6 coming on for hearing on the 10th, 11th, 12th, 17th, 19th and 20th January 1906, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—The plaintiffs in this case sued under section 539 of the old Code of Civil Procedure for the settlement of a scheme for the management of the suit temple, alleging that it is a public Hindu temple and that the management thereof is vested in the Ilayathakudi Kovil Nagarathars, as certain families of Nattukottai Chetties residing near the suit temple are styled, and that management by so large a body has become impracticable. They also allege that if, as is contended by the defendants, the management is already vested in some of the defendants as trustees, the necessity for a scheme is equally made out.

The Subordinate Judge has found that the temple is a public Hindu temple and that the suit accordingly lies under the section. This is the first point contested by the appellants, who contend that it is a private temple owned by the Nattukottai Chetties or Nagarathars of the locality, whereas the case for the respondents is that the temple is an ancient one founded by the local rulers before the advent of the Nattukottai Chetties to Ilayathakudi. The tradition among the Nattukottai Chetties, who are now so well-known in connection with the money-lending and banking business carried on by them in India and further East, is that they originally came from Tanjore, and the fact that they all style themselves Ilayathakudi Nagarathars suggests, as the Subordinate Judge points out, that their first settlement in the Madura District was at Ilayathakudi. Some of them afterwards removed to other places in the neighbourhood and became connected with other temples so that, while they are all

known as Ilayathakudi Nagarathars, the families whose principal place of worship is the suit temple at Ilayathakudi are known as Ilayathakudi Kovil Nagarathars. The same inference is supported by the fact that each of the several branches, although known by the name of the temple to which it is attached, still maintains some connection with the suit temple.

In these circumstances there does not seem to be any foundation for the suggestion that the temple was founded by the families who are now known as Ilayathakudi Kovil Nagarathars or for their claims that the temple is a private institution belonging to them. It is impossible to say at this distance of time who was the founder of the temple. The plaintiffs rely on the fact that, as mentioned in the *Inam* Register, the *Hindivi* accounts of 1801 showed that the temple was in possession of certain *inam* villages before the establishment of British rule, and the fact that there are certain statues of Ruling Chiefs as it is said in the temple to show that it was founded by former rulers for the use of the public, and that the local Nattukottai Chetties afterwards acquired the management of it as they did of the numerous other institutions in the district which are referred to in Exhibit A by reason of their wealth and benefactions. The plaintiffs also rely on the fact that the temple is open for public worship and that the rites and ceremonies are such as are observed in public temples. The grant of numerous *inam* lands to the temple is strong evidence of its public character, *Muhammad Jafar v. Muhammad Ibrahim* (1), as is also the character of the worship, *Peesapati Sitaramanujachari v. Kanduri Vellamma* (2), and in the plaint the Kiranipatty Amman temple which is admittedly a public institution, is alleged to be a temple subsidiary to the suit temple, and this contention is not traversed in the written statement, and it is proved that the funds of the two institutions are mixed up and not kept separate. On the evidence, therefore, we agree with the Subordinate Judge that the temple has been open to the Hindu public, and that the action of the managers in endeavouring to exclude or

(1) 24 M. 243.

(2) 30 Ind. Cas. 822; 18 M. L. T. 142; 2 L. W. 658.

MUTHIAH CHETTI v. PERIANNAN CHETTI.

excluding two local *zemindars* who had had quarrels about property with the temple is no sufficient proof that it was a private temple. It may be that a caste or a section of a caste can own a temple, ■ it has been held in *Pragji Kalan v. Govind Gopal* (3) that they can own vessels for cooking and dining, but in *Thackersey Dewraj v. Hurbhum Nursey* (4), the case which most nearly resembles this, it was held that a temple which was managed by a certain caste was the subject of ■ public charitable trust and that ■ scheme could be framed for it under section 539 of the old Civil Procedure Code and though on appeal the Court was of opinion that no scheme ■■ necessary, it is not suggested that they held that the section did not apply. Malabar cases in which temples were held to be the property of a *tarwad*, that is, of the descendants of one woman, and *Puramathan Somayajipad v. Sankara Menon* (5), where the temple was said to belong to the three *sabhayogams* or companies of Brahmin ascetics, appear to be less applicable. On the whole it cannot be said to be proved in this case that the temple was founded by the Nagarathars, and even if it was, it must have been founded by the whole community who settled at Ilayathakudi and not by the particular families which have continued to be attached to it. There is, therefore, in our opinion, no case for holding that the temple is the private property of the Ilayathakudi Kovil Nagarathars. Even if it had been shown that the temple was founded for the use of this particular section of the caste, which consists of several families not shown to be otherwise than very distantly related to one another, we should, as at present advised, be inclined to hold that they are a section of the public and that section 92 is applicable. Serious inconveniences would arise from holding that ■ temple of this kind was the private property of such a large body of persons as the Ilayathakudi Kovil Nagarathars, and we think that such private ownership should be strictly proved. In this connection, we may mention that a scheme has already been settled for one of

the temples in this district included in Exhibit A ■ under the management of the Nagarathars, *Ramanathan Chetty v. Murgappa Chetty* (6), and in ■ very recent case, we have held that ■ *mutt*, which was also mentioned in Exhibit A as under the management of the Nagarathars, ■■ in fact the property of the head of the *mutt*, and that owing to their benefaction the Chetties had been allowed to manage on his behalf. In the present case, the income of the temple was mainly derived from *inams* or State grants until the Chetties in 1877 levied money among themselves by a poll-tax and embarked it in ■ money-lending business in which large profits were realised, but this does not at all show that the temple was their private property. Nor does the fact that the temple was used for caste meetings and that recently out of the moneys which they had earned for the temple they erected buildings for caste meetings and incurred other expenditure for the benefit of the caste rather than of the temple, afford sufficient evidence of private ownership. The fact that the temple money has been spent not on the temple, but on various objects tending to promote the benefit of the caste alone merely shows that the caste has practically usurped control of the temple, but is not sufficient to prove that the temple is the property of the caste.

The next question is ■ to whether a scheme is necessary. There can be no doubt, we think, that on the whole the temple has been well managed, and that its resources have been greatly increased, and we should have been very glad if things had been allowed to go on without recourse to a Court of Law. At the same time, the impression left on our minds by the evidence and the exhaustive arguments to which we have listened is that it is very difficult to say exactly what the present scheme of management is, and we think that the questions which have now been raised ■■ sure to give rise to difficulties in future, unless they ■ set at rest by the settlement of ■ scheme. In *Ohapsey Cooverji v. Jethabhai Nursey* (7)

■ (3) 11 B. 534.

■ (4) ■ B. 432.

■ (5) 23 M. 82.

(6) 27 M. 192; 13 M. L. J. 341.

(7) 9 Bom. L. R. 514.

MUTHIAH CHETTI v. PERIANNAN CHETTI.

Chandavarkar, J., saw reason to express regret that the scheme settled by Scott, J., in *Thackersey Dewraj v. Hurbhum Nursey* (4), which as we have already said was a case similar to this, had been set aside on appeal as subsequent events had demonstrated the necessity of the scheme. The Subordinate Judge in paragraph 145 of his judgment has forcibly pointed out the evils and dangers resulting from the uncertainty which at present exists as to the right of management in this temple, and we agree with his conclusion that it is desirable that a scheme should be settled.

It has been repeatedly laid down that in the absence of evidence of the intentions of the founders, institutions of this kind should be governed by user, and though the past user of the institution is not binding on us in framing a scheme under the section, yet it may well be taken into account and departed from only as far as may be necessary. The case for the plaintiffs is that the management of the temple is at present vested in the whole body of Ilayathakudi Kovil Nagarathars. The case for the defendants is that, assuming the temple not to be a private temple, the trusteeship is vested in four particular families and was discharged from time to time by one member of each family, generally the eldest. It is undoubted that four Kariakars, one for each family, have acted ever since 1864, the date of the *Inam* Settlement, and that at that time they were recognized by the *Inam* Commissioner as trustees; and Exhibit G1, the *Inam* Register of one village, says the temple had been under the management of the trustees for a long time while Exhibit XXXI, a similar document of the same date, says that the temple had been under the management of the trustees for at least a century. We cannot agree with the Subordinate Judge that Exhibit G and the connected Exhibits show that this state of things arose subsequently to 1832, the date of those documents. What these documents show is that in 1832 when the Sivaganga *zamindari* was under attachment the Revenue Officials, as agents of the Board of Revenue and in the exercise of the powers conferred upon it by Regulation

VII of 1817, began to investigate the accounts of the temples in the *zamindari*; and the Chetties protested that the temples and *mutts* therein mentioned had always been under their management and asked that they should not be interfered with. There was no occasion to set out in detail the method in which each of the institutions was managed; and even if the suit temple was then managed by four trustees taken from four particular Chetti families, we think it might still be described as "under the management of the Nagarathars alone ever since the time of our ancestors," having regard to the greater or less control exercised over the trustees by the *kootam* or annual meeting of the Nagarathars at the temple.

The Subordinate Judge in paragraph 99 of his judgment rejects the case for the plaintiffs that the Kariakars were annually appointed trustees by the *kootam*, and also rejects the defendants' case that they were the hereditary trustees of the temple. He finds in paragraph 99 that the management is vested in the whole body of Nagarathars; that at some time or other they allowed members of each of four leading families to attend to the internal affairs of the institution; that after the death of these four persons one person from each of these families was tacitly allowed to look after the affairs of the institution; that even after these four persons were appointed the Nagarathars exercised control over the affairs of the temple in all important matters; and that until 1904 the four Kariakars considered themselves to have been appointed by and subject to the general body of Ilayathakudi Kovil Nagarathars, and only then took it into their heads to assert an hereditary right to the trusteeship and to claim absolute powers over the temple and its endowments. He finds accordingly (paragraph 100) that they are not trustees under the right claimed by them but have been tacitly allowed to act as trustees, being the representatives of the families to which the trustees first appointed by the Nagarathars to manage the affairs of the temple belonged.

As we have already said, we think the Kariakars go back further than the Subordinate Judge supposed, and we are not satisfied that he is right in holding that the small sums mentioned in Exhibits EE series were expended by the authority of the whole body of

MUTHIAH CHETTI v. PERIANNAN CHETTI.

Nagarathars assembled at their annual meeting. It seems to us quite possible, ■ suggested for the defendants, that the Nagarathars mentioned in this series may have been the Kariakars themselves describing themselves as Nagarathars. There are numerous deeds in which the Kariakars describe themselves as appointed by the Nagarathars, though, as the Subordinate Judge has rightly pointed out, there is no satisfactory evidence that they used to be actually appointed, and it is also possible that this appointment mentioned in Exhibits J series or XXXII series refers to appointment in the remote past and it seems to us that in Exhibits EE series they may have sometimes described themselves as Nagarathars because they regarded themselves as representing the whole body of Nagarathars; but if this be so, it only makes the case stronger for holding that the Nagarathars were the controlling authority. Further, as pointed out by the Subordinate Judge, one of the defendants, himself a Kariakar, has filed an affidavit YY in this suit in which he states that the trustees for the time being were consulting with the leading members of the community in important matters and were acting in accordance with the wishes of the community expressed at the general meeting of the caste during the Keeranipatty festival or on other occasions. The fact that the Kariakars in many instances also described themselves as *hakdars* or temple trustees is not, in our opinion, sufficient having regard to the rest of the evidence to establish their right to that character independently of the general body of Nagarathars.

On the whole, although as we have said, the evidence is not altogether consistent, we see no reason for differing from the conclusions of the Subordinate Judge in paragraph 59 of his judgment that the Ilayathakudi Kovil Nagarathars ■ a body had the control of the temple affairs, though they left most of the management to the four Kariakars, and there was also occasional interference in circumstances, which are not fully proved, by individual Nagarathars other than the four Kariakars, who not only acted, but also in some instances styled themselves as Kariakars and *hakdars*. In some instances, as pointed out by the Subordinate Judge, these individuals were not even members of the four *vahais* or families from whom the Kariakars

are taken, and the fact of their interference shows how little system there was in the way in which the affairs of the temple were managed, and makes it more than ever necessary to frame a scheme. We do not think it is desirable that at this stage we should indicate in detail the lines on which the scheme should be framed, and would leave it to the parties in the first instance to frame a scheme for the consideration of the Court. We may, however, say that the position of the four Kariakars from the four *vahais* or families ■ hereditary Kariakars or agents is entitled to consideration, for it is clear that for the last 100 years or so four families, to which defendants Nos. 1, 21, 31 and 33 belong, have held a right superior to the rights of the other members of the community, although that right may not be the right of absolute trusteeship. We are also disposed to think that it is desirable that, subject to such control on the part of the general body of Ilayathakudi Kovil Nagarathars ■ may be considered necessary, it is desirable that there should be a body of trustees who can be held responsible for the due administration of the trust. Assuming the right of management to be now lawfully vested in the general body in accordance with user, it must be very difficult for them to perform efficiently the duties of trustees, and still more difficult to enforce against them individually the obligations of trustees.

In the view we have taken it is unnecessary to deal with the alleged breaches of trust which are the subject of the 6th issue, for these breaches are more or less technical. If we look upon the institution merely as one for the benefit of the general public, undoubtedly the funds of the institution have been used irregularly, but when it is considered that the greater part of the present income of the temple is the result of the offerings and contributions made by the Chetti community, and that the expenditure of this income on caste purposes has not caused any real injury to the temple, we do not think that the trustees can be held guilty of any moral obliquity.

Apart from this, we think the necessity for ■ scheme has been sufficiently demonstrated. On the whole the management of the Kariakars has been honest and beneficial to the estate, though marked by some irregulari-

SATIKANTH BANERJEE v. RAM CHANDRA CHATTERJEE.

ties. This has scarcely been contested, and if they were trustees we do not think that they should be removed on the ground of misconduct in their office. Further, the suit was filed under section 539 of the old Civil Procedure Code which, as construed by this Court, did not admit of the removal of trustees in a suit framed under it, it is open to question whether the Kariakars could be removed for misconduct in the present suit even if they are regarded as trustees. For the reasons already given, we find some difficulty in regarding them as trustees, though we think there are strong grounds for holding them entitled to a hereditary office of Kariakars or agents. In any view, we do not consider it necessary that they should be expressly removed by the decree from the office of trustees and would modify the decree by omitting that provision. For the future their duties will be provided for in the scheme. Subject to this modification the appeal is dismissed except as to costs. In view of the peculiarity in circumstances of the estate, we think the costs of both sides here and below should come out of the estate.

The memorandum of cross-objections is dismissed. There will be no order as to costs.

Appeal and cross-objections dismissed;

Decree modified.

V. R. P.

CALCUTTA HIGH COURT.

APPLICATION FOR REVIEW IN CIVIL RULE
No. 636 OF 1915.

May 29, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief
Justice, and Justice Sir Asutosh
Mookerjee, Kt.

SATIKANTHA BANERJEE—PLAINTIFF—
APPELLANT—PETITIONER

versus

RAM CHANDRA CHATTERJEE AND
OTHERS—DEFENDANTS—RESPONDENTS—
OPPOSITE PARTIES.

*Appeal—Limitation—Amendment of decree, whether
extends time for appealing—Limitation Act (IX of
1908), s. 5.*

A party who prefers an appeal from a decree after its amendment beyond the period of limitation from the date of the decree but within it from the date of the amendment, is to be limited to his grounds of appeal which refer to the amendment, unless he is entitled to an extension of time under section 5 of the Limitation Act. [p. 557, col. 1.]

The rule laid down in *Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji*, 3 C. L. J. 188, for extending the time for appeal from a decree on its amendment approved. [p. 557, col. 1.]

Application for a review of the judgment of the Calcutta High Court, dated the 10th January 1915, passed in Civil Rule No. 636 of 1915, issued by the Court in Appeal from Original Decree File No. 132 of 1915.

Babus Jadu Nath Kanjilal and Taradas Chatterjee, for the Petitioner.

Babus Dwarka Nath Chakrabutty and Karunamoi Bose, for the Opposite Parties.

JUDGMENT.

SANDERSON, C. J.—I am of opinion that this Rule should be made absolute, and that the case should go to the Bench which would in the ordinary course have jurisdiction over the matter, so that that Bench may consider all the facts which are set out in the various affidavits. We have only had the opportunity of reading the facts set out in the affidavit of the 14th of April 1915, filed on behalf of the plaintiff. We now understand that there are other affidavits filed on behalf of the defendants, and the facts in the affidavit of the 14th of April are not accepted but are denied in material respects. Therefore, we think that this matter should go to the Bench. I have already intimated, so that that Court may consider all the facts which are material to the question, whether the time for entering the appeal should be extended. Supposing that that Court comes to the conclusion on the merits that the time for appealing should be extended, then no further question will arise. But supposing that that Court comes to the conclusion on the merits that the time should not be extended, then arises the question of law we have discussed this morning, as to whether the plaintiff is entitled as a matter of right to have his appeal filed. The plaintiff alleges that inasmuch as the decree was amended on the 27th of January 1915, the time for entering the appeal would not begin to run until that date, and that, therefore, inasmuch as the appeal was filed or attempted to be filed on the 21st of April it was within time. I think the proper rule to apply to such a con-

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

dition of affairs is that laid down in the case of *Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji* (1). The head-note expresses that part of the judgment to which I wish to refer, and it is as follows : "Every amendment made in a decree under section 206, Civil Procedure Code, does not necessarily entitle a party, who prefers an appeal against the decree, to claim an extension of time under the second paragraph of section 5 of the Limitation Act; whether there is sufficient cause for such extension must depend upon the circumstances of each individual case. If the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, such appeal should not be admitted out of time. On the other hand, if the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should exercise in his favour the discretion vested in it by paragraph 2 of section 5 of the Limitation Act." Applying this principle, what I mean to say is that if the Bench which is to hear this case does come to the conclusion on the merits of the case, as set out in the various affidavits to which I have referred, that there is no ground for extending the time for appealing, then the plaintiff ought to be limited to his grounds of appeal which refer to the amendments which were inserted in the decree on the 27th of January 1915, and to those amendments only.

This Rule is, therefore, made absolute with costs hearing fee, one gold *mohur*.

The Bench to which this is sent after hearing the material facts will either allow the whole appeal to be admitted or part of the appeal only as above mentioned.

MOOKERJEE, J.—I agree.

Rule made absolute.

(1) 3 C. L. J. 188.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 431 of 1914.

January 25, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KATTALAI MICHAEL PILLAI AND OTHERS—PLAINTIFFS NOS. 1 TO 3 AND 5—

APPELLANTS

versus

RIGHT REVEREND J. M. BARTHE, S. J., BISHOP OF TRICHINOPOLY, AND

OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 9—Suit for prohibit certain members of Roman Catholic persuasion from mixing with other members in the church, whether lies in Civil Court—Canon Law—Authority of Bishop, extent of—Caste distinction, if exists among Roman Catholics—Customary right, when valid—Suit by member of congregation against Bishop to continue a favour or indulgence, if lies—Interference of Civil Courts, when can be obtained.

Where certain Roman Catholic Christians, forming a portion of the congregation attached to the Vadakkankulam Church in the Trichinopoly District and composed of Pillai and Mudaliar converts to Christianity, acting on behalf of themselves and other members of their community, based their suit upon agreement and caste custom, and sued the Roman Catholic Bishop of Trichinopoly, the parish priest of the place and certain Nadar converts, as representing their community, for mandatory injunction to erect certain walls for separating the northern and southern wings of that Church, for a declaration of the exclusive right of the plaintiffs' community to the ownership of and entrance into the southern wing of the church to the exclusion of the Nadar convert community and to perform service at the altar and join in the service of the congregation except on certain days, and also for an injunction to restrain the Nadar section of the congregation from entering the chancel and other *peetams* and the Bishop and the parish priest from allowing them to do so, and for a declaration of their sole right to conduct certain processions and have custody of the sacred images and the keys of the church and to ring the church bells:

Held, (1) that according to the tenets of the Christian faith and the Canon Law such a suit did not lie, ■ the basis of the suit, *viz.*, the theory of pollution and defilement by touch could not be recognised in the case of Christians; [p. 562, col. 2.]

(2) that the so-called agreement was only an order by the Bishop to the congregation and was in the nature of a license and was not binding upon the successors of the Bishop, ■ it was not competent to the Bishop, however, unfettered and absolute his right of control over his flock might be, to contract himself out of his rights perpetually so ■ to prevent his successors from exercising the same authority; [p. 561, cols. 1 & 2; p. 565, col. 2; p. 566, col. 1.]

(3) that the suit ■ framed was not maintainable. [p. 564, col. 2; p. 565, col. 2.]

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

Per Napier, J.—*Quære*.—Whether the Courts have power to give declarations as between different classes of His Majesty's subjects on matters such as the existence of caste distinctions among Roman Catholic converts and whether any action can be founded on a disregard of such rights save as they arise out of trusts? [p. 559, col. 2.]

According to English Law, customary rights have one feature in common, namely, that however large the community enjoying them and however frequent the exercise of the right, they never amount to a continuous and complete deprivation of the owner of the soil of his natural exclusive right of user. Further, whether the customary right be a profit *a prendre* or a right of unprofitable user such as to hold a fair or play games in a particular close, the custom has always arisen in the close and has no other origin. [p. 559, col. 2; p. 560, col. 1.]

Where there is a recognised religious association such as the Roman Catholic Church under the supreme authority of the Pope of Rome, persons who become members of that body at a particular place cannot in respect of their local church derogate from the authority of the rulers of their community by any agreement made among themselves, or adopt rules for the conduct of ceremonial observances at variance with the canons of the church so long as they profess allegiance to the same. If they wish to do so, they must secede from that church and form a new religious association for themselves. A congregation has no power to select what canons it will follow and what disregard. The rules and jurisdiction of officers in the church are to be sought in the canons of the church and must be given effect to by the Courts. [p. 561, col. 2; p. 562, col. 1.]

Long v. Bishop of Cape Town, (1863) 1 Moo. P. C. (N. S.) 411; 2 N. R. 465; 15 E. R. 756; 9 Jur. (N. S.) 805; 8 L. T. 738; 11 W. R. 900; 138 R. R. 553 and *Merriman v. Williams*, (1882) 7 App. Cas. 484; 51 L. J. P. C. 95; 47 L. T. 51, explained.

A member of a church need not sue by virtue of an office [p. 562 col. 2.]

Brown v. Cure et Marguilliers de Norte Dame de Montreal, (1874) 6 P. C. 157; 44 L. J. P. C. 1; 31 L. T. 555; 23 W. R. 184, followed.

Per Sadasiva Aiyar, J.—The recognition by Courts of Hindu castes as distinct corporations with exclusive legal rights for certain purposes ought not to be extended to Christian communities, as it would lead to complications and anomalies of a far-reaching character. [p. 567, col. 1.]

Though the Courts have power, in any matter of a mixed spiritual and temporal character, to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury, the sentiment of pollution in a Christian Church, indulged in by the so-called caste Christians, is not such spiritual or temporal injury as can be recognised as a legal injury giving rise to a civil cause of action. [p. 568, col. 1.]

A bad usage, not accepted as lawful or invariable by a party, cannot be recognised as a reasonable custom having the force of law. [p. 568, col. 1.]

Favours and indulgences granted by an eccle-

siastical authority can only be interfered with by the authority granting the same, or by an appellate ecclesiastical authority. Though a Civil Court must recognise the favour or indulgence granted by the proper ecclesiastical authority when temporal or mixed spiritual and temporal rights flowing from the favour or indulgence are interfered with by wrongdoers, it cannot interfere with the jurisdiction of the ecclesiastical authorities in the grant or revocation of such favours and indulgences. [p. 568 col. 2.]

A grantee of a favour or indulgence can make no claim against his grantor that the favour or indulgence should be treated as irrevocable unless he can invoke the doctrine of estoppel in his favour. [p. 568 col. 2.]

Second appeal against the decree of the District Court of Tinnevely, in Appeal Suit No. 89 of 1913, preferred against that of the Court of the Subordinate Judge of Tinnevely, in Original Suit No. 62 of 1910.

Messrs. T. Rangachariar, V. S. Govindachariar and V. S. Kallabhram Aiyangar, for the Appellants.

Mr. W. Barton, for the Respondents.

JUDGMENT.

NAPIER, J.—This is an appeal from an appellate decree of the District Court of Tinnevely dismissing a suit brought by the five Roman Catholic Vellalas, as representatives of the Pillais and Mudalis of Vadakkankulam, against the Roman Catholic Bishop of Trichinopoly, the parish priest of Vadakkankulam and certain Shanani Roman Catholics, the last being sued as representatives of the Nadars, asking for certain reliefs in connection with the Holy Family Church situate in the above village. The reliefs may be grouped as follows:—

1. A mandatory injunction to re-erect walls between what are called the two churches in the above church, the cause of action being the obstructing of the plaintiffs' right, the obtaining an order under section 144 of the Code of Criminal Procedure, and the demolition of the walls, all in November 1910.

2. A declaration that the ownership of the alleged southern church is vested only in the so-called high caste Christians of the plaintiffs' *vagaira*.

3. A declaration of the right of the plaintiffs' *vagaira* alone to enter it and an order restraining other so-called low caste Christians of the *vagaira* of the defendants Nos. 3 to 14 from entering it.

4. An order restraining the latter from entering the altar and other *peetams* and

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

restraining the Bishop and the parish priest from allowing them to do so. (The phrase 'entering the altar' is meaningless. Altar is probably used for chancel).

5. A declaration of the sole right of the Pillais, Mudalis and so-called high caste Christians to perform services at the altar and join in the service of the congregation except on certain days.

6. A declaration of their sole right to conduct certain processions, have custody of the sacred images, and keys of the church, and ring the bell, etc.

7. A declaration that the *vagaira* of defendants Nos. 3 to 14 have no right to go in procession in palanquins in marriages through the streets inhabited by the plaintiffs and asking for appropriate injunctions in respect of the above declarations.

The last claim was not argued before us; but the others were pressed by Mr. Rangachariar on the grounds of agreement and custom. It has been a little difficult to ascertain the extent of the claims, as the learned Vakil was naturally not familiar with the meaning of the words 'altar' and 'pulpit' and with the nature of the ceremonial and observances of the Catholic Church. He has, however, pressed those parts of the claim as have reference to the ritual as strongly as those connected with the exclusive rights in the so-called southern church, and the custody of the whole fabric. The Bishop in his written statement has claimed that the church fabric and site is vested in himself in trust for sacred uses and has asserted the sole right of himself and the Vicar to regulate the accommodation inside, to prescribe the part to be taken by the congregation in the services and the ceremonies, has denied that any exclusive right or privilege can be claimed by members of any community, and has alleged that the so-called agreements have only been concessions which he has thought fit to withdraw. The Subordinate Judge who tried the case has, in his judgment composed chiefly of long extracts from exhibits, sometimes inaccurately quoted, given certain reliefs which as already stated have been set aside on appeal. In arguing his case Mr. Rangachariar has relied on a Bull issued by Pope Gregory XV in 1623 recognising caste distinctions and has invited an expression from the

Court as to the existence of these rights. Speaking for myself, I do not propose to express any opinion on so broad a subject which has not been thoroughly argued before us and, in my opinion, does not arise. Whether the Courts have power to give declarations as between different classes of His Majesty's subjects on such matters and whether any action can be founded on a disregard of such rights save as they arise out of trusts are questions on which I have serious doubts, but these doubts need not be resolved here. What we have to decide is a narrower question, namely, whether by agreement or caste custom a Roman Catholic can claim exclusive privileges for his caste inside a church against the directions of the Bishop having authority over that church. I have had some difficulty in ascertaining from Mr. Rangachariar the legal nature of the rights claimed. He did not press his claim to ownership of any part of the site of the church, but he put his claim as a customary right to deal with immoveable property—"dealing with" covering the exercise of any exclusive privilege within the church premises. Unfortunately he did not assist us by referring to any authorities on the subject of customary rights in *alieno solo*, and indeed English Law furnishes no precedent for a claim so wide as this. Such customary rights as are recognised, of which there are many examples in the text books, have one feature in common, namely, that however large the community enjoying them and however frequent the exercise of the right, they never amount to a continuous and complete deprivation of the owner of the soil of his natural exclusive right of user. Here the plaintiffs claim an exclusive right of use of a portion of the church on all occasions when the church is used, not, it is true, to the exclusion of the owner but to the complete exclusion of the owner's licensees. Again, the custom on which the claim is based is not one arising out of, and confined to, the exercise in the particular land or tenement. On the contrary it is a so-called caste right in *personam*, of application at all times and everywhere which the plaintiffs claim to enforce, when in occupation of the tenement. I can find no precedent for any such claim. Whether the customary right be a *profit a prendre* or

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

right of unprofitable user, such as to hold a fair or play games in a particular close, the custom has arisen in the close and has no other origin. Lastly, the alleged customary right can only have been associated with this particular tenement since the construction of the church between 1858 and 1872, a period quite insufficient to establish a right of customary user. Reference was made in the course of argument to the law of 'pews' in the established church: but these are easements vested in an individual by virtue of a dominant tenement or are presumed to have had such an origin and have no relation to customary rights claimed by a class. For these reasons I have no doubt that the claim cannot be supported on the basis on which it was placed by the learned Vakil for the appellants and that no customary right of this character is known to law. It is, however, abundantly clear on the record that the case has not been founded on any customary right *in alieno solo*, but on a claim of a right of freedom from contact which can have but one origin, strongly insisted on by all Hindu members of the caste, and evidently equally strongly adhered to by these so-called Christians—namely, that of *pollution*. In the eyes of these plaintiffs the Shanars are non-touchables—persons whose contact defiles and entails ceremonial ablution. Stated thus, they can certainly claim a far longer period of customary observance than the foundation of this church or the introduction of Christianity; and indeed their case on the alleged agreements means nothing more than the supposed recognition of this claim as one of right. The Vellalas are a high sub-caste of what are conveniently termed *Sudras*—though of course the term is not historically applicable to South Indian Dravidians, the whole caste of *Sudras* being, however, considerably below the three higher castes in the latter's estimation. The Shanars spring from a humble origin outside caste, but having raised their social position by their industry naturally seek the recognition due to their changed condition. It has been the effort of the Vellalas to keep them in their lowly status that has led to this trouble in the last 40 years. Conversion to Christianity has, it seems, in no way modified the pretensions of the former or taught them that sense of equality before God which is a cardinal

feature of the Christian religion as well as of other religions. Turning now to the history it appears that the case, so far as it is based on agreements, is stated as follows in the plaint. Paragraph 10 alleges a stamped agreement in 1855, signed by the plaintiffs' caste and the caste of the defendants Nos. 3 to 14 in the presence of the parish priest to the name of the Bishop, in pursuance of which two churches were to be built side by side with a common chancel so that worship should be seen from both churches. The said agreement further provided that all other rights of control should remain vested in the plaintiffs' caste. It is alleged that accordingly each caste built its church with its own labour and by its own contributions, the edifice being completed and consecrated in 1872. Paragraph 13 alleges that as the Nadars subsequently set up claims inconsistent with the agreement a compromise was made by the parish priest in 1877, agreed to by both parties, amending that agreement, which the Bishop bound himself to adopt and in consequence issued an Epistle in 1877 setting out the amended terms. This arrangement constitutes the alleged second agreement and on these two the suit is based. The appellants' Vakil argues that the lower Appellate Court has found the first agreement to be true and should accordingly have given effect to it. There is no foundation for this argument. The District Judge finds in paragraph 2 that no stamped agreement is forthcoming, though he does find that some arrangement was come to as to separation of castes. He states also in two paragraphs of his judgment that the case as presented before him was based on what is now treated as the second agreement evidenced by Exhibit F, and I have no doubt that this is so. On the failure to prove the written agreement relied on in the plaint, the Vakil in the lower Court probably abandoned that part of the case and it has now been raised here for the first time since the trial. On the evidence I have serious doubts whether the two castes ever did arrive at a clear arrangement. The fact that the written agreement was never signed seems to me fatal to the suggestion—and that the priest never contemplated binding himself is clear from the fact that the draft

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

agreement is only drawn as between the two castes, he not being a party. Even if he had been a party I should hold, for reasons that will appear later, that no such agreement could bind his successor or higher ecclesiastical authority. In this view, I have not thought it necessary to refer to Exhibit XVI, the diary of Father Gregory, covering the period of the dispute, which demonstrates his zeal ■ the parish priest in endeavouring to make peace between the warring elements in his flock, somewhat to the detriment of his authority and undoubtedly also at some sacrifice of the tenets of his faith. With regard to the alleged agreement founded on the language of Exhibit F, the District Judge has held in paragraph 9 that the document is both in terms and effect an *episcopal decree* "to speak of which as a contract is an obvious misdescription." We are invited to hold that the District Judge has misconstrued the document and that whatever be its form, its operation is that of a contract binding on the Bishop's successor. Mr. Barton has called our attention to ■ earlier document, Exhibit VI (a), a decree of the same Bishop issued soon after the consecration of the church in 1872, as showing the point of view of the ecclesiastical superior. It refers to an arrangement made between the two parties at the time when the construction of the church was commenced, but proceeds by way of 'allotment,' 'assignment' and 'direction' as to the share to be taken by the disputants in the ceremonies and concludes with the words "all that I have said in this *nirupam* are my orders." It appears, however, that the Nadars did not submit to this decree and Civil and Criminal Court proceedings between the parties continued up to 1877 (*vide* Exhibits I, II and III) when the Nadars put in a petition to the Bishop, Exhibit VI, the effect of which is that they have refused to sign an agreement but are willing to abide by his orders. It is in response to that petition that the Bishop issued his decree, Exhibit F. It is, therefore, ■ matter free from doubt that the decree is not the result of an agreement come to between the Bishop and the contesting parties, but is an order passed on a petition by one of the parties. It

certainly reproduces the paragraph that appeared in Exhibit VI (a) ■ to the arrangement made at the time of the construction of the church allotting separate naves in the church to the disputants, while it gives certain concessions to the Nadar petitioners, but the District Judge is correct in holding that it is both in form and substance an episcopal decree. That it was intended to be such is clear from the endorsement on it by its author to the parish priest, in which he uses the Tamil word *kattalai*, i.e., order, exhorts the Father to get this "*reglement*" faithfully observed and concludes "*Toute reserve faite de notre autorite.*" The case on the second agreement, therefore, fails, but even if there had been ■ agreement come to by which the Bishop bound himself to allow certain concessions to the weakness of his flock, I am clear that it was not in the power of the Bishop to use his unfettered right of control to prevent his successors exercising the same authority. That it is unfettered, save by higher authority, ■ to me clear on the canons of the church, just as it is equally clear on the law applicable that a congregation has no power to select what canons it will follow and what disregard, and that the rules and jurisdiction of officers in the church are to be sought in the canons of the church and must be given effect to by the Court.

Much reliance has been placed by the appellants' Vakil on the decisions of the Privy Council in *Long v. Bishop of Cape Town* (1) and *Merriman v. Williams* (2), as laying down that the congregation of a particular church can vary the canons of their religion from time to time. This contention is based on a misunderstanding of the use of the term "church" in those judgments. The question in dispute in the first case was ■ to the authority of ■ certain synod in South Africa and when their Lordships say [*vide Long v. Bishop of Cape Town* (1)] that "the members of the Church of England where there is no Church established by law may adopt, as the members of any other communion may adopt, rules for enforcing

(1) (1863) 1 Moo. P. C. (N. S.) 411; 2 N. R. 455; 15 E. R. 756; 9 Jur. (N. S.) 805; 8 L. T. 738; 11 W. R. 900; 138 R. R. 553.

(2) (1882) 7 App. Cas. 484; 51 L. J. P. C. 95; 47 L. T. 51.

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

discipline within their body which will be binding on those who expressly or by implication have assented to them," the Board was explaining that in such cases a church, in the broad sense of the word, can be constituted by persons who agree to form a new religious association. This is made abundantly clear in the later case in 1882, where their Lordships repeat the same language with reference to the articles of the constitution of the Church of South Africa framed in 1870, which in the opinion of the Board substantially excluded portions of the faith and doctrines of the Church of England (*vide* page 509). Nothing could be farther from the intentions of their Lordships than the suggestion that where there is a recognised religious association such as the Roman Catholic Church under the supreme authority of the Pope of Rome, persons who become members of that body at a particular place can, in respect of their local church, derogate from the authority of the rulers of their community by any agreement made among themselves or adopt rules for the conduct of ceremonial observances at variance with the canons of the Church. To do this they must secede from the Roman Catholic Church and form a new religious association for themselves, as was done by the Church of South Africa and by the great voluntary churches in England; but having so formed a new Christian church, they would be as much bound by its articles of constitution and be as powerless to vary its rules so as to accord with local wishes, as are the congregation of the Church of England as by law established in England. These rules are, in the language of the Board quoted above, "binding on those who expressly or by implication have assented to them", and no stronger implication of assent can arise than the admission into the fold of the church by baptism and the submission to its tenets by acceptance of its sacraments. Mr. Rangachariar has argued that it is open to the Courts to decide questions in dispute between the laity and the clergy, and that the District Judge was in error in holding that the claims in this suit being unconnected with an office could not be adjudicated

on, and he relied on the decision of the Board reported as *Brown v. Cure et Marguilliers de Notre Dame de Montreal* (3). I entirely accept the proposition that a member of a church need not sue by virtue of an office, but the difficulty still remains as to what alleged injuries are cognisable by a Court of Law. Whatever they be, however, the authority relied on is fatal to the appellants' case on the question of the material to be examined. Their Lordships say on page 207, that when a complaint is made by a member "that he has been injured as to his rights, in any matter of a mixed spiritual and temporal character, the Courts have power to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Assuming for the present that there is any allegation in the plaint of action by defendants Nos. 1 and 2 inflicting on the plaintiffs such injury as a Court will take cognizance of—a matter on which I have the gravest possible doubts—there can be no question, on the authority of the three cases in the Privy Council, that we cannot go outside the Canon Law to ascertain what are the rules which are binding on the plaintiffs as members of the Church. The claims are to introduce into a Christian Edifice their practice as to pollution and thus insist on a right to be kept from contact with a lower caste, to dictate to their clergy who shall and who shall not assist the priest in the ceremonial, and to control the arrangements for festivals, processions and custody. With regard to the first, it is hardly necessary to say more than it contradicts the fundamental doctrine of Christianity and is at variance with the universal practice in Catholic Churches where daily persons of every degree mingle in their worship. The plaintiffs rely on the practice of a great Roman Catholic Missionary, Father De Nobili, in the early part of the 17th century [*vide* a life of him, Exhibit H (4)] in adopting Brahmin dress and manners and in sanctioning them among his converts, but it is to be remembered that De Nobili's mission was to Brahmins alone

(3) (1874) 6 P. C. 157; 44 L. J. P. C. 1; 31 L. T. 555; 23 W. R. 184.

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

and that he failed in his efforts, just as his successor 150 years later, Abbe Dubois, has confessed failure. It is true that Pope Gregory XV supported De Nobili by "according to caste converts the cord, *kudumi*, sandal paste and purification of the body" [*vide* Exhibit H (4), page 27]; but it is not suggested that the Pope, in thus permitting the recognition of caste, has ever sanctioned such claims ■ are made in this suit. Certain directions are stated to have been given by the Holy See at a later date on this point [*vide* extract in Exhibit H, page 529, ■ work which apart from such extracts has no authority], but they say nothing more than that the people are not to be persuaded to renounce their usages, customs and manners "*provided that they be not most evidently contrary to Religion*," an exception which clearly covers a claim to assert caste pollution in ■ Christian church against the orders of the Bishop. In Exhibit K, a life of Bishop Canoz, the writer of Exhibits VI and F, written by a member of the Society of Jesus, the author, speaking of the construction of the Church, says on page 293, the Vellalas desired that the plan "should assign to each caste a separate part and Monseigneur Canoz '*ad duritiam cordis et pro bono pacis*' sanctioned it" and the diary of the parish priest bears testimony to the grief of the Bishop at having to make this concession. This concession has now developed into ■ claim that there are two churches belonging to each caste separately—a claim which has never received the sanction of the Bishop at any time. There can be no doubt that in his desire to see the new church built, the Bishop shut his eyes to the real foundation of a claim ■ inconsistent with his faith, in the delusion that time would remove the discord—a hope that has been falsified by the quarrels of the parties from that day to this. It was, however, within his powers to allot the sittings in the church as appears from ■ collection of the decrees on the *Congregationis Sacrae Rituum*, made in 1856 and published in Rome, which has been filed as Exhibit X. Each paragraph contains the question propounded from a diocese and the ruling by the Council on it. Nos. 256 and 1418 on pages 58 and 246, respectively, contain decrees laying down that the Bishop has the right to arrange the seating in ■ church at his absolute discretion, and there can be no doubt that in sanctioning the plan

in 1854 and in permitting the separation of the castes in 1872 and 1877, the Bishop purported to exercise ■ power vested in him at his absolute discretion. The like power has now been exercised by the 1st defendant in forbidding that separation. It is contended for the appellants that sanction having once been given could not be revoked, that is to say, that the Bishop in issuing directions within his power binds the successors in the diocese for all time. This proposition is in direct conflict with the view expressed in a treatise on Canon Law, ■ work of high authority by Cardinal Zeteli, revised and enlarged by Doctor Solieri, Professor of Canon Law in the Pontifical Institute of the Propaganda of the Faith, published in Rome in 1907. It opens by dividing the members of the church into clergy and laity and lays down the broad proposition that it is the province of the former to exercise the government in the church and of the latter to submit to the power of the former. At page 191, paragraph 251, dealing with the episcopal power of legislation, there is a passage so pertinent to the question in issue in this case that I think it necessary to extract it in full:—"Being the Pastor and Prince of his diocese, the Bishop has within the sphere of his jurisdiction everything that pertains to the legislative power. He can enact for his diocese laws pertaining to his office, which is to preserve and promote divine worship and to feed the sheep entrusted to his care, so as to direct them to the ecclesiastical end. The Episcopal laws, however, should not have a sanction too heavy and passing the bounds of moderation. From this, his legislative power, results for him the right to change, to abrogate, to relax by dispensations both his own laws and the laws of his predecessors, provided they have not been confirmed by an authority superior to his, *e. g.*, the Roman Pontiff or by his own oath. An oath taken by his predecessors would not bind him. From the same power results also the right to abrogate the particular customs of his diocese if they be obnoxious to the good of the church."

Mr. Rangachariar has sought to find limitation to this extremely definite pronouncement in the words that immediately follow the above quotation. They have been translated and filed as Exhibit N, and are as

KATTALAI MICHAEL PILLAI V. REV. J. M. BARTHE.

follows :—"In which matter, however, he should act prudently especially if there be any right of a third party which may suffer prejudice." This obviously is no limitation (1) ■ it is only a warning to the Bishop and (2) because ■ between the Bishop and his flock, the latter are not "a third party." The next passage is also relied on: "He cannot abrogate universal customs" (I think "practices" would be ■ better and more accurate translation) "because they are such ■ pertain to a common right". The suggestion put forward is that the rights claimed in this suit are *universales consuetudines* and come under the phrase *ad jus commune pertinent*. The argument ignores the meaning of the whole passage. A clear distinction is made between *particularis consuetudines sue diocesis* and *universales consuetudines* and the meaning is obvious. If ■ certain practice is a universal practice of the church, obviously it could not be in the power of the Bishop to abrogate it within the limits of his jurisdiction. But where any particular practice has been authorised either by himself or by his predecessor for his diocese, it is clear beyond doubt, on the above language, that he has power to modify or abrogate it. Reliance is placed on another passage at page 91 which is also extracted in Exhibit N. "As all practices are not in the knowledge of the chief in such cases his consent, presumed but of legal efficacy, is sufficient, because in Canon Law as well as in other law, all rational practices sanctioned by sufficient length of time are naturally approved of by the chief." (This is not the translation filed as Exhibit N, but is, I think, more accurately expressed in English). Here again there can be no real doubt as to the meaning of the passage and it does not support the argument of the appellants. It follows ■ passage in which the assent of the chief is stated to be *required* for all practices and provides for presumption of consent. It has of course no application where the Bishop has, with full knowledge, abrogated the particular practice. Several other passages have been extracted from this book on behalf of the appellants and are quoted in Exhibit N. They have not, however, been relied on and an examination of them shows that they deal with customary right in Civil

Law and wherever necessary ■ distinction is drawn between Civil Law and Ecclesiastical Law. There ■ others which are directions and advice to Missionary Bishops prescribing the powers of Vicar Apostolic. None of them are of any assistance to us in determining this question. On this point ■ to the power of Bishops, I do not think it necessary to examine the evidence any further; the passage at page 191 of the treatise being so clear and definite that it is fatal to the whole of the plaintiffs' claims. It is almost inconceivable that the congregation of the Church should think that they have the power to forbid their Bishops employing a member of a particular caste to assist him in the conduct of the service and the ceremony of the Mass. My learned brother in the course of the argument pointed out the absurdity of this contention. As to the claims of keeping the Church door and ringing the bells and other like matters, it appears on the evidence that there is an official called ■ sacristan who has charge of these matters and even if there were not, they obviously are matters in which the priest, subject to the Bishop's control, must have full discretion. I am, therefore, of opinion that the whole claim, whether founded on agreement or custom, fails both on the facts and on law. We are told by Mr. Rangachariar that the decision against the claims of the plaintiffs may have serious consequences, *viz.*, these people will leave the fold of the Roman Catholic Church. That is ■ matter which we cannot take into our consideration. We have only, according to the law laid down by the Privy Council, to ascertain who are the persons having authority over such matters and by what rules they are bound. Applying this test, it is clear to me that the plaintiffs' suit must fail and this appeal must, therefore, be dismissed with cost.

SADASIVA AIYAR, J.—As my learned brother has fully set out the pleadings and dealt with the facts in the judgment just now pronounced by him, it is unnecessary for me to set them out in detail. The plaint in the suit in spite of (or because of) its length is rather vague as to the foundation of the plaintiffs' case. After careful consideration, I think it must be taken ■ based on the Bishop's Epistle of May 1877, referred to

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

in paragraph 13 of the plaint. The first sentence in paragraph 14 is: "From that time, the high caste people of the plaintiffs' *vagaira* and the low caste people of the *vagaira* of defendants from No. 3 have been acting in accordance with the agreement termed as *Epistle* above."

The next paragraph 15 is as follows:—"The rights which have accrued as mentioned above to the Pillais and Mudalis of the *vagaira* of the plaintiffs in respect of the suit church have become established to the high caste people of the plaintiffs' *vagaira* not only on the ground of title but also by prescription and enjoyment."

(That is, I take it, prescriptive enjoyment from the date of the alleged agreement of 1877).

This Epistle, which is said in the above paragraph 14 to be an agreement binding on all the three parties, namely, (1) the plaintiffs' faction, (2) the faction of the defendants from the third defendant downwards and (3) the ecclesiastical authorities represented in this suit by defendants Nos. 1 and 2, is Exhibit F in the case. The third paragraph of Exhibit F is as follows:—"In accordance with the agreement made by the Pillaimars, Mudaliars and Nadars with the Vicar of the parish when the construction of the church was about to be begun, all the Pillaimars and Mudaliars and such other castes sat with them in the old church must be along with them in the southern half of the church, and all the Nadars together with such castes as sat with them in the old church, must be with them in the northern half of the church. Of whatever castes they may be, they must approach the communion table at the respective railings before the altar. Similarly also for the solemnisation of marriages and the performance of other requirements." (The beginning of the construction of the church was in 1854). The note to Exhibit F is as follows: "To prevent as far as possible the recurring of the deplorable disputes that desolated the Christian congregation of Vadakkankulam, I exhort our fathers to get this regulation faithfully observed and not to favour in anything the pretensions of rival castes. All our Christians should be well persuaded that henceforth things will go as we order it by the present order.

This will be the way of preventing the endless claims which would not fail to be raised on all sides on the day on which they would again discuss the conditions of this peace which has cost so much. *Toute reserve faite de notre autorite.*"

The Epistle with the note was entered in the register of the church, Exhibit XVI.

I do not think that Exhibit F can be treated as an agreement at all between the three sets of parties. It is only an order of the then Bishop to the worshippers at the church, to conduct themselves as directed by him in his Epistle and one of the motives for issuing that order was because the Bishop thought that the two sets of worshippers had entered into an agreement or arrangement in 1854. As the suit is based upon an alleged agreement of May 1877 (miscalled, according to the plaint, an Epistle) and as the Epistle F is an episcopal decree and not an agreement, the suit fails on the short ground that the foundation for the suit has not been established.

I shall assume, however, that the plaintiffs can fall back on the alleged agreement of 1854, referred to in paragraph 3 of the Epistle, Exhibit F. It is rather doubtful whether the statement about the alleged agreement is relevant evidence, as it cannot come under clause 4 of section 32 of the Indian Evidence Act, it having been made long after the controversies had arisen between the two factions. It does not also come under clause 2, as it cannot be said to have been made in the ordinary course of "business" by the Bishop. Clearly, clauses 1, 3, 5, 6 and 7 of section 32 do not apply. It may perhaps be relevant under clause 7, which refers to statements relating to a transaction mentioned in section 13 (a). Taking it then to be relevant evidence under clause 7 of section 32, it is evidence of a very weak character. Bishop Canoz was then being worried with the "deplorable" and "recurring" disputes between the two sets of worshippers. He refers to a previous episcopal decree of July 1872 and he says that "the devil which is an enemy to all good things, in order to ruin the souls of worshippers, eternally played his fraud and made them not to abide by" his decree of 1872. Exhibit D, the draft of an agreement prepared in 1854, was not signed by any Pillaimar Mudaliar or

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

Nadar and it is clearly erroneous to call it a concluded agreement and Father Canoz's reference to a concluded agreement of 1854 seems to have been intended more to justify his decision to his doubting mind than as an accurate and reliable statement of fact. That the terms of this draft prepared in 1854 were not accepted in their entirety by the Bishop when he issued his decree of 1872 is admitted. That many Nadars refused to be parties to any agreement recognising the claims of the Vellala and Mudali faction is clear from Exhibit VII. That Father Canoz's decree, Exhibit F, of 1877, was not treated by his successor (the 1st defendant) as binding on the Episcopate is shown by Exhibit XX, where the 1st defendant modified some of his predecessor's directions as contained in Exhibit F.

Again let us assume that there was a concluded agreement in 1854 between the two sets of worshippers as to the right to occupy seats in the church to be thereafter built. How can such an agreement be binding on the ecclesiastical authorities? They are the legal owners of the church premises. Even the incomplete document, Exhibit D, refers to the "order" of the parish priest and does not say that the parish priest was a party bound by the contemplated agreement. Again, the parish priest has no right to make any such agreement with the worshippers so as to bind the Bishop of Trichinopoly, or His Holiness the Pope, in whom the church buildings became vested as soon as they were consecrated to the worship of God according to the tenets of the Roman Catholic Church. Assuming (without deciding) that the Bishop can bind himself personally during the tenure of his office to allow the Vellala faction the exclusive use of the southern wing, I have not been shown any authority for the proposition that he can perpetually bind the Roman Catholic Church or his successors by any such agreement relating to the church property. I am clear that it would be a breach of trust on his part to grant any such perpetual license to a particular set of worshippers. In fact in 1896, the 1st defendant by using the following expressions in Exhibit XX, namely, "We hereby by our own authority" (or during the period of his own bishopric) "put it in force and we order that no one should make any alteration with-

out our permission", clearly asserted that Exhibit F was not binding on him or upon the worshippers except to the extent that he himself affirmed, ratified and re-issued the same.

Then there is the larger question whether certain Roman Catholic Christians, styling themselves as belonging to particular castes, can, by an agreement, bind the succeeding generations of Christians alleged to belong to the same castes.

Almost all the members of the communities professing to follow the Hindu religion belong to definite castes. The children of such caste people (unless they become apostates or are excommunicated) are, by their very birth, members of their parents' respective castes. Many of the Hindu caste communities living in defined localities recognise certain persons as the spiritual heads of the respective castes. Some few castes recognize also the authority of local headmen or of local caste *panchayats* to enforce caste discipline and to administer caste properties and the caste charities. In *Suppan Acharry v. Vannia Konar* (4), Sankaran Nair and Ayling, JJ., state that a caste can be recognised for the purpose of acquiring rights to property and easements by prescription as if the members of the caste formed a corporation owning civil rights. Then the learned Judges say:—"The cases show that properties are purchased for the caste and by the caste. Their right to hold and manage property has been recognised. Courts have often given effect to the resolution of the caste as a body as to the management of property. Suits have been brought on behalf of caste and against caste."

Now the identity of a Hindu caste as a unit is preserved (a) by the almost total exclusion of any accession from outside, that is, by confining accessions to its members to increases by births (*legitimate* births, except in very few cases like the children of dancing girls) and (b) by confining valid marriages to persons belonging to the same caste. Now it is almost impossible to impose such restrictions on the so-called caste Christians, because restrictions as to intermarriage (other than restrictions as to incestuous

(4) 24 Ind. Cas. 467; 27 M. L. J. 110.

KATTALAI MICHAEL PILLAI v. J. M. BARTHE.

connections and bigamous connections) cannot be legally recognized among Christians. Suppose that some Brahmin Hindus become Roman Catholic converts and settle in the plaint village, can the Pillaimars and Mudaliars prevent them from using the southern wing and can the Nadars and the other converts who sit with them (like Pariah Christians) prevent the new converts from occupying the northern wing? Supposing the Bishop or the parish priest appointed to the church was a Nadar or Panchama convert, can he be prevented from going into the southern wing or getting up the chancel for fear of polluting that wing or part of the church by his presence? Can excommunication of a Pillai Christian from caste by the vote of the community, because he dined in a Shanar's house, be recognized by Courts and can Courts prevent such a Christian from using the southern wing because those who excommunicated him were afraid of pollution by his contact? Supposing a Nadar Christian male marries a Vellala female and children are born and baptised into the Roman Catholic faith, or suppose an excommunicated Brahmin female gives birth to illegitimate children by unknown fathers and they become Roman Catholic converts and settle in this parish, to what caste are they to belong and in what wing of the church are they to be made to sit? To recognize caste among Christian communities as distinct corporations with exclusive legal rights as caste corporations would lead to complications and anomalies of such a far-reaching character that I am not prepared to extend the recognition by Courts of Hindu castes as distinct corporations for certain purposes to so-called caste Christians. It follows, therefore, that the alleged agreement of 1854, even if it is established, cannot bind any other persons except the particular individuals who entered into that agreement, assuming that it would bind even them as individuals. That alleged agreement being more than 60 years old, very few, if any, of the parties to the agreement, can now be living. (Of the parties named in the plaint, I find only five could have been born then and as all of them must have been boys or children at that time, they could not have been parties to the alleged agreement.)

In the Kamudi temple case, *Sankaralinga Nadan v. Rajeswara Dorai* (5), the learned Subordinate Judge excluded Hindu Nadars from access to a particular temple on the ground that the temple itself would be polluted according to the Hindu Ecclesiastical Law by the admission of Shanars into it. The Madras High Court also referred to the entry of Shanars, Pallars, Pariahs and Chucklers into the temple as causing pollution and to the Shastras prohibiting the Shanars from so entering the temple. Their Lordships of the Privy Council (through Lord Robertson) make the following observations in their judgment—"It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. * * *

The controversy touches, but does not involve, delicate and abstruse questions of Hindu religious doctrine. ■ ■

The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the respondents' treatment of the appellants in other respects. All this, however, as matter of theological argument, is too rationalistic, while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants are not among the people for whose worship this particular temple exists."

Thus their Lordships have clearly indicated that what the Courts have to see is whether a particular place of worship was not intended for the benefit of any particular people and if (by the evidence of usage) it is so established, Courts should negative the claims of such people to worship therein. In the present case, it cannot be allowed for a moment that the defendants from the third defendant downwards are not persons for whose use

(5) 31 M. 236; 18 M. L. J. 387; ■ C. L. J. 230; 12 C. W. N. 946; 35 I. A. 176; 4 M. L. T. 101; 10 Bom. L. R. 781.

KATTALAI MICHAEL PILLAI v. REVD. J. M. BARTHE.

the plaint church was built. The Bishop and the parish priest acting under the Bishop's directions have uncontrolled authority in regulating the seatings in the church and in the conduct of ceremonies and festivals within the church enclosure. That authority was never given up and could not be legally given up according to the Canon Law, which is binding on the parties to this suit. In "any matter of a mixed spiritual and temporal character, the Courts have power to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Now injury by pollution to lawful worshippers in a Hindu temple or to the image in the temple through the presence of people belonging to castes below the fourth caste (known as polluting castes) is a matter of "mixed spiritual and temporal character." But the sentiment of pollution in a Christian church indulged in by so-called caste Christians is neither spiritual nor temporal injury and it seems to me rather brazen to ask a Civil Court to recognize it as a legal injury giving rise to a civil cause of action. The bad usage, never accepted as lawful or invariable by the Shanars, by which in this church, finished about 40 years ago, they have been usually confined to the northern wing, cannot be recognised as a reasonable custom having the force of law.

*"Justice and Truth with Custom's hydra
brood
Wage silent war"*

and custom, though not reasonable, sometimes wins in Courts of Justice, when buttressed (as in the case of many Hindu customs) by theological writings, whether genuine or spurious. The usage relied on by the appellants in this case cannot make a shadow of a claim to even such theological buttressing up and Mr. Rangachariar's attempts to quote one or two ancient Roman Catholic ecclesiastics in favour of his clients failed utterly.

Mr. Rangachariar in the course of his arguments referred (without dealing elaborately with the matter) to the prescriptive right to occupy pews and seats in the churches consecrated for divine worship by the Church of England, as

furnishing an analogy in support of the right claimed by the plaintiffs. In the first place, I am instructed by my learned brother that the system of enclosed seatings called pews does not obtain in Roman Catholic Churches and I think that this one fact makes the analogy sought to be relied on by Mr. Rangachariar largely inapplicable to this case. A right to a pew can only be acquired by faculty or prescription, the long user necessary to establish prescription being held to be evidence of a lost faculty. Now, a faculty is "a privilege or special dispensation granted to a person by favour and indulgence to do that which by the law he cannot do." It seems to me that favours and indulgences granted by one ecclesiastical authority (say, a Consistory Court representing the Bishop's ancient ecclesiastical jurisdiction) can only be interfered with by himself or by the appellate ecclesiastical authorities (the final Appellate Court being the Privy Council). A Civil Court must, of course, recognise the favour or indulgence granted by the proper ecclesiastical authority when temporal or mixed spiritual and temporal rights flowing from the favour or indulgence are interfered with by wrongdoers. But it seems to me that Civil Courts cannot interfere with the jurisdiction of the ecclesiastical authorities in the grant or revocation of such favours and indulgences. A grantee of a favour or indulgence can make no claim against his grantor that the favour or indulgence should be treated as irrevocable unless the grantee can invoke the doctrine of estoppel in his favour.

"In the English Church before the Reformation, no seats were allowed for the use of parishioners in a church" except in private chapels. "After the Reformation, any question as to seats in the body of a church was to be decided by the 'Ordinary,' because the place is common to all the inhabitants and it belongs to the Bishop to order it so that the service of God may be best celebrated and that there be no contention." The duty of church wardens under the Bishop's control is "to provide to the best advantage for the accommodation of all parishioners so that as far as practicable every one may have a seat and they are bound not to accommodate richer

MICHAEL PILLAI KATTALAI v. REV. J. M. BARTHE.

classes beyond their real wants to the exclusion of their poorer neighbours" (Halsbury's Laws of England, Vol. 11, page 740). I have no reason to believe that the Canon Law governing Roman Catholics is based on different principles ■ far as the right of the parishioners to seating accommodation in the church is concerned. "By the common law, there is no property in nor any right to sell or let a seat in the body of ■ parochial church or chapel." Such rights in English churches seem to have been introduced mostly by private Acts of Parliament in derogation of the wholesome common law rule. In *Claverley Vicar v. Claverley Parishioners* (6) Sir John Nicholl's remarks in an old ■ are referred to. Those remarks are to the effect that in former times faculties for pews had been granted with too great facility and "they ought to be granted thereafter with the greatest prudence and circumspection." In the Roman Catholic Church now in dispute, there are no enclosed seats or pews. The body of the church consists of two wide expanses of sitting accommodation. It has been held so long ago as in 1612 [in *Corren's case* (7)] that church wardens and Bishops "cannot make an irrevocable assignment of seats or divest themselves or their successors of the power of making fresh arrangement, whenever circumstances render it desirable." Further, "the parishioners to whom seats are assigned have no right to exclude others if they and their family do not occupy the whole." (Page 471 of Halsbury's Laws of England, Vol. 11.) It seems to me therefore that the analogies derivable from the English Ecclesiastical Law relating to seats in churches are rather against Mr. Rangachariar's contentions than in their favour.

The plaintiffs in this case do not allege that they were refused necessary sitting accommodation in the church or that they were made to give up their seats for others after they had lawfully seated themselves. Their bold claim is to compel the ecclesiastical authorities to refrain from giving available seats in the southern wing to Christians whom

the plaintiffs consider to belong to polluting castes and also to restrain the Nadras, etc., from occupying such available seats. The plaintiffs have, of course, given up the Hindu orthodox notion that the touch of a European is polluting (as they receive with unction holy water and sacramental bread, etc., from the European priests and Bishops) but have retained that sentiment as regards their fellow-Christians of Indian nationality.

It is natural that I should feel a greater sense of freedom in dealing with modern undesirable innovations in support of alleged rights to exclude certain classes of worshippers from ■ Hindu temple and in respect of squabbles over honorary precedence in Hindu temples than when dealing with similar disputes in ■ Christian church. [See *Athan Sadagopa Chariar Swamigal v. Eliavalli Srinivasa Chariar* (8) and *Gopala Mooppanar v. Subramania Iyer* (9).] I have, therefore, not yielded to the temptation I have felt to express my views on the system of pews in English churches. Nor shall I say anything on the policy of some of the Roman Catholic ecclesiastics of a bygone generation in partially recognising caste sentiments and scruples among their converts as a matter of expediency rather than of principle. It is very difficult to describe the plaintiffs' faction ■ a class recognizable with reasonable definiteness, ■ they are the descendants of Hindu converts who belonged to at least two Hindu sub-castes, namely, Vellalas and Mudaliars. I find also that there are references in the documents to other castes who have been sitting in the southern and northern wings, respectively, as they belonged respectively to the touchable castes like the plaintiffs or the non-touchable castes like the Shanars. The plaintiffs cannot invoke (like the Hindus) the sanction of accepted sacredotal texts (whether genuine or spurious) for perpetuating the distinction (and that in God's House) between human beings ■ touchables and untouchables during ■ particular life period by reason solely of birth. While even among Hindus the strength of this distinction and of the alleged religious sanc-

(6) (1909) P. 195.

(7) (1612) 12 Co. Rep. 105; 77 E. R. 1380.

(8) 19 Ind. Cas. 257; (1913) M. W. N. 289; 13 M. L. T. 340.

(9) 26 Ind. Cas. 7; (1914) M. W. N. 822; 27 M. L. J. 253; 1 L. W. 675.

BALU MUDALI v. DURVASALU PILLAI.

tion therefor is, according to competent authorities, being weakened in these days through the effects of several unifying causes, it is difficult for one to sympathise with the efforts of so-called caste Christians to obtain legal sanction for alleged customs among them tending in the opposite direction.

In the result I agree with my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

V.R.P.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 35 TO 42
OF 1915.

February 25, 1916.

Present:—Mr. Justice Srinivasa Aiyangar.

I. BALU MUDALI AND OTHERS—
DEFENDANTS—PETITIONERS

versus

V. DURVASALU PILLAI—PLAINTIFF—
RESPONDENT.

Muhammadan Law—Wakf—Mutwalli—Lease for over three years, whether void or voidable—Sub-lease—Sub-tenants, whether can question their lessor's title—Estoppel.

The *mutwalli* of a *wakf* has, ordinarily and in the absence of a prohibition in the deed of endowment, the right to lease the *wakf* property for three years and, with the consent of the *kazi*, for a longer period. [p. 570, col. 2.]

Where, however, the lease is granted for more than three years without the *kazi's* consent and is not to the advantage of the *wakf*, it is not absolutely void but voidable and even the *mutwalli* can sue to set it aside. [p. 671, col. 1.]

Sub-tenants under a lessee of a *wakf* property cannot, in a claim for rent, question their lessor's title on the ground that he came into possession under an invalid lease. [p. 571, col. 1.]

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif of Tiruvalur, in Small Cause Suits Nos. 882 to 884, 886, 887, 894, 895 and 942 of 1914.

Mr. L. A. Govindaraghava Aiyar (with him Mr. L. S. Veeraraghava Aiyar), for the Appellants.

Mr. A. Sundaram, for the Respondent.

JUDGMENT.—Mr. Govindaraghava Aiyar wanted to raise a contention that ordinary Civil Courts have no jurisdiction, ■ the suit village was an "Estate" ■ defined by the Estates Land Act. I declined to hear him on the point, as it was not taken in the lower Court. The village is an *inam* village settled by the *Inam* Commissioner. If this point had been raised in the lower Court, evidence may have been forthcoming to prove the nature of the grant and to prove that the grantee was the owner of the *kudivaram* at the time of the grant. Mr. Govindaraghava Aiyar contends that the documents filed in the case establish that the *inam* was only of the land revenue and that the grantee was not the owner of the *kudivaram*, but seeing that the plaintiff in any event will have to be given an opportunity of adducing evidence on these points, I did not think it right to allow the petitioner to raise it here in revision. After all it cannot affect the liability of the defendants if they are liable.

The substantial question argued was whether the plaintiff has any title to sue the defendants for rent. This depends on whether the *inam* was a personal *inam*, or *masjid inam* and, therefore, *wakf* property, and if it was the latter, whether the plaintiff's lease which was for over three years was absolutely void. On the former question the lower Court came to the conclusion that it was a personal *inam*. I am unable to agree in this conclusion. The *Inam* Register, Exhibit D, shows that the *inam* was a *masjid inam* and was confirmed as such. Though there have been sub-divisions of the *inam* that cannot convert it to ■ personal *inam* if it was originally *deradayam*. It is unnecessary to pursue this matter further, as the learned Counsel for the respondent did not support the finding of the Judge on this point. I might, however, point out that the Settlement Register is not of much value in determining the particular class to which an *inam* belongs. Under the Muhammadan Law, in the absence of any rules or conditions regulating the power, the *mutwalli* has the power of leasing agricultural land for three years and with the sanction of the *kazi* for a longer term. Of course he can only lease it for the best rent. But if the lease is granted for a longer term without such

MEAJAN MATBOR V. ALIMUDDIN MEA.

sanction, is it absolutely void? In Mr. Ameer Ali's book in the section headed 'The Lease of Wakf Property', the author set out views of various jurists, some of them holding that the *mutwalli*, in the absence of a prohibition in the deed of endowment, can, if it is to the advantage of the *wakf*, grant a longer term. Looking to the reason of the thing, I am inclined to think that if the lease is granted in the usual course of management and in the customary manner, a longer term than the prescribed period may be allowed. Ameer Ali, page 477, *et seq.* I am unable to hold that a lease for over three years is absolutely void; but it may be set aside even at the instance of the trustee. This is the view taken by a learned writer, Mr. Tyabji, in his *Muhammadian Law*, page 421. He cites Bailee, 2nd edition, page 606. Though the passages in Bailee are not quite clear, I think the reasonable inference to be drawn is that, in the author's view, such leases were not void but only voidable. The learned Pleader for the petitioner relied on certain cases of sale. But a sale stands on a different footing from a lease. A lease may be merely an act of management, but a sale is not.

The tenants who recognized the plaintiff as their landlord do not contend that they did so owing to any misapprehension or mistake; the lessors of the plaintiff have not repudiated the lease, nor have the tenants paid the rent to anybody.

In these circumstances I confirm the decrees of the lower Court though not for the same reasons. The petitions must be dismissed with costs.

Petitions dismissed.

V.R.P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 79 OF 1913

May 10, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

MEAJAN MATBOR—PLAINTIFF—
APPELLANT

versus

ALIMUDDIN MEA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 18, 23—Compromise

offer of, of a claim to be filed in Court—Negotiations between Pleader of one party and his adversary—Statement by party, admissibility of—Admission of defendant, whether receivable against co-defendants.

Plaintiff sued the defendants for rent. Defendants pleaded discharge. At the trial, the plaintiff's Pleader deposed that, a month prior to the institution of the suit, the 2nd defendant had approached him for a compromise and requested him to persuade the plaintiff to make a reduction of claim. The Pleader also stated that on the day the suit was filed, the defendant No. 2 went to him with a relation and asked him not to file the deficit Court-fee, but to make a compromise. This evidence was admitted and the claim was decreed. The decree was affirmed on appeal. In second appeal to the High Court, Mr. Justice Chapman held that the Pleader's evidence was inadmissible under section 23 of the Evidence Act and remanded the suit. On further appeal under section 15 of the Letters Patent:

Held, (1) that the 2nd defendant's statement to the plaintiff's Pleader was admissible in evidence, in the absence of an express or implied understanding between the parties that evidence of the same was not to be tendered; [p. 574, col. 1; p. 576, col. 2.]

Wallace v. Small, M. & M. 446; *Mahabeer Singh v. Dhujoo Singh*, 20 W. R. 172; *Watts v. Lawson*, M. & M. 447n.; *Nicholson v. Smith*, 3 Stark. 128; *Harding v. Jones*, 1 Tyr. & Gr. 125; *Jorden v. Money*, (1854) 5 H. L. C. 185 at p. 245; 23 L. J. Ch. 865; 10 E. R. 868; 101 R. R. 116, referred to.

(2) that the statement was admissible against the other defendants. [p. 575, col. 2; p. 577, col. 2.]

Kali Kishore Chowdhury v. Gopi Mohan Roy Chowdhury, 2 C. W. N. 166, not approved.

Kowsulliah Sundari Dasi v. Mukta Sundari Dasi, 11 C. 588; *Chalho Singh v. Jharo Singh*, 18 Ind. Cas. 61; 39 C. 995, referred to.

Per Sanderson, C. J.—The mere fact that it was contemplated between the parties that a suit was about to be instituted will not make a conversation as regards settlement of the claim a privileged conversation or a conversation without prejudice or prevent it from being given in evidence. [p. 574, col. 1.]

The second conversation is a natural consequence of the first conversation which took place a month before, and as the first conversation is not privileged, no difference can be drawn between the first and second conversation as to their being admissible in evidence. [p. 575, col. 1.]

The defendants can be looked upon as co-contractors as they were joint tenants of the plaintiffs. When one of those contractors or partners came to the plaintiff's Pleader for the purpose of seeing whether he could not settle the action which was brought by the plaintiff against all the defendants, he must be implied to have authority to act on behalf of all the defendants. [p. 575, col. 2.]

Per Mookerjee, J.—When several persons are jointly interested in the subject-matter of a suit,

MEAJAN MATBOR V. ALIMUDDIN MEA.

an admission of any one of these persons is receivable not only against himself, but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. [p. 577, col. 2.]

An offer of compromise, the essence whereof is that the party making it is willing to submit to a sacrifice or to make a concession, is rejected, though nothing was expressly said at the time respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected. In the absence, however, of any express or strongly implied restriction as to confidence, an offer of a compromise is clearly admissible and may be material to some evidence of liability, although it may not be proper to enquire into the exact terms offered, as such offer might have been made for the sake of purchasing peace, and without any intention to admit liability to the extent of the claim. [p. 576, col. 2; p. 577 col. 1.]

Appeal, under section 15 of the Letters Patent, against the decree of Mr. Justice Chapman, dated the 11th March 1913, in Appeal from Appellate Decree No. 357 of 1911.

FACTS material to the report were as follows:—

The plaintiff brought a suit for rent. The defendants pleaded payment and in support of their plea produced two receipts. The Registrar Munsif of Munshigunge (Dacca) found the receipts to be fabricated and decreed the suit. The defendants appealed and the Additional District Judge of Dacca dismissed the appeal. He agreed with the Munsif in his findings and greatly relied upon the evidence of the plaintiff's Pleader, who proved that defendant No. 2 came to him on two occasions, once before the suit and on another day when the suit had been filed, and asked him to make a settlement by diminishing the amount of the interest claimed by the landlord. A second appeal preferred by the defendants was dismissed by Chapman, J., by the following judgment:

"The question in this case was whether the rent sued for had been paid or not. The learned District Judge says the determining factor in the case is the evidence of the plaintiff's Pleader and that evidence was to the effect that one of the defendants had approached him at the time when the suit

was filed and subsequently for the purpose of compromise. Now the Courts below have not considered the application of section 23 of the Evidence Act. It seems to me quite clear, having regard to the time when this offer of compromise was made, that it was made on the understanding that evidence of it would not be given in the case; the evidence was inadmissible. Moreover the evidence referred to only proved an admission by defendant No. 2 and his admission is no evidence against the other defendants in the case.

The judgment and decree of the learned District Judge is set aside and the case is remanded for decision upon the evidence after leaving out of consideration the evidence given by the plaintiff's Pleader."

The costs will abide the result.

Babu Jogesh Chandra Roy (with him Babu Prokash Chandra Mozamdar), for the Appellant, urged that the evidence of the talk about the compromise was wrongly excluded by the Hon'ble Judge of the High Court. There was no circumstance from which it could be reasonably inferred that there was an implied understanding that the conversation took place without prejudice. He referred to *Mahabeer Singh v. Dhuijoo Singh* (1), Taylor on Evidence, section 795 and sections 774, 796, 797, Powell on Evidence, page 293; and Phillip's Evidence, page 110.

As regards the admissibility of that evidence against the defendants other than the one who made the proposal for compromise, his argument was that all the defendants had a common interest in the matter, so that it could not be reasonably held that one of them would make the proposal without consulting the others. He referred to *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (2) and *Challho Singh v. Jharo Singh* (3). Moreover, the evidence while given in the first Court was not objected to, so it ought not to be excluded afterwards. If it were objected to, some other evidence relating to the same point might have been given or the plaintiff might have proved his case in some other way. At any rate, the omission on the part of the defendants to object to the admissibility of the evidence

(1) 20 W. R. 172.

(2) 11 C. 588.

(3) 18 Ind. Cas. 61; 39 C. 995.

MEAJAN MATBOR V. ALIMUDDIN MEA.

goes to show that they themselves did not think that the talk of compromise took place on the understanding that no evidence of it would be given.

Babu *Rajendra Chandra Guha*, for the Respondents.—Section 23 of the Evidence Act makes evidence of the compromise talk irrelevant. Therefore there cannot be any waiver by reason of the omission to object. The section is based on principles of public policy and cannot be evaded by the doctrine of waiver. An offer of a compromise is made for the sake of purchasing peace, such an offer does not amount to any admission of liability. The defendant might have thought it prudent to make an amicable settlement with the landlord instead of fighting with him, though he knew the landlord's claim was false. As regards the question of objection, as a matter of fact objection was taken in the Court of first instance. But even if no such objection was taken, the omission could not make the admission relevant, if it was really irrelevant under the law. See *Miller v. Babu Madho Das* (4).

Again, if it is held that there was admission of liability on the part of the defendant who approached the landlord's Pleader for a compromise, such admission cannot affect the other defendants. There is no evidence, no circumstance in the case showing that this defendant had the authority of the other defendants to make the admission. It has been held that an admission of a co-tenant is not admissible against the other co-tenants. *Vide Kali Kishore Chowdhury v. Gopi Mohan Roy Chowdhury* (5).

In any case there ought to be a remand, as part of the evidence concerning the admission was misapprehended by the first Appellate Court.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of Mr. Justice Chapman, by which he set aside the judgment of the Officiating Additional District Judge of Dacca whereby he affirmed the judgment of the learned Munsif.

The action was brought for rent by the plaintiff, and the defence was that the

rent had in fact been paid. The learned Munsif found that it had not been paid.

The learned Officiating District Judge investigated the facts and came to the conclusion, ■ the learned Munsif did, that the rent had not in fact been paid, and he said in his judgment: "The learned Munsif has disbelieved the witnesses to payment for cogent reasons and they have not been met." Then after making a few other observations he goes on to say:—"The determining factor in the case is the evidence of the plaintiff's Pleader. He deposes that defendant No. 2 came to him before the suit and asked him to make a settlement," and on reference to the evidence it appears that the interview to which the learned District Judge was referring was about a month before the suit was instituted. The form of settlement was suggested, *viz.*, diminution of interest. On the day the suit ■■■ filed defendant No. 2 again came with a relation and asked the Pleader not to file the deficit Court-fee stamps but to make ■ compromise." Now the learned Judge who has allowed the appeal from the District Judge came to the conclusion that this evidence of the plaintiff's Pleader ought not to have been admitted; and the learned Vakil for the defendants has supported his judgment upon this ground. He says that reference must be made to section 23 of the Indian Evidence Act, which runs in this way: "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." Now, it is admitted by the learned Vakil for the defendants that this case does not come within the first branch of that section, or, in other words, he agrees that there was no express condition that the evidence of this conversation or interview should not be given. But he says that it does come within the second branch of it, because he argues that there were circumstances from which the Court could infer that the parties agreed together that the evidence of it should not be given. The learned Judge, Mr. Justice Chapman, has taken that view, and he says "that evidence was to the effect that one of the defendants

(4) 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73.

(5) 2 C. W. N. 166.

MEAJAN NATBOR v. ALIMUDDIN MEA.

had approached him at the time when the suit was filed and subsequently for the purpose of compromise." It is to be pointed out, first of all, that the learned Judge has somewhat misunderstood the evidence in the case, because the first interview between the defendant No. 2 and the plaintiff's Pleader was at least a month before the suit was instituted, and was not at the time when the suit was filed as the learned Judge says it was. We have to seek whether there are any circumstances in this case from which we can infer that there was an understanding between the plaintiff's Pleader and the defendant No. 2 that the conversation which they had about the settlement of this suit should not be given in evidence against the defendants. I did not see those circumstances, and I asked the learned Vakil yesterday what they were and so far as I can make out from his argument, they were that inasmuch as there was a suit about to be instituted, and inasmuch as this conversation was about a compromise of the claim, it must be inferred that it was intended by the parties that that conversation should be a *privileged* conversation or should be a conversation *without prejudice*. I do not think that the mere fact that it was contemplated between the parties that the suit was about to be instituted prevents the conversation as regards a settlement of the claim from being given in evidence.

My opinion is supported by the case to which my attention was drawn by my learned brother Mr. Justice Mookerjee and which was decided so long ago as 1830 by Chief Justice Lord Tenterden, in *Wallace v. Small* (6). There the action was upon an *assumpsit* on a charter party. There was some difficulty in fixing the defendants with the contract. It appeared, however, that after the action was brought—I draw attention to that because the conversation in the present case was at least a month before the action was brought, while in that case [*Wallace v. Small* (6)] it was after the action had been brought—an offer of a specific sum had been made and evidence was given on the part of the plaintiffs that a friend of theirs in consequence

went to the defendants and advised them to increase their offer, and that the defendants refused to do so saying "we shall lose enough by the charter party as it is". The witness stated that nothing was said about this communication being without prejudice. The Attorney-General for the defendants argued that the evidence was inadmissible and he said that "from the very nature of the transaction it appears to have been a negotiation for a compromise", the very argument which the learned Vakil put forward in this case "and if so, it must be understood to be without prejudice, although nothing is said on that subject at the time, nor does it, even if admitted, amount to any proof of liability." There the learned Chief Justice said that the evidence ought to be admitted; and he also said he thought it good *prima facie* evidence of liability. He said "it is not said to be without prejudice, and an offer to compromise may be very well made, without any restriction as to confidence." That is entirely in accordance with my judgment, and not only that, but within my experience.

The mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted, is not in itself sufficient to prevent the conversation from being put in evidence. That really disposes of the first conversation. I ought to mention in connection with that, that when the case was being tried in the Court of first instance, no objection was taken by those who were appearing on behalf of the defendants to the conversation which took place a month before the institution of the suit being given in evidence. That, of course, is not conclusive, but it is some evidence at least that the parties themselves did not regard that conversation as being a *privileged* conversation.

Then, it is said that the second conversation which took place about the time of the filing of the suit is *privileged*. It is quite true that objection was taken to that being given in evidence in the first Court. But it seems to me that the second conversation was a natural consequence of the first conversation which took place a month before. As I understand, it only amounted to this, that the defendant must have obtained information that the suit was filed and that

MEAJAN MATBOR v. ALIMUDDIN MEA.

the deficit Court-fee had not yet been paid, and he and a relation went to the plaintiff's Pleader, and in fact asked for time in order to see whether the suit might not be compromised. Having formed the opinion, as I have said before, that the second conversation followed as a natural consequence of the first and that the first conversation was not privileged, I do not think that any difference can be drawn between the first and the second conversation as to their being admissible in evidence.

A subsidiary point was taken by the learned Vakil on behalf of the defendants that the learned District Judge had misunderstood the effect of the evidence as to the second conversation, namely that the learned District Judge said that it was the defendant No. 2 who took part in the conversation on the second occasion, whereas, as a matter of fact, it was the relation who went with him who made the offer of compromise. I really think that it is too small a point to require any serious consideration, because that was a conversation which took place in the presence of defendant No. 2 and it must be taken to have been made with his authority.

The other point upon which the learned Vakil relied was that even if the conversation was rightly admitted, it ought to have been admitted only against the defendant No. 2, who is supposed to have made the admission. I think that the learned Judge did take it as being an admission against all the defendants, and, therefore, it is necessary to consider whether the admission made by the defendant No. 2 can be taken in evidence against all the defendants. In my judgment, it can. The question depends upon section 18 of the Indian Evidence Act which runs in these terms, "statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, expressly or impliedly authorized by him to make them, are admissions." Here again there is no express authorization of the defendant No. 2 to make these admissions. If these admissions are to be taken against all the defendants they must come within the implied authority by the other defendants to him. Now it was pointed out by Sir Richard Garth, when he was the Chief Justice of this Court, in the

case of *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (2), that this section which I have just read is a concise statement of the law which was, I think, correctly laid down in Mr. Taylor's book on Evidence because the learned Chief Justice says at page 590, "Where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence against the others". Then he refers to the passage in Taylor on Evidence, Volume I, 1st edition, page 489, section 525 (which is now section 543):—"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered". Then he further says, "The principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others; and this rule, as I take it, is enacted, though in a somewhat concise form, in section 18 of the Indian Evidence Act." In my judgment the defendants in this case can be looked upon as co-contractors as they were joint tenants of the plaintiffs. In one sense they may be looked upon as partners. When one of those contractors or partners comes to the plaintiff's Pleader for the purpose of seeing whether he cannot settle the action which was brought by the plaintiff against all the defendants, it seems to me that he must be implied to have authority to act on behalf of all the defendants. For these reasons I think the evidence was rightly admitted, not only as against the defendant No. 2 but as against all the defendants: and consequently, that evidence having been rightly admitted, I think the learned Judge Mr. Justice Chapman was wrong and that this appeal ought to be allowed. The result of that is that the judgment of the District Judge is restored. The defendants will have costs both in this

MEAJAN MATBOR v. ALIMUDDIN MEA.

appeal and the appeal before Mr. Justice Chapman.

MOOKERJEE, J.—I am of opinion that upon each of the two questions of law involved in this appeal, the rule has been too broadly formulated by Mr. Justice Chapman and that if the principles applicable are duly qualified, his judgment cannot possibly be sustained.

The plaintiff brought this suit against the defendants for recovery of arrears of rent due under a lease executed in favour of their father on the 3rd February 1897. The substantial defence was a plea of payment. This plea was overruled concurrently by both the Courts below. Upon appeal to this Court Mr. Justice Chapman has reversed the decision of the District Judge and has remanded the case for reconsideration, on the ground that the decision of the District Judge was based on evidence inadmissible in law.

The evidence to which exception is taken is that of the Pleader for plaintiff, who deposed that the second defendant had come to him before the institution of the suit and had asked him to arrange for a settlement by way of remission of interest. The District Judge held that this request for remission of interest was an indirect admission that the whole of the amount claimed was due; in other words, that the plea of payment was untrue. On behalf of the defendants, it was argued before Mr. Justice Chapman, *first*, that that evidence was not admissible to prove that the defendant had proposed a settlement and had thereby indirectly admitted the claim; and *secondly*, that even if the admission was held admissible as against the second defendant, it could not be used as against the other defendants. Mr. Justice Chapman has given effect to both these contentions.

As regards the *first* objection, Mr. Justice Chapman observed that the Courts below did not consider the application of section 23 of the Indian Evidence Act and that it was quite clear that having regard to the time when the offer of compromise was made, it was made on the understanding that evidence of it would not be given in the case. Now, section 23 provides that "in civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given or

under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." It is not disputed that in the case before us, there was no such express condition; consequently, the defendants can rely only on that portion of section 23 which provides for the exclusion of an admission made under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The judgment of Mr. Justice Chapman does not specify the circumstances from which, in the present case, this inference could be drawn. Apparently he assumed that because an offer of compromise was made, there was necessarily an implied understanding that evidence of it would not be given in the case. This view is supported, to some extent, by the observation of Mr. Justice Phear in the case of *Mahabeer Singh v. Dhujjoo Singh* (1), where the following statement will be found: "It is a rule which all Courts of Justice find it right to observe that nothing which passes between the parties to a suit in any attempt at arbitration or compromise, should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. Unless this were so, the only thing which could be prudently recommended to suitors would be, never to listen for one moment to any proposal to settle the matter, or to compromise it, after it had come into the Civil Court." This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. It is consequently not necessary for me to consider whether the statement was a correct exposition of the law as it stood before 1872. But, in my opinion, the rule enunciated in the judgment mentioned is expressed too broadly. In view of the provisions of section 23 of the Indian Evidence Act, an offer of compromise, the essence whereof is that the party making it is willing to submit to a sacrifice or to make a concession, is rejected, though nothing was expressly said at the time respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty to which the party was led by the confidence

MEAJAN MATLOR v. ALIMUDDI MEA.

of an arrangement being effected. In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material ■ some evidence of liability, although, ■ has been said, it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim. That this is the true rule is obvious from the decisions in *Wallace v. Small* (6), *Watts v. Lawson* (7) and *Nicholson v. Smith* (8). The rule is also well illustrated by the decision in *Harding v. Jones* (9), where the fact that the drawer of a bill, whose signature was in issue, had proposed a settlement was used against him as his admission. Reference may in this connection be also made to the observations of Lord St. Leonards in *Jorden v. Money* (10), with reference to negotiations between an attorney on the one side and the opposite party: "When an attorney goes to an adverse party with ■ view to ■ compromise, or to an action, you must always look with very great care at his evidence of what then occurred. There must be such a disposition in an attorney, who has brought an action, to maintain it, that it is always very desirable that the attorney should abstain as much ■ possible from talking to a person, when he means afterwards to swear to the conversation, and upon that conversation to found ■ right which otherwise might not be found to exist." These observations would have been obviously superfluous, if, ■ has been contended by the respondent in this case, all negotiations for settlement between the attorney on one side and the opposite party had been, by reason of a rigid and inflexible rule, always inadmissible in evidence. I hold accordingly that the evidence of the Pleader for the plaintiff as to what had passed between him and the second defendant for the settlement of the case was admissible in evidence. This view is strengthened by the circumstance

that no objection was taken in the Trial Court to the reception of a portion at any rate of the statement made by the Pleader.

As regards the second objection, Mr. Justice Chapman has held that the evidence of the Pleader only proved ■ admission by the second defendant and that such admission is no evidence against the other defendants. In support of this view, reference has been made on behalf of the respondents to the decision in *Kali Kishore Chowdhury v. Gopi Mohan Roy Chowdhury* (5). In my opinion, the contention that an admission by one defendant is not receivable in evidence ■ against another defendant is too broadly formulated. The cases to which reference has been made on behalf of the appellant, viz., *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (2) and *Chalho Singh v. Jharo Singh* (3), show that under section 18 of the Indian Evidence Act, an admission by one defendant may, in certain circumstances, be admissible in evidence ■ against another defendant. The principle is that when several persons are jointly interested in the subject-matter of the suit an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. Now in the case before us the defendants have been jointly sued as the representatives-in-interest of the original tenant. As was explained in *Ahinsa Bibi v. Abdul Kaler Saheb* (11), in cases of contract where one of the contracting parties dies, the right or obligation under the contract passes to his representatives ■ one entire juristic person. In the case before us, the defendants are jointly liable to the plaintiffs as the representatives-in-interest of their father, who was the original tenant and obtained the lease. We cannot consequently hold that the evidence is admissible as against the second defendant and not admissible ■ against the others. The result of the acceptance of the contrary view would be that as against the second

(7) M. & M. 447n.

(8) 3 Stark. 128.

(9) 1 Tyr. & Gr. 135.

(10) (1854) 5 H. L. C. 185 at p. 245; ■ 3 L. J. Ch. 865 10 E. R. 868; 101 R. R. 116.

(11) 25 M. 26.

ANMIRAJU v. SESHAMMA.

defendant the Court would have to hold that the plea of payment was untrue and that the plaintiff was entitled to a decree for the entire sum, while, as against the other defendants, the Court would be driven to the conclusion that the plea of payment was established, and that, so far as they were concerned, the plaintiff was not entitled to a decree for the whole sum. But it is perfectly clear that the only possible decree which can be made in the suit is a joint decree for the entire sum found payable by all the defendants jointly as representatives of the original tenant. In my opinion, it is plain, upon principle as also upon the authorities, that the admission was rightly used by the District Judge not merely against the second defendant but also against the other defendants. On these grounds, I agree that the decree made by Mr. Justice Chapman must be reversed and that of the District Judge restored with costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1357 OF 1914.

March 24, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

CHIKKAM AMMIRAJU AND OTHERS—
DEFENDANTS—APPELLANTS

versus

CHIKKAM SESHAMMA AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 15, 16 (2) (b)—‘Coercion’, from whom it must proceed—Release-deed, execution of, by threat of suicide—Contract voidable—‘To the prejudice of any other person’, meaning of.

The ‘coercion’ that will invalidate a contract under section 15 of the Contract Act need not proceed from a party to the contract, or be immediately directed against the party whom it is intended to coerce to enter into the contract, or affect his property or be specifically to his prejudice. [p. 579, col. 1; p. 580, cols. 1 & 2.]

Plaintiffs Nos. 1 and 2, mother and son, executed a deed of release of their properties to defendant under pressure from S, husband of 1st plaintiff and father of the 2nd, as S threatened to commit suicide if the plaintiffs did not effect the release. In the present action to set aside the deed:

Held, per Sadasiva Aiyar, J.—That S’s threat to commit suicide amounted to ‘coercion’ and ‘undue

influence’ invalidating the release under sections 15 and 16 of the Contract Act. [p. 579; col. 2; p. 580, col. 1.]

Per Moore, J.—That the prejudice to S’s own life was not sufficient to bring the threat to commit suicide within the definition of coercion, and that, though S was in a position to dominate the will of the plaintiffs, the document was not voidable for undue influence as S was not a party to the contract under section 16 (2) (b) of the Contract Act. [p. 580, col. 2.]

Askari Mirza v. Jai Kishori, 16 Ind. Cas. 344; 15 O. C. 92, *Ranjanyakamma v. Alwar Setti*, 13 M. 214, referred to.

In dealing with a case of coercion, the Court should decide whether the alleged act of coercion amounts to an offence under the Indian Penal Code. [p. 580, col. 2.]

Second appeal against the decree of the District Court of Gudavari at Rajahmundry, in Appeal Suit No. 6 of 1913, preferred against that of the Court of the Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 4 of 1912.

Mr. M. Patanjali Sastri for Mr. P. Narayana Moorthy, for the Appellants.

Mr. G. Venkataramiah, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants are the appellants. The only question in this case is whether the release-deed, Exhibit A, was executed by the plaintiffs with their free consent, or whether it was obtained from the two plaintiffs (mother and son) through the exercise of coercion or undue influence or both brought to bear upon them by the defendants (the younger brothers of the 1st plaintiff’s husband) and their father Doraiyya through the 1st plaintiff’s husband Swami, who threatened to commit suicide unless the plaintiffs executed the release-deed (Exhibit A) in respect of their reversionary rights in certain lands, which the 1st plaintiff’s mother had sold without necessity to the defendants’ father’s vendor.

The lower Courts found (a) that the 1st plaintiff’s husband (the 2nd plaintiff’s father) did threaten to commit suicide if the plaintiff would not execute the release-deed and that it was on account of that threat working on their minds that the plaintiffs executed the deed; (b) that such a threat was “coercion” and a deed brought about by such a threat is not a deed executed with free consent, and (c) that though the threat was not made by the defendants (the parties to

AMMIRAJU V. SESHAMMA.

the deed) but by their brother, the document was voidable, as "coercion" used by a person who is not a party to the deed also negatived free consent. On these findings, the plaintiff's suit for cancellation of the deed was decreed.

The material contentions in second appeal are found in the grounds 3 and 4 of the memorandum as follows:—

"3. The facts relied upon by the Courts below do not in law constitute coercion or undue influence."

"4. The Courts below ought to have held that any persuasion on the part of the 1st plaintiff's husband, who is no party to Exhibit A, even if proved, cannot invalidate the document." Coercion is defined (Contract Act, section 15) as "committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." I think the words "any person whatever" have been advisedly used by the Legislature to indicate that the act need not be to the prejudice of the person entering into the contract. I think also that the words "to the prejudice of any person whatever," which are separated by a comma from the previous word "property," relate both to the committing or threatening to commit an act forbidden by the Penal Code and to the unlawful detaining or threatening to detain property. It means the same thing whether, when a man kills himself, it is called an act of suicide or a successfully accomplished attempt to commit suicide; and an attempt to commit suicide is punishable under the Penal Code. Hence suicide and an attempt to commit suicide are acts forbidden by the Penal Code, though the former cannot be punished under the Code as a dead man cannot be punished. Provided the threat of the forbidden act does have the intended effect of bringing about the consent to the agreement, it does not matter who made the threat or to whose prejudice it was made. Mr. Patanjali Sastriar for the appellants argued that the "prejudice" to the feelings or to the supposed spiritual welfare of the wife and son of Swami by the carrying out of Swami's threat was not the sort of prejudice contemplated by section 15 and that

the "prejudice" to Swami's own life by the threatened act was immaterial as he was not a party to the deed. It is unnecessary to go into the question whether prejudice or injury to sentiments, feelings or supposed spiritual welfare is also contemplated in the definition of coercion in the Contract Act. (See, however, sections 298, 499, 508, etc., of the Indian Penal Code showing that the Criminal Law does recognize also acts causing some of such sentimental injuries as punishable.) I agree with the lower Courts that the prejudice to Swami's own life is sufficient to bring his threat within the definition of "coercion," provided it was intended by the person using the threat to bring about the agreement thereby. Mr. Sastriar put the following question in support of his contention: "Suppose A threatens to blow up the Taj Mahal unless B gives C a pro-note for Rs. 10,000 and suppose B is a man of such fine artistic feelings that to save the noble structure, he gives the pro-note, is the note voidable for coercion?" I see no difficulty in answering the question in the affirmative, provided the Court is able to arrive at the conclusion that the threat (which was to do an act of mischief or vandalism prohibited by the Penal Code to the prejudice of Government) was intended to bring about the execution of the pro-note and did have that effect. (I need not say that the mere use of the threat will not render the agreement voidable unless the agreement was not only intended to be but *was actually* "caused" by it. See section 19 of the Contract Act and the explanation thereto.) That the threat need not proceed from the party to the agreement has been held in *Askari Mirza v. Jai Kishori* (1), relying on the well-known books of Shephard and Pollock on the Contract Act. It is unnecessary to consider in detail the question whether the release-deed was caused by undue influence. The line between coercion (section 15 of the Contract Act) and undue influence (section 16 of the Act) is sometimes thin and it is possible to conceive of cases where the act might fall under both heads. In *Ranganayakamma v. Alwar Setti* (2) a widow executed a deed of

(1) 16 Ind. Cas. 344; 15 O. C. 92.
(2) 13 M. 214.

AMMIRAJU V. SESHAMMA.

adoption, as her relations (*not the adopted boy*) obstructed the removal of her husband's corpse by her or her guardian to the cremation ground unless she executed the deed. Collins, C. J., and Muthusawmi Aiyar, J., held that the act of the defendants was an unlawful act covered by section 15 or section 16 of the Contract Act (see at page 224). I think that when a man uses a threat of suicide to his wife and his son and they, owing to the distress of mind caused by the strength of that threat, execute a document, they are persons "whose mental capacity" (which, I take it, includes volitional freedom and strength) "is temporarily affected by reason of mental distress" within the meaning of that expression in clause (2) (b) of section 16 of the Contract Act.

I would, therefore, dismiss the second appeal with costs.

MOORE, J.—I regret that I have the misfortune to differ from my learned brother.

The findings of the lower Courts which we must accept are that, under a threat of suicide by Swami, his wife, the 1st plaintiff, and his son, the 2nd plaintiff, executed the release-deed. There is evidence that the 1st plaintiff was greatly distressed owing to her son having run away from home in order to avoid having to execute the document, and that owing to the pressure brought to bear upon her by her husband, coupled with his threat to commit suicide, she was induced to join in the execution of a document. I have found considerable difficulty in deciding the question whether the husband's threat to commit suicide amounts to coercion as defined in section 15 of the Contract Act. The difficulty lies in the words "to the prejudice of any person" which occur in the section and which must, I think, be read with both branches of the section. The lower Courts have not dealt with the question in a satisfactory manner. The Subordinate Judge says: "The degrading position to which a respectable Hindu wife would be reduced in case Swami had given effect to his threat should have considerably contributed in (*sic*) inducing the plaintiff to sign Exhibit A." The District Judge observes that "there is no doubt that a threat to commit suicide constitutes coercion within the meaning of section 15 of the Contract Act." The words of the section are very wide, and the

coercion invalidating the contract need not proceed from a party to that contract, or be immediately directed against the party whom it is intended to coerce to enter into the contract, or affect his property or be specifically to his prejudice.

The words "act forbidden by the Penal Code" make it clear that the Court must decide whether the alleged act of coercion is such as to amount to an offence.

Suicide is, I take it, an act forbidden by the Penal Code, and the abetment of suicide is punishable (section 306, Indian Penal Code).

I am unable to accept as correct the view taken by the lower Court that the prejudice to Swami's own life was sufficient to bring the threat within the definition of "coercion" (assuming that Swami intended by the threat to induce his wife and son to execute the release-deed). In *Ranganayakamma v. Alwar Setti* (2) it was held that an adoption by a Hindu widow 13 years of age was not binding on her, it having been found that the relations of the adopted boy obstructed the removal of the corpse of her husband from her house until she consented to the adoption. The decision proceeded on the ground that the widow's consent to the adoption was not free. The Court seems to have thought that the obstruction to the removal of the corpse by the deceased's widow was within section 15 of the Contract Act as being forbidden by the Penal Code, the section applicable being presumably section 297, Indian Penal Code.

In *Ranganayakamma v. Alwar Setti* (2), however, there would have been no difficulty in finding that the widow's consent was obtained by "undue influence" within the meaning of section 16 of the Contract Act. As regards the question whether the release-deed was brought about by "undue influence," it may be that Swami was in a position to dominate his wife's will but he was not a party to the contract; and section 16 (2) (b) of the Contract Act consequently does not, I think, apply.

The Subordinate Judge's finding (paragraph 12 of the judgment) is that Exhibit A was executed under coercion, though not under undue influence in the

ASHUTOSH MOOKHERJEE v. AKHOY KUMARI DEBI.

DALIPA v. SURAJ KAUR.

strict legal sense (whatever that may mean). The conclusion I have arrived at, though with considerable hesitation, is that the facts relied on by the lower Courts do not in law constitute "coercion" or "undue influence" so as to invalidate the release-deed executed by the plaintiffs. I would, therefore, allow the appeal.

By THE COURT.—Under section 98 of the Code of Civil Procedure, the decree of the lower Appellate Court is confirmed with costs.

Appeal dismissed.

V. R. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORDERS NOS. 285 AND 334 OF 1915.

May 26, 1916.

Present:—Mr. Justice Teunon and Mr. Justice Sheepshanks.

ASHUTOSH MOOKHERJEE AND OTHERS—
JUDGMENT-DEBTORS—APPELLANTS

versus

AKHOY KUMARI DEBI AND OTHERS—
DECREE-HOLDERS—RESPONDENTS.

Hindu Law—Rent-decree against widow—Execution after widow's death—Tenure in hands of reversioners, liability of, for sale—Bengal Tenancy Act (B. C. VIII of 1885), s. 65.

A tenure or holding in the hands of the reversionary heirs after the death of a Hindu widow remains liable in respect of decrees for its arrears of rent obtained against the widow when she held it as heiress to her husband.

Kristo Gobind v. Hem Chunder 16 C. 511; *Bireswar Das Dey v. Kamal Kumar Dutt*, 16 Ind. Cas. 437; 17 C. W. N. 337, distinguished.

Jiban Krishna Roy v. Brojo Lal Sen, 30 C. 550; 1 Bom. L. R. 428; 30 I. A. 81; 7 C. W. N. 425, followed.

Appeals against the orders of the District Judge, Bankura, dated the 23rd March 1915, affirming that of the Munsif, Bishenpur, dated the 16th September 1914.

Babu Jadu Nath Kanjilal and Jogendra Kumar Dey, for the Appellants.

Babu Mohini Mohan Chatterjee, for the Respondents.

JUDGMENT.—These two appeals arise out of proceedings in execution of two decrees for rent. These decrees were obtained against a Hindu widow and on her death the reversionary heirs of the husband were brought on the record as her representatives for the purposes of the execution. The only questions in these appeals are, whether the holding in respect of which decrees for rent were obtained, being now in the hands of the

reversionary heirs, can be sold in execution of decrees obtained, against the widow. In support of his contention that the defaulting holding cannot be sold, the appellant has invited our attention to the cases of *Kristo Gobind v. Hem Chunder* (1) and *Bireswar Das Dey v. Kamal Kumar Dutt* (2). But in these two cases the question for decision was whether the estate of the husband (other than the defaulting tenure) could be sold in execution of such decrees. They, therefore, throw no light upon the present question. On the other hand the case of *Jiban Krishna Roy v. Brojo Lal Sen* (3) decided by their Lordships of the Privy Council appears to us to be good authority for the proposition that the tenure in the hands of the reversionary heirs does remain liable in respect of decrees for rent obtained in the time of the widow; and this also is in accordance with the provisions of section 65 of the Bengal Tenancy Act. For these reasons we dismiss the appeals with costs. We assess the hearing-fee at one gold mohur in each case.

Appeals dismissed.

(1) 16 C. 511.

(2) 16 Ind. Cas. 437; 17 C. W. N. 337.

(3) 30 C. 550; 5 Bom. L. R. 428; 30 I. A. 81 (P. C.); 7 C. W. N. 425.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1212 OF 1910.

December 13, 1915.

Present:—Mr. Justice Chevis and Mr. Justice LeRossignol.

DALIPA AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Rani SURAJ KAUR—PLAINTIFF—
RESPONDENT.

Custom—Adequate proof, what is—Claim based on custom—Custom not proved—Right of plaintiff to rely on Hindu Law—Alienation—Dhillon Jats of Ambala District—Status of married daughter to contest alienations by mother or step-mother—Civil Procedure Code (Act V of 1908), s. 11—'Court,' meaning of—'Former' suit, meaning of—Several suits decided by one judgment—Appeals—Appeals cognizable by different Courts—Pecuniary jurisdiction—Decision of Divisional Judge in appeal from decree in one suit—Whether res judicata in appeal to Chief Court from the simultaneous decision in another suit where parties identical—Provision in bar of suit—Interpretation.

Where a claim is based on custom, the plaintiff must adduce clear evidence of instances in which the custom has been followed. Opinions, however, numerous that the custom ought to have been followed are not sufficient to justify a Court in holding that the custom had been established. [p. 582, col. 2.]

DALIPA v. SURAJ KAUR.

Among the Dhillon Jats of the Amballa District a married daughter succeeding to her father's estate has the right to contest alienations effected by her mother or step-mother. [p. 582, col. 2.]

Where a custom on which a claim is based is not proved, the plaintiff cannot fall back on any provision of Hindu Law in support of his case which he did not press at the first hearing. [p. 583, col. 1.]

Obiter:—The right of a Hindu female to challenge the alienations of an earlier female life incumbent must be decided on the evidence adduced in each particular case and no general proposition can be laid down to cover all cases. [p. 583, col. 1.]

The Court referred to in section 11 of the Civil Procedure Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided. [p. 584, cols. 1 & 2.]

Midnapore Zemindary Company Limited. v. Nitya Kali Dasi, 24 Ind. Cas. 243, dissented from.

Legal provisions in bar of any suit must be strictly interpreted in favour of the suit. [p. 584, col. 2.]

Plaintiff, a married daughter, on succeeding to her father's estate brought one consolidated suit in the District Court contesting a number of alienations effected by her mother or step-mother. By order of Court, however, the suit was split up into three separate suits, some of the alienations being retained in the original suit and the rest forming the subject-matter of the other two suits. All the three suits were decided by one judgment, and the decree in one of the suits of the jurisdictional value of Rs. 295 was taken in appeal to the Divisional Court, Ambala, which confirmed the decree of the lower Court. There was no second appeal preferred against that decision. This present appeal to the Chief Court was preferred against the decree in another connected suit. It was urged for the respondent that the decision of the Divisional Court of Ambala as between the same parties operated as *res judicata* to this appeal:

Held, that the decision of the Ambala Divisional Judge, though a decision in a 'former' suit, was not a decision by a Court which could have dealt with this appeal and did not, therefore, operate as *res judicata*. [p. 584, col. 1.]

Rampal Singh v. Ram Prasad Singh, 27 A. 37 (P. C.); 1 C. L. J. 46; 2 A. L. J. 237; 32 I. A. 17, *Gururajammah v. Venkatakrishnama Chetti*, 24 M. 350; *Mariamnissa Bibi v. Joynab Bibi*, 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149, *Zaharia v. Debi*, 7 Ind. Cas. 156; 33 A. 51 (F. B.); 7 A. L. J. 861, *Dakhni Din v. Syed Ali Asghar*, 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995; *Beni Madho v. Indar Sahai*, 3 Ind. Cas. 707; 32 A. 67; 6 A. L. J. 991, distinguished.

First appeal from the decree of the District Judge, Ambala, dated the 15th August 1910.

The Hon'ble Mr. Muhammad Shafi, K. B., Messrs. Nanak Chand and Gokal Chand Narang, for the Appellants.

Mr. Beechey and Lalas Dharm Das Suri and Beni Pershad, for the Respondent.

JUDGMENT.

LE ROSSIGNOL, J.—By this Court's order of 4th April 1914 the issue "whether among Dhillon Jats of the Ambala District a married daughter, on succeeding to her father's estate, has a right to contest alienations effected by her mother or step-mother," was sent down to the Court below, for further inquiry and finding.

The return to the remand is that no such right has been established.

On behalf of the respondents Mr. Beechey contended that the custom had been established. He admitted that only one instance, that of *Musammam Suraj Kaur* printed at paper-book E, pages 10—11, had been discovered, in which a female had successfully challenged the alienation of another female, but he pointed to the array of 101 witnesses produced by his clients, and urged that though their testimony merely reflects their opinion, the cumulative effect of their opinion and sentiment on the point was sufficient to justify us in holding that the custom had been established.

As to this argument it is sufficient for us to say that the only adequate proof of a custom is clear evidence that such and such a custom is followed and not merely opinions, however numerous, that such and such a custom ought to be followed.

A grievance also was made of the fact that the inquiry on remand had been confined to the Ambala District and it was urged that the boundaries of districts are dictated by other than ethnological considerations.

This argument, of course, has no novelty and we do not imagine that a district boundary is necessarily the line of demarcation between the followers of one custom and the followers of another, but experience has taught the lesson that customs do vary among members of the same tribe dwelling in different localities, and the district was taken as the limit for the inquiry because there is no general tribal custom universally prevalent throughout this Province, and some limit had necessarily to be fixed.

DALIPA V. SURAJ KAUR.

In any case, this point which should have been agitated before the Bench which ordered the remand, and not at this late stage before this Bench.

We agree with the Court below that the plaintiff-respondent has failed to prove that by custom she is competent to challenge alienations by her female predecessors-in-title.

Failing to prove a specific custom, Mr. Beechey then argued that he was entitled to fall back upon Hindu Law, that on general principles also, *e.g.*, on the maxim *ubi jus, ibi remedium*, *i.e.*, 'there is no wrong without a remedy,' a female heir is of necessity competent to protect her right against the depredations of an earlier incumbent, who had merely a life-interest, and who was bound at her death or remarriage to pass on that estate unimpaired to the next heir. A final plea was that as regards one of the appellants, Gobind Ram, the matter was *res judicata*, inasmuch as in another case between plaintiff and Gobind Ram, the competency of the suit had been decided between plaintiff and Gobind Ram, prior to the decision of this appeal, by the Divisional Court of Ambala, and that Court's judgment was final.

With regard to both these points, we hold that respondent is not entitled to be heard; they are pleas which could and should have been pressed at the first hearing of this case; the order of remand as also the notes of my learned brother who was on the remanding Bench reveal that they were never mentioned, nor indeed does Counsel for respondent assert that they were mentioned. We find that the position accepted by the respondents was that they were to fail or succeed according as they did not prove or did prove the alleged custom in the inquiry to be made by the original Court, after remand. Had a right under Hindu Law been specifically pleaded, the result might have been other than it is, but on this we are not called upon to decide; we would note, however, that in Civil Appeals 1013, 1014 of 1909 of this Court, a Full Bench, though pressingly invited to do so, refused to lay down any general proposition regarding a female's right to challenge the alienations of an earlier female life incumbent and decided that the rights

and privileges of a female heir had to be decided on the evidence of each particular case.

This decision of the Full Bench would preclude us from giving effect to respondent's contention that a right of inheritance must of necessity comprise a right to protect the estate, even if we thought it right to go behind the remand order, a course which as above stated we cannot adopt.

The point of *res judicata* is of interest and for that reason we devote some remarks to it.

The plaintiff originally brought one consolidated suit to contest a large number of alienations, but on the order of the Subordinate Judge, this original suit became three; some of the alienations were retained in the original suit, whilst others were excluded from it and formed the subject-matter of two separate suits. All three suits nevertheless were decided by one judgment, dated 15th August 1910, and one of them of the jurisdictional value of Rs. 295-5-0 was taken in appeal to the Divisional Court, Ambala, which maintained the District Court's decree on the ground *inter alia* that *Maqsood-ul-Nissa v. Kaniz Zohra* (1) was authority for holding that the plaintiff did enjoy a right of challenge. The existence of this right does not appear to have been seriously questioned in that Court, where the contest was waged chiefly on the points of necessity, estoppel and limitation. The Divisional Court's confirmation of the first Court's finding is dated 14th July 1913, and was not challenged in second appeal, so that it is final.

Thus, argued respondent, before this Court was called upon to proceed to judgment in this appeal, there was a final decision of a competent Court as between plaintiff and Gobind Ram, regarding the competency of the suit.

Rampal Singh v. Ram Prasad Singh (2) was cited as authority that a status determined in an earlier suit between parties to a subsequent suit was *res judicata* in the subsequent suit, but the question in

(1) 135 P. R. 1903; 194 P. W. N. 1908.

(2) 27 A. 37; 1 C. L. J. 46; 2 A. L. J. 237 (P. C.); 32 I. A. 17.

ADWAITYA CHARAN V. SORAJRANJAN.

this case is whether the competency of the suit had been finally decided in a former suit.

Gururajammah v. Venkatakrishnama Chetti (3) has been cited as authority for the view that the date of institution of the two suits is not the criterion for determining whether one suit is to be described as the former suit with regard to another suit in which the plea of *res judicata* is raised.

Mariamnissa Bibi v. Joynab Bibi (4) also was cited; in that case the Judges differed, but the facts of that case are not at all parallel with those of this case.

In *Zaharia v. Debi* (5) there were two cross-decrees in only one of which an appeal was preferred. The appeal was held to be barred because the decree not challenged had become final.

The decision at page 151 [*Dakhni Din v. Syed Ali Asghar* (6)] of the same volume is to the same effect.

In *Beni Madho v. Indar Sahai* (7) it was held that it is the competency of the original Court to entertain the two suits which regulates the application of the rule of *res judicata*, whilst in *Midnapore Zemindary Company, Limited v. Nitya Kali Dasi* (8) it was laid down that the doctrine of *res judicata* does not apply to Courts of first instance only.

None of these judgments is precisely in point here.

In this case the 'former' suit cannot refer to the District Judge's decision, for the District Judge's decision was given in all three suits on one day at one time. If the decision which operates as a bar is the Divisional Court's decision, then that decision is a decision in a 'former' suit, but it is not a decision by a Court which could have dealt with this suit in appeal.

With all deference to the views expressed in *Midnapore Zemindary Company, Limited v. Nitya Kali Dasi* (8) we would hold that the Court referred to in section 11 of the

Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided. This view is confirmed by the language of explanation II to the section.

In this case we hold that there was no 'former' decision of the original Court and the fact that a simultaneous decision was made final by the decision of the Divisional Court, a Court which was not competent to decide this appeal, before this appeal reached the stage of judgment, does not convert the simultaneous decision into a decision in a former suit between plaintiff and Gobind Ram.

Legal provisions in bar of any suit must be strictly interpreted in favour of the suit.

As we find that plaintiff has failed to prove the custom upon which she relied, we accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

ORDER No. 1834 OF 1916.

May 3rd 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

ADWAITYA CHARAN CHOWDHURI—
RESPONDENT—PETITIONER

versus

SORAJRANJAN CHOWDHURY—

APPELLANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 30, 31—Judgment written and signed by retired Judge, if good judgment—Appeal under Letters Patent, extension of time for.

The judgment of one of the two Judges constituting a Division Bench of the High Court which heard an appeal written and signed by him after retirement, is a good judgment if it is read out and delivered on his behalf by the other Judge. [p. 585, col. 2.]

In the special circumstances of the case the High Court extended the time by more than five years for preferring an appeal under section 15 of the Letters Patent. [p. 585, col. 2.]

Appeal from Original Decree No. 84 of 1908, being an appeal preferred against the decree of the Sub-Judge, 3rd Court, Midnapore, passed in Suit No. 529 of 1907 and dated the 17th February 1908.

(3) 24 M. 350.

(4) 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149.

(5) 7 Ind. Cas. 166; 33 A. 51 (F. B.); 7 A. L. J. 861.

(6) 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995.

(7) 3 Ind. Cas. 707; 32 A. 67; 6 A. L. J. 991.

(8) 24 Ind. Cas. 243.

BIBI SODHAN v. HARSA SINGH.

FACTS material to the report will appear from the petition to the High Court printed below :—

"The humble petition of the abovenamed petitioner most respectfully sheweth:—

1. That your petitioner brought a suit for mesne profits against the opposite party in 1907 in the Subordinate Judge's Court of Midnapore and got a decree in 1908.

2. That said opposite party preferred the above mentioned appeal to this Hon'ble Court against that decree.

3. That the said appeal was heard by a Bench consisting of Mr. Justice Richardson and Mr. Lal Mohan Doss, the then Judge of this Hon'ble Court.

4. That their Lordships differed on the point of law and passed an order that the appeal might be referred to a third Judge on the 13th of January 1910.

5. But since then the matter was never put before any of the Judges of this Hon'ble Court.

6. That in the meantime the Vakil for the appellant as well as the Vakil for the petitioner-respondent died and your petitioner executed a second *vakalatnama* in favour of Babu Satcouri Pati Roy, a Vakil of this Court who accepted it and appeared on his behalf.

7. That your petitioner's said Vakil enquired in the office and was told that the judgment of Mr. Doss was signed by him after the date on which he retired from the Bench and, therefore, his judgment could not be regarded as a proper judgment.

8. That if your Lordships think that the judgment of Mr. Doss is all right and not defective, the matter may be referred to a third Judge for hearing on the question of law.

9. But that if your Lordships think that the judgment of Mr. Doss is no judgment in the eye of law, your Lordships may order the appeal to be heard by another Bench, i. e., the regular Bench taking up the appeals of the District of Midnapore.

10. That the matter is pending before this Court for such a long time and your petitioner has been put to such inconvenience that he is bound to approach your Lordships for an order for early disposal of this appeal.

Therefore your petitioner humbly prays

that your Lordships will be pleased to pass an order for hearing of the said appeal either by a third Judge or by the regular Bench or pass any other order that would seem fit in this case.

And your petitioner as in duty bound shall ever pray."

Babu Satcouri Roy, for the Petitioner.

Babu Mohini Mohan Chatterjee, for the Opposite Party.

ORDER.

SANDERSON, C. J.—We think in this case that the matter is of some hardship to the parties. Speaking for myself, I think that the judgment which was delivered by Mr. Justice Richardson on behalf of Mr. Justice Doss, when he read out the written and signed judgment of Mr. Justice Doss, was a good judgment: Consequently the only course open to the defendant is to prefer an appeal under section 15 of the Letters Patent. Of course, he will be now entirely out of time, but having regard to the unusual circumstances of this case, he ought to have the time extended; and we give him such time as is reasonable for preferring the appeal, and that will be one month from this date.

The notice of the Letters Patent appeal may be served on the Vakil for the respondents as prayed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1598 OF 1913.
December 14, 1915.

Present:—Mr. Justice Rattigan.
Musammât BIBI SODHAN AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus
HARSA SINGH—DEFENDANT—
RESPONDENT.

Hindu Law—Mitakshara—Inheritance—Daughter of uncle of last male owner, whether entitled to succeed. According to the Mitakshara system of Hindu Law, a daughter of the uncle of the last male owner is not

BIBI SODHAN C. HARSA SINGH.

entitled to inherit the property, even though there are no other heirs. [p. 586, col. 2.]

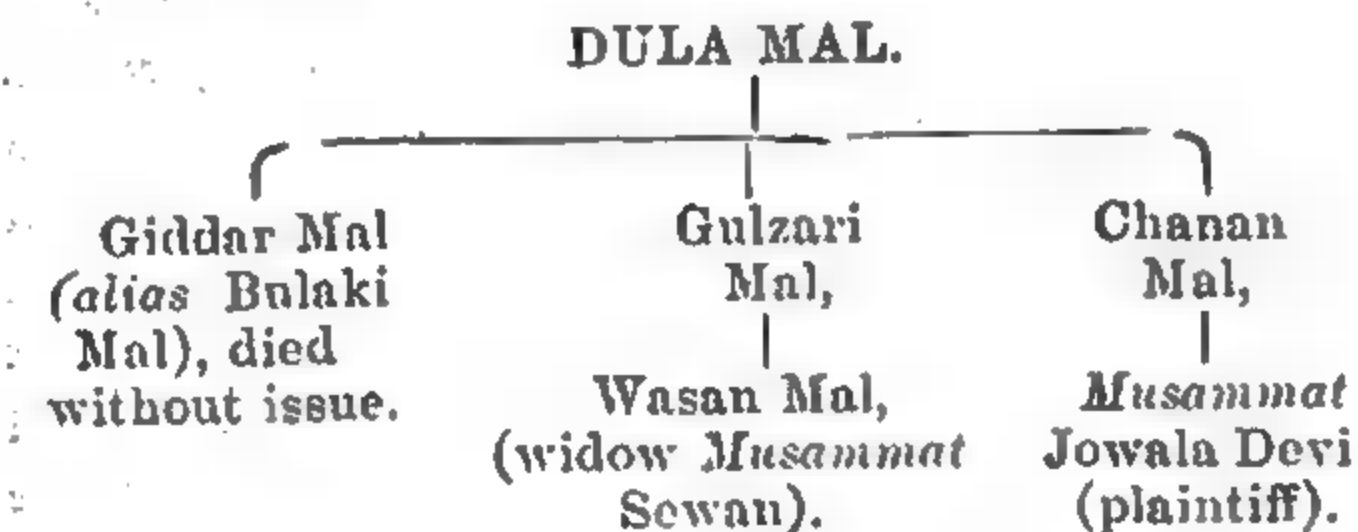
Jagan Nath v. Champa, 18 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87; *Jogdamba Koer v. Secretary of State*, 16 C. 367; 13 Ind. Jur. 385; *Mangat Ram v. Devi Chand*, 20 P. R. 1906; 69 P. L. R. 1906, referred to.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 28th June 1913.

Messrs. *Nand Lal and Ralli*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—Plaintiff, *Musammatt Jowala Devi*, belongs to an *Ajora* family of Ferozepore, admittedly governed by Hindu Law, and the pedigree table of her family, so far as is material for the purposes of this case, is ■■ subjoined.



The property in suit originally belonged to Wasan Mal and was mortgaged after his death by his widow, *Musammatt Sewan*, to the defendant. Plaintiff, alleging herself to be the legal heir of Wasan Mal (*Musammatt Sewan* having died before suit), claims to recover possession of the said property from the defendant. In her plaint she stated that the alleged mortgage in defendant's favour was fictitious and that even if proved to be genuine, was effected for no consideration and without necessity.

Her claim was decreed by the first Court but was dismissed on defendant's appeal, by the Divisional Judge who held that plaintiff was not entitled, under the Hindu Law prevailing in this Province, to inherit from Wasan Mal, her father's cousin, and had, therefore, no *locus standi* to sue for possession of the property. The Divisional Judge further found that even if plaintiff could maintain the suit, the mortgage was valid and binding upon her.

From this decree plaintiff has appealed to this Court, and the sole question argued before me is as to her right to maintain the suit as an heir to Wasan Mal's property. It

is admitted that there ■■ no other heirs and that if plaintiff's claim fails, defendant's possession of the property must continue unless Government prefers a claim thereto on the ground of escheat.

The question then is whether under the Hindu Law of the Mitakshara, the daughter of the uncle of the last male owner is entitled, in the absence of all other heirs, to inherit the property.

In my opinion, this question must be answered, upon the authorities, in the negative, ■■ it would now appear to be settled law that, according to the Benares School, females do not succeed to males unless their right of inheritance is expressly recognised by some text in their favour. Females whose right of inheritance is so recognised are (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother. The daughter of ■■ cousin is nowhere recognised as an heir and whatever may be the law prevailing in the Bombay and Madras Presidencies (where female heirs to males are more favoured than in Bengal and by the Benares School), there can be no doubt that ■■ woman in the position of the present plaintiff has no possible claim to succeed to her father's male cousin according to the Mitakshara system, [see *Mayne's Hindu Law*, 8th edition, page 748; *Trevelyan's Hindu Law*, 1912, page 350; *Mulla's Hindu Law*, page 132; *Jagan Nath v. Champa* (1), *Jogdamba Koer v. Secretary of State* (2) and *Mangat Ram v. Devi Chand* (3). In the case last cited ■■ reference was made (at page 78) to ■■ decision of the High Court of Allahabad which was apparently not in accord with earlier decisions of that Court, inasmuch as it recognised the right of a daughter's daughter to succeed in the absence of preferential heirs. This case [*Bansidhar v. Ganeshi* (4)] has been expressly dissented from in *Jagan Nath v. Champa* (1) and is, as the learned Judges who decided the later case point out, opposed to a series of Full Bench and other rulings of the same Court. It cannot, therefore, be regarded as

(1) 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87.

(2) 16 C. 367; 13 Ind. Jur. 385.

(3) 20 P. R. 1906; 69 P. L. R. 1906.

(4) 22 A. 338; A. W. N. (1900) 107.

FATTEH CHAND v. BILAS RAI.

an authority, and in any case it would not support the present claim.

I must accordingly hold that plaintiff has no *locus standi* to maintain the present suit as she is not entitled to succeed as an heir to the property of Wasan Mal, and as a result her appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 207 OF 1914.

March 22, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Scott-Smith.

FATTEH CHAND—DEFENDANT—

APPELLANT

versus

BILAS RAI—PLAINTIFF AND Musammatt KAURI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Partition Act (IV of 1893), s. 2—Partition—Order for sale—Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Suit for possession by partition—Decree specifying mode of partition—Appeal—Proper fee.

Plaintiff sued for possession by partition of certain joint land and houses and obtained a preliminary decree settling the respective shares of the parties. The Court, having fixed the price of the joint land, appointed a Commissioner and directed him to auction the separate pieces of immoveable property, the share-holders only being allowed to bid. The Court further ordered that the sum so realised should be divided among the parties according to their respective shares. The auction was held a few days afterwards. The defendant appealed objecting to this mode of partition:

Held, (1) that the method of partition suggested by the lower Court was open to objection, ■ it could quite conveniently be made in the ordinary way by allotting to each sharer houses approximately of the value of his or her share, at the same time respecting actual possession so far as possible, any small excess or deficiency being made good by money payments; [p. 588, col. 1.]

(2) that the fact that the defendant had bid at the auction did not estop him from filing an appeal; [p. 588, col. 1.]

(3) that as it was impossible to assign a value to the appellant's claim, section 7 (iv) (b) of the Court Fees Act had no application to the case and a Court-fee of Rs. 10 was sufficient and correct under Article 17 (vi) of the Second Schedule of the Act. [p. 588, col. 1.]

First appeal from the decree of the District Judge, Ambala, dated the 23rd October 1913, decreeing the claim.

Mr. Gullu Ram, for the Appellant.

Mr. Lakshmi Narain, for Musammatt Kauri, Defendant-Respondent.

JUDGMENT.—In this case the first point for decision is a preliminary objection raised by Mr. Lakshmi Narain that the Rs. 10 Court-fee on this appeal is insufficient and should be made up to what the law requires. The suit was by one co-sharer against four co-sharers for possession by partition of certain joint land, the *jama* of whole being Rs. 345-7-2. In the prayer it was said that the family house property had been already divided up, but if defendants contested this, plaintiff should be allowed a separate suit for its partition. On 4th July 1912, the District Judge ruled that the suit must be for the whole of the joint property, whereupon an amended plaint was put in, which included the houses. Questions as to the valuation of the houses and of a garden had been raised, and it had been summarily decided that the garden was worth Rs. 5,000, the houses apparently remained standing at the value assigned by plaintiff—see pages 4 and 5, paper-book—, i. e., some Rs. 41,760. On 23rd October 1913, the District Judge passed a preliminary decree settling shares, giving plaintiff 1/6th and present appellant Fatteh Chand 1/3rd. The Court then appointed a Commissioner and directed that the separate pieces of immoveable property shall be auctioned by the Commissioner among the parties, the share-holders only being allowed to bid. The total sum thus paid in will be divided among the parties in the proportionate shares given above.

On 6th January 1914 the Commissioner held auction, and on 19th January, defendant Fatteh Chand filed this appeal objecting to the mode of partition.

OTTAPURAKKAL THAZATH SUPPI v. ALABI MASHUR KOYANNA KOYA KUNHI KOYA.

In these circumstances we think ■ Court-fee of Rs. 10, under Article 17 (vi), Schedule II, Court Fees Act, is sufficient and correct. In our opinion section 7 (iv) (b) has no application to the case, as it is impossible to assign ■ value to Fattah Chand's claim. *Hari Chand v. Jiwan Mal* (1), relied on by the defence, is not in point, for there the plaintiff was out of possession. Here appellant does not want to be put in possession of any property he has not got.

This being so, we proceed to deal with the case on the merits, first noticing that Mr. Lakhshmi Narain's contention that Fattah Chand is estopped by having bid at the auction cannot be accepted. Fattah Chand must have made up his mind to appeal before the auction, but like ■ prudent man he was obliged, in view of possible defeat on appeal, to take part in the auction and safeguard his interests.

The auction has taken place and we have perused its results. It seems to us quite clear that there was no occasion for resort to the method of auction. The five sharers are in possession of various parcels of the house property, some having more and some less than their share, but the houses are numerous, and partition could quite conveniently be made in the ordinary way by allotting to each sharer houses approximately of the value of his or her share, at the same time respecting so far as possible previous actual possession, any small excess or deficiency being made good by money payments. This involves appointment of a Commissioner to value the property, the fees being paid by the parties in proportion to their shares. Each party should be called upon to pay in his share. If any party objects, the plaintiff should pay subject to subsequent recovery. Not only is auction unnecessary, but it is obvious that in a case like this it opens ■ door to trickery, each sharer being subjected to the temptation of running up the prices of houses held by the other sharers so ■ to enhance his own ultimate cash receipts.

We accept the appeal, set aside the order of the Commissioner and his

proceedings, and direct the lower Court to proceed to carry out the partition on the lines indicated above, Fattah Chand's costs here (Pleader's fee Rs. 50) to be paid by Mr. Lakhshmi Narain's client. Stamp on appeal refunded.

We may note that a *razinama*, signed by Bilas Rai, Shadi Ram and Fattah Chand, was presented to us yesterday, but we are unable to give effect to it ■ Atma Ram and Musammatt Kauri, defendants, gave no assent to it and Shadi Ram has backed out.

Appeal accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 345 OF 1914.

March 15, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

OTTAPURAKKAL THAZATH SUPPI
AND OTHERS—APPELLANTS

versus

Sayid ALABI MASHUR KOYANNA
KOYA KUNHI KOYA—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 104, (1) (h) (2), 107 (2) O. XXXIX, r. ■ (2), (3), XLIII, r. 1 (r)—Refusal to take action under O. XXXIX, r. 2 (3)—Appeal—Change in language, effect of—Orders of attachment and imprisonment, how to be passed—Injunction dissolved after disobedience—Effect of dissolution—Object of order of attachment or imprisonment explained.

An order refusing to take action under rule 2 (3) of Order XXXIX for an alleged disobedience or breach of a temporary injunction granted under rule ■ (2) of the Order is appealable and in spite of the change "the Court granting ■ injunction may order" made in the wording of Order XXXIX, rule 2 (3), the Appellate Court is competent to pass the order which might have been passed by the Court of first instance. [p. 589, col. 2; p. 590, col. ■]

Under Order XXXIX, rule 2 (3), ■ Court can, in its discretion, order either arrest or attachment of property and is not bound in the first instance to attach property and then only order imprisonment. [p. 590, col. 1; p. 591, col. 2.]

(1) 2S P. R. 1903; 65 P. L. R. 1903.

OTTAPURAKKAL THAZATH SUPPI v. ALABI MASHUR KOYANNA KOYA KUNHI KOYA.

If a disobedience or breach of an injunction, granted under Order XXXIX, rule 2 (2), has occurred and an application for action being taken under Order XXXIX, rule 2 (3), is made while the suit is pending and the injunction has not been dissolved owing to the dismissal of the suit, a subsequent dissolution of the injunction by the dismissal of the suit can in no way excuse the party who has already disobeyed it. [p. 590, col. 1; p. 591, col. 2.]

Per *Srinivasa Aiyangar, J.*—An order for attachment of the property or imprisonment of the person of a party guilty of disobedience of an injunction is not, strictly speaking, enforcing the order of injunction. It is really a punishment for past disobedience. [p. 590, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment and order of the Hon'ble Mr. Justice Oldfield, reported in 27 Ind. Cas. 131, in Letters Patent Appeal No. 100 of 1913, preferred against those of the Hon'ble Mr. Justice Miller, reported in 22 Ind. Cas. 404, in Civil Revision Petition No. 772 of 1912, on the file of the High Court, preferred against the order of the District Court of North Malabar, in Civil Miscellaneous Appeal No. 10 of 1912 (Miscellaneous Petition No. 821 of 1911, in Original Suit No. 952 of 1909, on the file of the Court of the District Munsif, Badagara).

FACTS of the case appear from 22 Ind. Cas. 404 and 27 Ind. Cas. 131.

Mr. J. L. Rozario, for the Appellants.

Mr. A. Sundaram, for the Respondent.

JUDGMENT.

WALLIS, C. J.—The main question in this appeal is whether under Order XLIII, rule (1) (r), an appeal lay to the District Court from the refusal of the District Munsif to take action under Order XXXIX, rule 2 (3), for an alleged breach of a temporary injunction granted under Order XXXIX, rule 2 (2). It is quite clear that an appeal lay in a similar case under section 94 of Act VIII of 1859, and also under section 588 (24) of the Code of 1882, which corresponds to Order XLIII, rule (1) (r); and that such appeals lay not only from orders in exercise of the powers conferred by the section but also from orders refusing to exercise such powers. It is also clear that refusal by the Court to take action on the breach of an injunction might seriously prejudice the party in whose favour the injunction had been granted, and

it is said to be likely that the Legislature intended to affect such right of appeal when it re-cast the language of section 493 of the old Code when enacting it in the present Code. The alteration is that, whereas in section 493, it was provided generally that in case of disobedience the injunction might be enforced by imprisonment or attachment, it is provided in Order XXXIX, rule 2 (3), that "the Court granting the injunction" may order the attachment or imprisonment; and it is said that those words constitute a prescribed limitation under section 107 of the power which the Appellate Court would otherwise have under that section to pass the order which might have been passed by the Court of first instance. In support of this contention attention was called to section 104 (h), which provides for an appeal from an order under any of the provisions of the Code imposing fine, or detention, otherwise than in the execution of a decree and to the provision in section 104 (2) that no appeal shall lie from any order passed in appeal under this section, which by virtue of sub-section (1) (h) includes orders made on appeal under Order XLIII (1) (r), and it was suggested that the alteration in Order XXXIX, rule 2 (3), was introduced to prevent an order of imprisonment being made by the Appellate Court, from which there is no further appeal under the section. If, however, this was the object of the alteration, it goes further than was necessary, as the rule could equally prohibit appeals from a refusal to order attachment. Farther, if it had been desired to restrict the right of appeal from orders under Order XXXIX, rule 2, in this way, nothing would have been easier than to say so expressly in Order XLIII (1) (r), which is the provision dealing with appeals from orders under the rule in question, instead of in Order XXXIX, rule 2, which deals with original orders. It is not, in my opinion, permissive to read the words "the Court granting the injunction" as restricting the right of appeal, unless they would otherwise have no effect, whereas they may have the effect of preventing original applications in respect of breaches of the injunction being made to any other Court than that which granted the injunction, as for instance in the case of the injunction having been granted by the original Court and the breach having occurred after an appeal had

OTTAPURAKKAL THAZATH SUPPI v. ALABI MASHUR KOYANNA KOYA KUNHI KOYA.

been preferred, or possibly after the case had been transferred.

As regards the other points taken, where as here the injunction was disobeyed and the application to commit was put in while the suit was pending, but the order was made after the suit was dismissed, that does not, in my opinion, affect the powers of the Court to take action for the breach. Lastly there is, in my opinion, no foundation for the contention that the Court can only make an order of imprisonment after an order of attachment.

I am, therefore, of opinion that the appeal lay to the District Judge and that he had jurisdiction to pass the order. Mr. Justice Miller has refused to revise that order and I am not prepared in this case to interfere in appeal with the exercise of his discretion. In the result the appeal is dismissed with costs.

ABDUR RAHIM, J.—I agree.

SRINIVASA AIYANGAR, J.—Three points are raised by Mr. Rozario in this appeal. (1) That no appeal lies from the order of the District Munsif declining to order arrest or attachment of property for disobedience of an interlocutory injunction. (2) That when the Appellate Court interfered, the injunction had ceased to exist by reason of the dismissal of the suit in the first Court. (3) That the Court had no right to order arrest and imprisonment without first ordering attachment of property.

General jurisdiction to make interlocutory orders pending suits is conferred by section 94 of the Code. Detailed provision for the exercise of such jurisdiction is to be found in Orders XXXVIII, XXXIX and XL. Order XXXIX relates to interlocutory injunctions. General jurisdiction to entertain appeals from orders is conferred by section 104 of the Code. Order XLIII, rule 1, makes provision for appeals from orders made under rules as provided for in clause (i) of section 104. Under clause (v) of rule 1 of Order XLIII, an appeal is allowed from an order under rule 2. The injunction in the present case was granted under Order XXXIX, rule 2, by the District Munsif. The application for arrest and attachment was also made under clause (3) of rule 2 to the Court which granted the injunction (*i.e.*, the Munsif). The order in question passed by

the Munsif declining to order arrest or attachment under clause (3) of rule 2 is obviously an order under rule 2 and would, therefore, be appealable. But it was argued that the introduction of the words "the Court which granted the injunction" in clause (3) of rule 2 showed that an order under that clause can only be passed by the Court which granted the injunction and no other Court even in appeal can do so. This construction ignores the fundamental rule that an Appellate Court only passes the order which the first Court should have passed. In many cases applications are made and in all cases suits filed in Trial Courts, whose duty it is to pass orders or decrees and in appeals, where the Appellate Courts interfere, they only pass such orders as the first Court should have passed. (Section 107, Civil Procedure Code.) The introduction of the words "the Court which granted the injunction" in the new Code, words which are not to be found in the corresponding section 493 of the old Code, is merely due to the change in the method of drafting. It is to be observed that the words "may be enforced" found in section 493 have been omitted in the corresponding rule and the omission has necessitated the re-drafting of the rule in the form in which it stands. An order for attachment of the property, or imprisonment of the person, of a party guilty of disobedience of an injunction is not, strictly speaking, "*enforcing the order of injunction.*" It is really a punishment for past disobedience. That was probably the reason for the omission of the words. Full scope can be given to the words "Court granting the injunction" by construing them as applicable to the original petition. For example, if an injunction is granted by an Appellate Court, pending an appeal from a decree, the application to enforce that injunction in the case of breach could be made only to the Appellate Court, for in that case the Trial Court, before whom no action is pending, would not be in a position to entertain an application. That must be the result even under the old Code. It is clear that disobedience of an order of injunction passed in appeal could not be punished by the Court which tried the suit, as section 36 or 37 corresponding to section 649 of the old Code does not apply. Where the business of

OTTAPURAKKAL THAZATH SUPPI V. ALABI MASHUR KOYANNA KOYA KUNRI KOYA.

one Court is transferred to another, the Court to which the business is so transferred may, I think, under section 150, entertain an original application for attachment or arrest under clause (3) of rule 2 of Order XXXIX. Attention was drawn to section 104 which provides an appeal in cases of *fine and imprisonment*. That provision was made in the body of the Code in analogy to the Judicature Act of 1894 which allows an appeal without leave in all cases, where the liberty of the subject is concerned, to prevent the right being taken away by rules passed by superior Courts by virtue of their rule making power. In the absence of such provision in the body of the Code it would be possible for the High Courts, after consulting the Rule Committees, to abolish the right of appeal in the cases provided for by Order XLIII, rule 1, including orders under Order XXVIII, rule 4, and Order XXXIX, rule 2, clause (3). The argument of Mr. Rozario, if correct, leads to this result, that an order passed by the first Court for attachment of the property and its sale is not appealable as also orders declining to commit or to attach property. In England it is now settled that an appeal lies in cases where the first Court declines to order committal or sequestration of property [see *Jarmain v. Chatterton* (1)], though of course the Appellate Court would not ordinarily interfere with the discretion exercised by the first Court.

The view which I have set forth above is fully supported by a passage in High on Injunctions, section 1431, where the learned author says: "An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt, notwithstanding such appeal. And an appeal from an injunctive order does not deprive the Court granting the writ of the right to punish for contempt for its violation, and the lower Court and not the reviewing Court is the proper tribunal to entertain such proceeding. . . . Where the Court of Appeal of the State has jurisdiction to grant a *supersedeas* to an order of an inferior Court dissolving an injunction, and defendants, after the grant-

ing of such *supersedeas*, proceed to the commission of the act forbidden by the injunction, such action is a contempt of the Court of Appeals and may be punished upon proceedings in that Court."

As regards the second question, the breach of the injunction occurred when the injunction was in force, and also when the application was made. The dissolution of the injunction owing to the dismissal of the action which happened long after the application, could in no way excuse the party who had already disobeyed it. [See *Eastern Trust Company v. Mackenzie Mann and Company Limited* (2).]

As to the third point I think in spite of the difference in the language the meaning is the same. The Court can, in its discretion, order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment. Mr. Rosario's contention leads to this result: that the Court has power to order attachment alone or attachment and imprisonment, but not imprisonment alone. It is to be observed that the contention is not, that it is only if the attachment proves infructuous in compelling future obedience, that the writ of committal is to be issued. In England the usual order in cases of disobedience of an injunction by natural persons is attachment of the person or committal, while sequestration is the usual order passed in cases of disobedience by corporations. (See Oswald on Contempt, page 223.) The former practice seems to have been that unless there was a previous issue of a writ of attachment sequestration will not issue, but now attachment and sequestration may issue concurrently. I, therefore, agree in the order proposed.

Appeal dismissed.

V.R.F.

(2) (1915) A. C. 750; 84 L. J. P. C. 152.

(1) 20 Ch. D. 493; 51 L. J. Ch. 471; 30 W. R. 461.

GOUR SUNDAR BHOUMIK v. RAKHAL RAJ BHOUMIK.

CALCUTTA HIGH COURT.

RULE No. 273 OF 1916.

May 3, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

GOUR SUNDAR BHOUMIK AND OTHERS — APPELLANTS — PETITIONERS

versus

RAKHAL RAJ BHOUMIK—PLAINTIFF,

AND OTHERS—Pro forma DEFENDANTS—

RESPONDENTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 8, scope of—Review, whether whole case re-opened in.

After the retirement of one of the two Judges of a Division Bench of the High Court which heard an appeal, an application for review of judgment made to the other Judge was granted and the judgment and decree were amended, but subsequently the Judge on being moved to re-hear the case, heard it again and made an order which was the same as that made on the review application. On appeal this order was set aside on the ground that the Judge, sitting by himself had no jurisdiction to re-hear the case as he was not a Division Bench and the appeal was directed to be re-heard by a Division Bench. The Division Bench when hearing the appeal did not allow the whole case to be re-opened, but confining itself to the point involved in the review proceeding made an order which had already been made in that proceeding. An application for review of this order was made on the ground that the Division Bench ought to have heard the whole case:

Held, per Sanderson, C. J.—That after the amendment of the decree in the review application, every other proceeding that took place was superfluous. [p. 594, col. 1.]

Per Mookerjee, J.—That the appeal was concluded by the final decree made by the order in the review application and the judgment of the Division Bench need not be interfered with, as it merely repeated the decision of the Judge who granted the review. [p. 596, col. 1.]

That it was not incumbent upon the Division Bench to re-hear the entire appeal. [p. 595, col. 1.]

A review may be granted either as to the entirety of the order assailed or as to a portion only thereof. [p. 595, col. 1.]

Rule 8 of Order XLVII, Civil Procedure Code, clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be re-opened in part or its entirety, so when a review of a decision has been admitted the whole case is not necessarily re-opened thereby. [p. 595, col. 2.]

Bhugwandeon Doobey v. Myna Bacc, 11 M. L. A. 487 at p. 499; 9 W. R. 23 (P.C.); 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184; Huroo Chunder Chuckerbutty v. Ramkissore Chuckerbutty, W. R. (1864) 141; Byjnath Sahoy v. Wuzer Narain, 24 W. R. 427; Dhuroni-dhur v. Agra Bank, 5 C. 86; 4 C. L. R. 434; Thacoor Prosad v. Baluck Ram, 12 C. L. R. 64; Hurbans Sahye v. Thacoor Pursad, 9 C. 209; 7 Ind. Jur. 306; 5 Shome L. R. 22; Bhubaneswarari v. Ajodhya Singh, 11 Ind. Cas. 102; 15 C. L. J. 339, referred to.

Sainal Ranchod v. Dullabh Dvarka, 10 B. H. C. R. 360; and Emperor v. Narayan, 32 B. 111 at p. 120; 9 Bom. L. R. 789; 6 Cr. L. J. 164; 2 M. L. T. 414, not approved.

Sudar-ud-din v. Ekram-ud-din, 20 Ind. Cas. 670; 11 C. W. N. 22; 19 C. L. J. 225; Janaki Nath v. Prabhasini Dassi, 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 178; Vadilal v. Fulchand, 30 B. 56; 7 Bom. L. R. 664; Gopala Aiyar v. Ramasami, 31 M. 49; 1 M. L. T. 519; 17 M. L. J. 603, distinguished.

Rule issued by High Court in an application for a review of the judgment of the High Court, dated the 24th November 1915, passed in appeal from Appellate Decree No. 145 of 1909, being an appeal preferred against the decree of the Sub-Judge of Nadia, passed in Title Appeal No. 23 of 1908 and dated the 23rd September 1908, modifying that of the Additional Munsif of Kushtea, passed in Title Suit No. 381 of 1906 and dated the 4th January 1908.

Babu Asita Ranjan Ghose, for the Petitioners.

Babus Mohendra Nath Roy and Manmotha Nath Roy, for the Opposite Parties.

JUDGMENT.

SANDERSON, C. J.—The learned Vakil at the opening of his remarks for the purpose of showing cause stated that this was rather a peculiar matter. I entirely agree with him and I most sincerely hope that it is not only a peculiar matter, but also an exceptional matter, because the facts relating to the proceeding in this case are truly amazing—there is no other word for them. The action was brought in November 1906, very nearly ten years ago by the plaintiff for the recovery of certain land. The Court of first instance gave the plaintiff a judgment. Then there was an appeal to the first Appellate Court. That Court varied the judgment of the first Court by declaring that the plaintiff and the defendants were joint owners of the land. Then there was an appeal to the High Court, and the High Court, consisting of Mr. Justice Brett and Mr. Justice Richardson, allowed the appeal and restored the judgment of the Court of first instance, and thereby declared that the plaintiff was entitled to the possession of the land in question.

Unfortunately by mistake, it has not been made plain to me how the mistake arose—

GOUR SUNDAR BHOUMIK v. RAKHAL RAJ BHOUMIK.

the decree gave the plaintiff something more than he asked for, inasmuch as it not only declared that the plaintiff was entitled to the possession of the land but it also declared that he was entitled to the possession of a building which was upon the land. That was a matter which was obviously an error—and which, in my opinion, ought to have been set right as soon as the parties saw the decree. If that had been brought to the attention of the learned Judges before the decree was signed, it could have been set right in five minutes. Instead of that, in consequence of that mistake which was made in December 1912, proceedings have been going on in this Court from December 1912 down to May 1916. I think I am justified in saying that the proceedings in this case are nothing short of amazing. What happened then is this: An application was made to Mr. Justice Richardson, the other learned Judge, Mr. Justice Brett, having by this time left the Court. That was made in April 1913, and Mr. Justice Richardson granted a Rule limiting it to this particular point, and calling upon the opposite party to show cause why the judgment and decree of this Court, dated the 12th December 1912, should not be set aside or amended or why such other order should not be made as to this Court might seem fit, on the ground that in giving the plaintiff a decree for the structures on the land this Court went beyond the reliefs claimed in the plaint. So that the rule was granted on that one point only. In June 1913, this Rule was argued before Mr. Justice Richardson; and after argument he made the Rule absolute. I agree with what fell from my learned brother Mr. Justice Mookerjee, during the course of the argument in the case, that there was an end of the matter as soon as the Rule was made absolute, and in accordance with that Rule the decree would, as a matter of fact, have been amended in respect of the point which was mentioned in the Rule that was granted. For some reason or other Mr. Justice Richardson was persuaded to re-hear the case under Order XLVII, rule 8, of the Code of Civil Procedure and after hearing the case he made the order which has

been referred to and which is to this effect: "The judgment will, therefore, be altered in this way, that for the words, 'with such structures as may be standing on the land', the following will be substituted, 'that the defendants do remove the structures from the land within two months from the date of this order. In the event of their failing to do so the plaintiff will be at liberty to remove them at the costs of the defendants to be realised in execution of the decree'. A corresponding alteration will be made in the decree." Then he went on to say: "I make no order as to costs. The mistake should have been brought to notice before the decree was signed." Well, some ingenious person then thought of the point that Mr. Justice Richardson had no jurisdiction to re-hear the case sitting by himself, and although he had jurisdiction to grant the Rule and to make the Rule absolute and thereby to make an order by which the judgment would be amended, still he had no jurisdiction to re-hear the case in the proper sense of the word, as he by himself could not constitute a Division Bench. Therefore, this point was taken and an appeal from his decision was instituted and it was heard in this Court by the late Chief Justice and Mr. Justice Nalini Ranjan Chatterjea, and they decided that he had no jurisdiction to re-hear the case, because he was not a Division Bench, and they directed that the appeal should be re-heard. As a result of that, two other learned Judges were called upon to hear this appeal, and Mr. Justice Holmwood and Mr. Justice Mullick heard it on the 24th of November 1915, some two years after the order which was made by Mr. Justice Richardson, and having heard it they made an order identical in terms with the one that was made by Mr. Justice Richardson in the month of June 1913. The parties were not satisfied even then, but some of the defendants came here and obtained a Rule upon the ground that Mr. Justice Holmwood and Mr. Justice Mullick had not re-heard the case. If I may say so with every respect to the learned Judges, I think they took a reasonable view of the matter. What they did was, they said that the whole of this

GOUR SUNDAR BHOUMIK v. RAKHAL RAJ BHOUMIK.

matter arose from an obvious error, upon which the Rule was granted for review by Mr. Justice Richardson, and they confined themselves to that error and declined to go any further and said they had discretion in the matter. It is argued by the learned Vakil that they were wrong in so doing and he wishes us to make the Rule absolute, so that this case may be re-heard by two other learned Judges of this Court.

All I can say, speaking for myself, is this; as far as I can understand the proceedings, when Mr. Justice Richardson made that Rule absolute in June 1913, by reason of which the judgment and the decree would, ■ a matter of course, be amended in the way he intended them to be amended and in the way he intended them to be drawn up, from that moment every other proceeding was superfluous. If we were to make this Rule absolute it would be ■ travesty of justice to which I will not be a party.

Therefore, in my opinion, this Rule ought to be discharged with costs—hearing-fee two gold *mohurs*.

MOOKERJEE, J.—I agree that the order we are invited to review is substantially correct, notwithstanding the extraordinary errors which have characterised the proceeding in its later stages.

The suit was instituted so far back as the 12th November 1906 for declaration of title to land and for recovery of possession thereof. It was decreed in the Court of first instance on the 4th January 1908. On appeal by the defendants, the Subordinate Judge modified this decree. The result was that the present appeal was lodged in this Court on the 5th February 1909 by some of the defendants. The plaintiff thereupon presented ■ petition of cross-objection. The appeal was heard in the first instance by Mr. Justice Brett and Mr. Justice Richardson on the 12th December 1912; they dismissed the appeal and allowed the cross-objection, so that the decree of the primary Court was restored. The decree of this Court, however, contained ■ provision for possession of

the structures on the land in a manner not contemplated by the plaint. The defendants took advantage of this error, and presented an application for review of judgment to Mr. Justice Richardson, on the 28th April 1913, after Mr. Justice Brett had ceased to be a member of the Court. Thereupon, Mr. Justice Richardson issued a Rule calling upon the opposite party to show cause why the judgment and decree, dated the 12th December 1912, should not be set aside, or amended or why such other order should not be made as might seem fit, on the ground that, in giving the plaintiff ■ decree for the structures on the land, the Court had gone beyond the reliefs claimed in the plaint. This Rule was heard by Mr. Justice Richardson on the 5th June 1913, as he was obviously competent to do, and was made absolute, with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule. Mr. Justice Richardson, however, not only made the Rule absolute, but proceeded to act under rule 8, Order XLVII, of the Civil Procedure Code. That Rule provides that "when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit." Mr. Justice Richardson apparently thought that it was incumbent upon him to re-hear the case under rule 8 of Order XLVII. The result of the re-hearing was that the alteration already mentioned was made in the judgment and decree. The substance of the matter was that the order made on the re-hearing of the case was identical with the order whereby the Rule was made absolute. An appeal was then preferred under clause 15 of the Letters Patent against the judgment of Mr. Justice Richardson, and was heard by Sir Lawrence Jenkins, C. J., and Mr. Justice N. R. Chatterjea. They allowed the appeal on the ground that Mr. Justice Richardson had no jurisdiction to re-hear the case under rule 8 of Order XLVII; but they not only cancelled that portion of his order, but proceeded to direct that the appeal should be re-heard. At the re-hearing which took place before Mr. Justice Holmwood and Mr. Justice Mullick the

GOUR SUNDAR BHOUMIK v. RAKHAL RAJ BHOUMIK.

question was raised, whether the appeal was to be re-heard in its entirety or whether the ground urged before Mr. Justice Richardson in support of the application for review was the only ground open for consideration. The Court came to the conclusion that the latter course should be pursued. The result was that Mr. Justice Holmwood and Mr. Justice Mullick proceeded to make a decree identical with what had been made by Mr. Justice Richardson when he made the Rule for review absolute. We are now invited to set aside on review the decree made by Mr. Justice Holmwood and Mr. Justice Mullick on the ground that it was incumbent upon them to re-hear the entire appeal. In my opinion there is no foundation for this contention.

In the first place, it is indisputable that a revision may be granted either as to the entirety of the order assailed or as to a portion only thereof. This was laid down by the Judicial Committee so far back as 1867 in the case of *Bhugwandeem Doobey v. Myna Bae* (1), where Sir James Colville observed that "the Judges who might have made a final order, granting or rejecting the application *in toto* or in part, were not incompetent to make the qualified order which they did make, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried." This view has been adopted by this Court in 1864 in the case of *Hurro Chunder Chuckerbutty v. Ramkissore Chuckerbutty* (2) and has been consistently followed in a long series of decisions [*Byjnath Sahoy v. Wuzeer Narain* (3), *Dhuronidhur v. Agra Bank* (4), *Thacoor Prosad v. Baluck Ram* (5), *Hurban Sahye v. Thacoor Purshad* (6) and *Bhubaneshwari Keor v. Ajodhya Singh* (7)]. Reliance has been placed on behalf of the petitioner on the observation in the case of *Sainal Ranchod v. Dullabh Dvarka* (8), that when a

review of a decision has been admitted, the whole case is thereby re-opened—an observation quoted with approval in the case of *Emperor v. Narayan* (9). I am not prepared to accept this comprehensive statement as an accurate exposition of the law. Rule 8 of Order XLVII, which reproduces section 630 of the Code of 1882, clearly leaves it optional with the Court to determine whether when a review is granted, the case should be re-opened in part or in its entirety. It is obvious that any other view might lead to grave inconvenience, if not injustice. It is conceivable that the different points in a case may be so inseparably connected with each other, that if the decision on one point is set aside it becomes essential in the interests of justice that the whole case should be re-opened. On the other hand, cases are equally conceivable in which the different points may be so distinct, that re-consideration of one of those points may not necessitate the re-examination of the other points. Consequently, the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be re-opened and re-considered. This view is supported by the decisions in *Sadar ud-din v. Ekram-ud-din* (10), *Janaki Nath v. Prabhasini Dasi* (11), *Vadilal v. Fulchand* (12) and *Gopala Aiyar v. Ramasami* (13). These cases show that the Court may, in its discretion, direct that the whole case be re-opened, if it is necessary, in the interests of justice, that such a course should be adopted, but they are not authorities for the proposition that whenever a review is granted on a particular point, the whole case must be re-opened. The facts of the case before us afford a good illustration, why the contention of the petitioner should not be accepted. The point whereon the review was sought and granted, was absolutely distinct from the other points in the case. The question was, whether the plaintiff should be allowed a decree for possession of

(1) 11 M. I. A. 487 at p. 499; 9 W. R. 23 (P. C.); 1 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184.

(2) W. R. (1864) 141.

(3) 24 W. R. 427.

(4) 1 C. 86; 4 C. L. R. 434.

(5) 12 C. L. R. 64.

(6) 9 C. 209; 7 Ind. Jur. 306; 5 Shome L. R. 22.

(7) 11 Ind. Cas. 102; 15 C. L. J. 339.

(8) 10 B. M. C. R. 360.

(9) 32 B. 111 at p. 120; 9 Bom. L. R. 789 (F. B.); 6 Cr. L. J. 164; 2 M. L. T. 414.

(10) 20 Ind. Cas. 670; 18 C. W. N. 22; 19 C. L. J. 225.

(11) 30 Ind. Cas. 838; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 178.

(12) 30 B. 56; 7 Bom. L. R. 664.

(13) 31 M. 49; 2 M. L. T. 519; 17 M. L. J. 603.

VEERAKKAL V. THIRUMAKKAL.

the structures on the land or whether the defendants should be reserved liberty to remove them. The determination of this question did not, in any way, affect the other points in the case; it was also conceded that the erroneous order in the decree in this behalf had been made by an oversight. Clearly, it was not necessary in the interests of justice that if the decree were modified in this respect, the whole case should be re-opened. But I am also of opinion that the case was concluded when Mr. Justice Richardson made the Rule absolute, and that there was nothing further to re-consider or re-bear. Although, therefore, in this view, the judgment now under review was passed by Mr. Justice Holmwood and Mr. Justice Mullick in an appeal which had been concluded by a final decree made by Mr. Justice Richardson, still it is not necessary for us to interfere, as it merely repeats the decision of Mr. Justice Richardson. This Rule must accordingly be discharged with costs.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2442 OF 1914.

March 10, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

VEERAKKAL—PLAINTIFF—APPELLANT
versus

THIRUMAKKAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Alienation—Gift by widow—Transfer of life-interest—Donee allowed to alienate property, effect of—Burden of proof—Document, construction of.

A gift by a Hindu widow of property in which she has only a life-interest passes nothing to the donee beyond her limited interest, and a provision in the document empowering the donee to alienate the property by gift or sale exhausts its force on the widow's death. [p. 597, cols. 1 & 2; p. 598, col. 1.]

The onus of proving that an absolute estate passed by the gift of a Hindu widow lies on those asserting it. [p. 597, col. 1.]

Ramadhan v. Mathura Singh, 10 A. 407; A. W. N. (1888) 79; 13 Ind. Jur. 232, distinguished.

Per Coutts Trotter, J.—A Judge should not be guided in construing a document by evidence as to what the parties meant, though he can look at the

surrounding circumstances to find out the matters with reference to which they were contracting. [p. 597, col. 2.]

Per Seshagiri Aiyar, J.—The absence of words in a deed of gift by a widow that the estate was to be enjoyed from 'son to grandson', is an indication that the donor parted only with a limited interest. [p. 598, col. 1.]

Quære.—Whether the principle of Hindu Law that an alienation by a widow can be validated by the consent of the reversioners can be applied to gifts by life-estate owners? [p. 598, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 136 of 1913, preferred against that of the Additional District Munsif, Tirupur, in Original Suit No. 547 of 1911.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.

Mr. V. Ramadoss, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—By a document described as a deed of settlement and dated 8th of March 1904, one Mathakkal, who was a Hindu widow in possession of her husband's property and entitled to a life-estate in it, purported to hand over certain properties in two shares, one share to her daughter Attakkal and her son, and the second share to her younger daughter Veerakkal and her children. And the document goes on in these words:—"You shall, therefore, enjoy in future the respective properties got by you by various rights" relating to the lands "separately and with power to alienate the same by gift, sale, etc. . . . I shall relinquish the *patta* in my name and have the same transferred to your names. Till my death individuals Nos. 1 and 2 (that is, the daughters) shall pay"—certain provisions for her maintenance are specified. It is contended for the respondents—and that construction has found favour with the lower Court—that this document was, and must be taken to be, an out and out gift of the whole interest in the property to the donees, and that, whether or no it was a valid gift which could bind the reversioners—a question which does not arise here—at any rate it was a valid gift binding on Veerakkal as a consenting party, she being the person who now seeks to say that this document has exhausted its force, because since its

VEERAKKAL v. THIRUMAKKAL.

execution both Mathakkal and Attakkal, the other daughter, have died. In support of that proposition reliance is placed upon the case of *Ramadhin v. Mathura Singh* (1), where a widow executed a deed of gift in favour of her grandson with the express consent of her daughter. The fact of that consent was recited in the deed. The Court there held that the consent of the daughter validated the gift, at any rate, during the life not merely of the donor but of the consenting daughter. The authority of that case has more than once been questioned but we do not think it necessary to decide in this case as to whether that decision is good law or not; because we are content to rest our decision on the construction of this document being a gift not purporting to extend to the whole interest in the property but confined to what Mathakkal could properly dispose of, namely, her own life-interest. It is said that there are words in the deed which are quite inconsistent with such a construction and particular reliance was placed on the words "with power to alienate by gift, sale, etc." It seems to me to be a sufficient answer to that to say that Mathakkal was able to give or sell her own life-interest, she has only conferred upon her donees the same power that she had herself. And it seems to me that those words are not in the least inconsistent with the construction of this gift as a gift only of her life-interest. I entertain no doubt that the onus is upon those who seek to prove that the widow was purporting to convey more than she legally could convey. That seems to me to be in accordance with settled principles of legal construction and nothing further need be invoked than the maxim *nemo plus juris in alium transferre potest, quam ipse habet*. We are asked to leave that aside and say that, whatever may be the construction of the document on the face of it, when the facts are looked at on the finding of the learned Judge, the conclusion must be that all these three, the mother and the two daughters, met together and agreed to enter into this deed on the footing that it was to be an

absolute disposition of the whole interest in the property. All I can say is that, if the learned Judge guided himself in the construction of the document by listening to what the parties said they meant, he misdirected himself and his finding is bad in law. It is perfectly true that you are entitled to look at the surrounding circumstances to see how the parties were placed and to find out the matters with reference to which they were contracting or writing deeds or making Wills, as the case may be: you are entitled to look at the circumstances to see what they must have meant, but you are not entitled to listen to their words or the negotiatory letters or similar matters to see what they said they meant. You may just as well look at the first draft of an Act to construe the Statute. In my opinion the learned Judge ought not to have allowed the evidence of what the parties subsequently did to influence his construction of the document any more than their evidence as to what they intended to do. On this short ground I think the appeal must succeed, the document of the 8th March 1904 exhausted its effect by the death of the donor Mathakkal. The appeal will be allowed and the judgment of the Judge set aside and the Munsif's decree restored. Subject to this the appeal will be dismissed as regards item No. 7 and the mesne profits. Parties to pay and receive proportionate costs here and below.

SESHAGIRI AIYAR, J.—I agree. After listening to the full arguments of Mr. Ramadoss I am not able to change my view, that Exhibit II conveys only the life-interest of Mathakkal. There are a number of circumstances which have guided me in coming to this conclusion. In the first place the document, Exhibit II, says that Mathakkal was old and unable to manage the properties and consequently she surrendered the estate to her two daughters. It is well settled that under the Hindu Law it is competent for a life-estate owner to surrender possession of the estate to the immediate reversioner. Then there is a provision for maintenance in this document, which makes it clear that the estate is to endure only during the life-time of the grantor. There is another circumstance which has been pointed out by Mr. Ananthakrishna Aiyar,

(1) 10 A. 407; A. W. N. (1888) 79; 13 Ind. Jur. 232.

SHER JAN KHAN v. ALIMUDDI.

and that is, there are no words in this document to the effect that the estate is to be enjoyed from son to grandson. That again is an indication that what Mathakkal was parting with was only her interest in the property. Moreover, ordinarily a grantor must be presumed to have given only what he or she is competent to dispose of, although there may be circumstances which may show that the grantor parted with not only what he or she was possessed of, but also of an estate which he or she was capable of transferring under certain conditions or for certain purposes. Much stress was laid by Mr. Ramadoss upon the fact that there is a provision in the document that the donees are competent to alienate by sale, gift, etc. It is now settled law that a life-estate owner is competent to dispose of her interest by sale, gift, or otherwise. Consequently when she inserted this provision in the document she was only granting to the donees the power which she herself was capable of exercising. For all these reasons I am clear that Exhibit II is only a conveyance of the life-interest which Mathakkal possessed in the property and is not an alienation of the whole property with the consent of the nearest reversioner. If I had accepted Mr. Ramadoss' contention, I should have required further argument to convince me that the decision in *Ramadhin v. Mathura Singh* (1) is sound law, especially having regard to the observations of the learned Judges in *Pilu v. Babaji* (2). I should have liked to have heard fuller arguments on the question as to whether the principle of Hindu Law that an alienation by a widow can be validated by the consent of the reversioners, can be applied to gifts by life-estate owners. As I have come to the conclusion that Exhibit II only conveys a life-estate, this other question does not arise. I agree in the order proposed by my learned colleague.

Appeal allowed.

V.R.P.

(2) 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE NO. 1468
OF 1913.

July 13, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

SHER JAN KHAN AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

ALIMUDDI AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Principal and agent—Principal, liability of, for fraud of agent—Attachment, illegal—Damages.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. [p. 599, col. 1; p. 601, col. 2.]

Lloyd v. Grace, Smith & Co., (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547, followed.

British Mutual Bank Company v. Charnwood Forest Railway Company, (1887) 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150, referred to.

Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. [p. 601, col. 2.]

Where the agent of a decree-holder, on account of the ill-feeling which he bore towards the judgment-debtors, got illegally attached and sold their moveable property and the judgment-debtors claimed damages from the decree-holder for the illegal attachment and sale:

Held, that the decree-holder was liable for the fraudulent conduct of the agent and bound to pay the damages. [p. 599, col. 1; p. 602, col. 1.]

Per Roe, J.—The sole test in such cases is the scope of the agent's authority. [p. 601, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Backerganj, dated the 31st January 1913, affirming that of the Munsif, Barisal, dated the 26th June 1912.

Babu Abinash Chandra Guha, for the Appellants.

Babu Asita Ranjan Chatterjee, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendants in an action for recovery of damages for illegal attachment and sale of moveable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons who may be called X and Y, obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone

SHER JAN KHAN v. ALIMUDDI.

by attachment and sale of his moveables. The warrant of attachment was issued in due course, but the peon, ■ the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon, who was in collusion with P, had the cattle sold for an insignificant sum. It has been established that P acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts below have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against D alone, the property of B could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the moveable property of the plaintiffs. The sole question in controversy is, whether the defendants are liable for the fraudulent conduct of their agent, who, in collusion with the peon, has fraudulently brought about this result. The Courts below have answered this question in the affirmative.

There can be no doubt that on both principle and authority this view should be sustained.

It has not been disputed that under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is definitely laid down by the House of Lords in *Lloyd v. Grace, Smith & Co.* (1), which overrules the dicta to the contrary by Lord Bowen in *British Mutual Banking Company v. Charnwood Forest Railway Company* (2) and by Lord Davey in *Ruben v. Great Fingall Consolidated Ltd.* (3). But it has been argued on behalf of the appellants that a contrary rule was enunciated in *Barwick v.*

English Joint Stock Bank (4) and was adopted by the Judicial Committee in *Bombay-Burma Trading Corporation Limited v. Mirza Mahomed Ally* (5). There is no foundation, however, for this contention. In the first place, as explained by the House of Lords in *Lloyd v. Grace, Smith & Co.* (1), the decision in *Barwick v. English Joint Stock Bank* (4) is not an authority for the proposition that ■ principal is not liable for the fraud of his agent unless committed for the benefit of the principal. In the second place, it is extremely unlikely that Sir Montague Smith, who was ■ party to the decision in *Barwick v. English Joint Stock Bank* (4), should have misunderstood its effect and misapplied it in *Bombay-Burma Trading Corporation Limited v. Mirza Mahomed Ally* (5), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the third place, the decision of the Judicial Committee ■ based on the ground that the acts of the alleged agent could not be treated as wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes, J.: "In all these cases it may be said...that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes, J., in *Barwick v. English Joint Stock Bank* (4), which was approved by the Judicial Committee in *Bombay-Burma Trading Corporation Limited v. Mirza Mahomed Ally* (5), may also be ascertained from the opinion of

(1) (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547.

(2) (1887) 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.

(3) (1906) A. C. 439 at p. 465; 75 L. J. K. B. 843; 95 L. T. 214; 22 T. L. R. 712; 13 Nanson 249.

(4) (1867) 2 Exch. 259; 38 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

(5) 5 I. A. 130; 4 C. 116; 3 Suth. P. C. J. 525; ■ Sar. P. C. J. 823; 2 Ind. Jur. 501.

SHERJAN KHAN v. ALIMUDDI.

the Judicial Committee in two other cases, *Mackay v. Commercial Bank of New Brunswick* (6) and *Swire v. Francis* (7), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth v. City of Glasgow Bank* (8), where *Barwick v. English Joint Stock Bank* (4), *Mackay v. Commercial Bank* (6) and *Swire v. Francis* (7) are examined and explained. Lord Selborne observes that the principle on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency, and adds:—"The decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as it was well put by Mr. Justice Willes in *Barwick v. English Joint Stock Bank* (4), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Lord Blackburn is equally explicit: "The substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (sections 452, 456), where that distinguished lawyer states: "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them." The learned author adds: "The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly autho-

risied them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn, J., in *McGowan v. Dyer* (9) and had been foreshadowed nearly two centuries earlier when Holt, C. J., held in *Hern v. Nichols* (10) that a merchant was accountable for the deceit of his factors, though not *criminaliter* yet *civiliter*, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger." This position is well illustrated by the decisions in *National Exchange Company of Glasgow v. Drew* (11), *Brocklesby v. Temperance Permanent Building Society* (12), *Pearson v. Dublin Corporation* (13), *Citizen's Life Assurance Company Ltd. v. Brown* (14), *Glasgow Corporation v. Lorimer* (15), *Bowles v. Stewart* (16) and *Fitzsimons v. Duncan* (17). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins v. Watervliet* (18), Mr. Justice Andrews observed:—"Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such [] by the latter is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided, only, that the agent was acting at

(6) (1874) 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 2 W. R. 473.

(7) (1877) 3 A. C. 106; 47 L. J. P. C. 18; 37 L. T. 554.

(8) (1880) 5 A. C. 317; 42 L. T. 194; 28 W. R. 677.

(9) (1873) 8 Q. B. 141 at p. 145; 21 W. R. 560.

(10) (1708) 1 Salkeld 269; 91 E. R. 256.

(11) (1855) 2 Macqueen H. L. 103.

(12) (1895) A. C. 173; 64 L. J. Ch. 433; 11 R. 159; 72 L. T. 477; 43 W. R. 606; 59 J. P. 676.

(13) (1907) A. C. 351; 77 L. J. P. C. 1.

(14) (1904) A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739; 20 T. L. R. 497; 53 W. R. 176.

(15) (1911) A. C. 209; 80 L. J. P. C. 175; 104 L. T. 354.

(16) (1803) 1 Sch. & Lef. 209.

(17) (1908) 2 I. R. 483; 10 Irish Law Reports 506.

(18) (1871) 46 N. Y. 23; 7 Am. Rep. 293.

SHERJAN KHAN v. ALIMUDDI.

the time for the principal, and within the scope of the business." Again, in *Jackson v. American Telephone Company* (19), Mr. Justice Walker observed: "Whoever commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. *Qui facit per alium, facit per se*. Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business." In *Alger v. Anderson* (20) the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy; it seems more reasonable that, where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger: *Philadelphia and Reading Railroad Company v. Derby* (21), *Washington Gaslight Company v. Lansden* (22), *Mc Intire v. Pryor* (23), *Foster v. Essex*

Bank (24), *Reynolds v. Witte* (25), *Andrews v. Solomon* (26) and *Milburn v. Wilson* (27).

Reference may also be made to the decisions in *Subjan v. Sariatulla* (28), *Morrison v. Verschoyle* (29), *Iswar Chunder Santra v. Satish Chunder Giri* (30), *Gopal Chandra Bhattacharya v. Secretary of State* (31) and *Motilal v. Govindram* (32). These cases recognised the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, dicta in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes, J., in *Barwick v. English Joint Stock Bank* (4), and, particularly, of the expression, "for the master's benefit." The true meaning and scope of the rule, however, has now been settled beyond controversy by the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* (1). The principle expounded there is based, as we have seen, on justice, equity and good conscience, and no conceivable reason has been suggested, why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

ROE, J.—Negligence and malice, mistake and fraud are so closely allied that they are often not to be distinguished. It could never be, and never was, a good defence to an action upon a tort done by a servant or by an agent, to plead that the tort was done, not by accident, but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable, the act of the servant must be for the master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority.

(19) (1905) 139 N. C. 347; 51 S. E. 1017; 70 L. R. A. 738.

(20) (1897) 78 Fed. 709.

(21) (1852) 14 Howard 468; 14 Law. Ed. 502.

(22) (1898) 172 U. S. 534; 43 Law. Ed. 543.

(23) (1898) 173 U. S. 38; 43 Law. Ed. 606

(24) (1821) 17 Mass. 479; 9 Am. Dec. 168.

(25) (1879) 13 S. C. 5; 36 Am. Rep. 678.

(26) (1816) Peter C. C. 360; 1 Fed. Cas. 378.

(27) (1901) 31 Can. Sup. Court 481.

(28) 3 B. L. R. 413; 12 W. R. 329.

(29) 6 C. W. N. 429.

(30) 30 C. 207; 7 C. W. N. 126.

(31) 1 Ind. Cas. 735; 36 C. 647; 13 C. W. N. 619.

(32) 30 B. 83 at p. 87; 7 Bom. L. R. 385.

OFFICIAL RECEIVER OF TRICHINOPOLY v. SOMASUNDARAM CHETTIAR.

In the case before us the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable and that the appeal be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 197 OF 1914.

February 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

THE OFFICIAL RECEIVER OF TRICHINOPOLY—APPELLANT

versus

S. A. SOMASUNDARAM CHETTIAR AND OTHERS—INSOLVENTS AND CREDITORS

Nos. 1 TO 15—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 4 (a), 18, 19, 36—Trust in favour of creditors for pro rata distribution, validity of—'Valuable consideration', meaning of—Trustees appointed, whether 'third persons' under section 4 (a)—'Void,' meaning of, in s. 36—Receiver, appointment of, under s. 18—Practice.

A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata*, made more than three months before the presentation by him of a petition in insolvency, is a transfer for valuable consideration within the meaning of section 36 and section 38 (c) of the Provincial Insolvency Act, and is not void as against the Official Receiver. The undertaking by trustees to distribute the assets is sufficient consideration for the conveyance. [p. 602, col. 2; p. 606, col. 2.]

Such properties do not vest in the Official Receiver on the adjudication in insolvency. [p. 605, col. 1; p. 606, col. 2.]

Khoo Kwat Siew v. Wooi Taik Hwat, 19 C. 223; 29 I. A. 15, distinguished.

Currie v. Misa, 10 Ex. 153 at p. 162; *Maham-madunissa Begum v. J. C. Bachelor*, 29 B. 428; 7 Bom. L. R. 477, referred to.

Mannohandas Ramji v. N. C. Macleod, 26 B. 765; 4 Bom. L. R. 154, distinguished.

The word 'void' in section 36 of the Provincial Insolvency Act means 'voidable.' [p. 604, col. 2; p. 606, col. 1.]

The words 'third person' in section 4 (a) of the Act do not exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors. [p. 604, col. 1.]

The word 'purchaser' in section 36 is used in the general sense of a person who has given valuable consideration. [p. 605, col. 2.]

Hance v. Harding, (1888) 20 Q. B. D. 732 at p. 736; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629, followed.

Before properties can vest in the Official Receiver,

the Court should formally pass an order appointing a Receiver under section 18 of the Act. The practice of treating the properties as vesting in the Official Receiver after the passing of the adjudication order is illegal. [p. 603, col. 1; p. 606, col. 1.]

Appeal against the order of the District Court of Trichinopoly in Insolvency Petition No. 11 of 1912, dated the 3rd January 1914.

Mr. S. T. Srinivasagopalachariar, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The question in this case is whether the trustees under Exhibits II and III are purchasers for valuable consideration. In *Narayan Coomari Debi v. Shajani Kanta Chatterjee* (1) it was held that a contract to pay remuneration to a person appointed as an executor was a contract for valuable consideration proceeding from the person appointed ■ an executor. The learned Judges say at page 18: "The plaintiff who was not legally bound to accept the office of executor,.....applied for Probate as executor, and having obtained Probate, he performed the duties of executor." "There was thus, we think, a clear consideration for the alleged contract. [See Indian Contract Act, section 2 (d), Addison on Contracts, page 2, 9th Edition, and Pollock on Contracts, 5th Edition, page 176.]" A responsibility, therefore, taken by a person to whom properties are transferred in consideration of his taking such onerous work seems to me to fall within the expression "valuable consideration" found in section 36 and section 38 (c) of the Provincial Insolvency Act. Hence the three creditors who undertook to be trustees of the insolvents' properties for the benefit of all the creditors and have admittedly been discharging the duties of trustees, do come in my opinion within the protection afforded to transferees for 'valuable consideration' in sections 36 and 38.

So far as regards the property (a house) not transferred to them under the trust-deeds, the Official Receiver is entitled to take possession of it notwithstanding the promise of most of the creditors made to the insolvents not to proceed against it for realization of their claims.

OFFICIAL RECEIVER OF TRICHNOLY V. SOMASUNDARAM CHETTIAR.

Section 16, clause 2 (a), no doubt, makes the whole of the property of the insolvents "to be vested in the Court or in a Receiver as hereinafter provided."

But on the execution of Exhibits 2 and 3, the properties mentioned therein had ceased to be the property of the insolvents and had become vested in the three creditors as trustees and hence it seems to me that section 16, clause 2 (a), which vests only the property of the insolvents in the Court or the Receiver, cannot by itself transfer those properties to the Receiver.

The words "Receiver as hereinafter provided" seem to refer to the succeeding section 18, which says that the Court may appoint a Receiver for the property of the insolvent and that such property shall thereupon vest in the Receiver. Section 19 (2) says: "Where any Official Receiver has been appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver issued by any such Court." Reading then sections 16, 18 and 19 together, it seems to me that it is the duty of the Court, if it intends the Official Receiver to become vested with the title to the insolvents' property, to make an order under section 18 appointing a Receiver. The practice which (I am informed) obtains in the mofussil of treating the Official Receiver as vested with the properties of the insolvents as soon as an adjudication order is made, without a preliminary order under section 18 appointing a Receiver, seems to be illegal.

In the present case, it does not appear that there was an order under section 18 passed by the District Court appointing a Receiver. Assuming that there was such an order and that the Official Receiver by the force of section 19 became the Receiver of the insolvents' properties, the properties mentioned in Exhibits 2 and 3 had ceased to be the insolvents' properties long before the date of adjudication and unless Exhibits 2 and 3 are cancelled or are void against the Receiver, he cannot claim any right to deal with them.

In this case the insolvents were adjudicated on their own petition and not on the petition of any creditor. Under section 6, clause 3, of the Insolvency Act, the debtor cannot avail

himself of the transfer of his property to a third person for the benefit of his creditors generally as an act of insolvency entitling him to be adjudicated as an insolvent. Under section 6, clause 4 (c), a creditor can so avail himself of such transfer [see section 4, clause (a)], provided the transfer occurred within three months before the presentation of the petition. It has been held in *Manmohandas Ramji v. N. C. Macleod* (2) that, on the general principles enunciated by the Privy Council in *Khoo Kwat Siew v. Woon Taik Hwat* (3), the assignment of the whole of the property of a trader to trustees for the benefit of the creditors is void as against the Official Assignee. In that case the assignment took place (1) within three months of the petition for adjudication, (2) which was presented by a creditor, (3) who did not assent to the assignment. Jenkins, J., distinguishes *Dhanjibhai Kharsetji Ratnagar, In re* (4), which held that such a transfer was not void in insolvency proceedings on the ground that the assignment in the case did not constitute the act of insolvency on which the adjudication was based, the adjudication in that case having been made on the insolvent's own petition. The learned Judge, however, seems not to have thought much of that distinction by the use of the phrase "the distinction for what it may be worth" (see page 776). Russell, J., says at page 768: "as to conveyance in trust for all creditors, it has been held from the earliest times of bankruptcy law that as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would, therefore, be invalid as against, and perhaps even without reference to the policy of, the bankruptcy laws."

Their Lordships of the Privy Council in *Khoo Kwat Siew v. Woon Taik Hwat* (3) say broadly that "the well-known rule of law is that if a trader assigns all his property except on some substantial contemporaneous payment, or some substantial undertaking to make payment in futuro, that is an act of bankruptcy and is void against the

(2) 26 B. 765; 4 Bom. L. R. 154.

(3) 19 C. 223 (P. C.); 19 I. A. 15.

(4) 10 B. H. C. R. 327.

OFFICIAL RECEIVER OF TRICHNAPOLY v. SOMASUNDARAM CHETTIAR.

creditors and the assignee." But can a creditor, for whom that act is not available as a ground for the petition to adjudicate the debtor as an insolvent, treat it as void as against him? A creditor cannot present a petition for adjudication if the act of bankruptcy on which he relies is one to which he was himself a privy. See Williams on Bankruptcy, pages 4, 5 and 46, 11th Edition. If again the transfer for the benefit of creditors has taken place more than three months before the petition, no creditor can avail himself of it. I do not think their Lordships of the Privy Council intended to hold that a transfer to trustees executed (say) 7 years before the adjudication, should be treated as void against the creditors and the assignee. I at first thought that section 4 (a) of the Provincial Insolvency Act says that the transfer of property for the benefit of creditors must be made to a third person in order to constitute an act of insolvency, the transfer made to three of the creditors themselves is not such an act. Though I am unable to fully appreciate the object of the Legislature in using the expression 'third person', I do not think it was intended to mean more than "to a person who is not a trustee for the debtor himself." (Section 24 of Statute 11 and 12 Vic. Chapter 21, uses the expression "shall voluntarily convey, assign, transfer any estate real and personal..... to any creditor or other person whomsoever or to any person in trust for or to or for the benefit of any creditor or other person whomsoever.") In the Bankruptcy Act of 1883, section 4 (1) (a), 46 and 47 Vic., the expression is, "he makes a conveyance of property to a trustee or trustees for the benefit of his creditors generally." I, therefore, do not think that the words "third person" in section 4 (a) were intended to exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors. The question again was not argued before us. Further while section 4 (a) of the Provincial Insolvency Act of 1907 mentions "transfer of the debtor's property," the corresponding section of the Presidency Towns Insolvency Act of 1909 [section 9, clause (a)] uses the expression "transfer of all or substantially all his property." If it be held that as section 4, clause (b), of the

Provincial Insolvency Act refers to a transfer of the debtor's property or any part thereof whereas section (a) refers to "transfer of his property," section 4 (a) applies only where the transfer is of all his property without a single exception, then it is arguable that the transfer under Exhibits 2 and 3 in this case is not an act of insolvency as a house was retained by the debtors. This point also was not argued and as at present advised I think that section 9 (a) of the Presidency Towns Insolvency Act and section 4 (a) of the Provincial Insolvency Act mean the same thing, though the words "all or substantially all" were introduced in the Presidency Towns Insolvency Act of 1909 at the suggestion of the Bengal Chamber of Commerce, which seems to have thought that section 4 (a) of the Provincial Insolvency Act was ambiguous.

Though section 36 of the Provincial Insolvency Act states that certain transfers are void against the Receiver, it has been held in *Abdul Kadhar Sahib v. Official Assignee of Madras* (5) that the similar expression used in section 55 of the Presidency Towns Insolvency Act means that such transfers are only voidable and not void. I respectfully concur with that opinion, especially in section 36 there is a provision for annulling such a transfer by the Court which annulment will be unnecessary if it is void and not merely voidable.

There is besides no injury to the general body of creditors by not treating as void transfers to trustees for the benefit of all creditors made more than three months before the petition in insolvency, provided that the trustees are honest and capable. On the other hand, it saves the creditors the burden of the Official Receiver's fees. Even where the trustees appointed under the private trust-deed are found dishonest or incapable there are provisions in section 57, 58, 61, 73, etc., of the Trusts Act under which the beneficiaries (the creditors) can protect their interests by taking proper proceedings. On the whole, after having given anxious consideration to the subject and not without hesitation, I have come to the conclusion

(5) 20 Ind. Cas. 485; (1913) M. W. N. 876; 14 M. L. T. 51; 25 M. L. J. 508.

OFFICIAL RECEIVER OF TRICHENOPOLY v. SOMASUNDARAM CHETTIAR.

that the transfer made *bonafide* to trustees by the debtor cannot be cancelled under section 36 and I would confirm the order of the District Judge. The creditors 12 to 14 will have their costs out of the trust properties in their hands and the appellant (Official Receiver) out of the property in his hands.

MOORE, J.—I agree with the conclusion arrived at by my learned brother whose judgment I have had the advantage of perusing.

The facts are shortly these:—

Two traders, named S. A. Somasundaram Chetti and S. A. Muthukumara Chetti, being unable to pay their debts, convened a meeting of their creditors and on January 2nd, 1911, entered into an agreement, Exhibit I, with the majority (about four-fifths) of their creditors. The agreement provided *inter alia* that all the properties of the debtors should be handed over to three trustees, who were themselves creditors of the debtors. The trustees were to realise the outstandings due to the debtors, sell their properties, pay such creditors as were willing to receive the amount due to them *pro rata* and retain with them the dividends due to such of the creditors as had not assented to the arrangement. The creditors were to be satisfied with the dividends so distributed, and the debtors were to have no claim to the surplus amount.

The terms of the arrangement were embodied in a trust-deed, Exhibit II, which one of the debtors, Somasundaram Chetty, executed in favour of the above-mentioned trustees on 4th January 1911, by which he handed over to the trustees the whole of his properties described in the document as well as any other properties which might have been omitted. In Exhibit II it is stated that the debtors had executed a mortgage to the trustees in respect of a house which they had been allowed as an act of grace to retain as a residence.

The other debtor executed a similar trust-deed, Exhibit III, in favour of the same three persons confirming the agreement of 2nd January 1911.

The trustees, it appears, took possession of the properties and distributed a dividend to the majority of the creditors. The amounts due to the creditors who had not assented to the arrangement, were, it is said, deposited in the Indian Bank on 9th October 1912, that is, within 2 years of the execution of Exhibits II and III. The debtors presented an insolvency petition to the District Court, and were adjudged insolvents by the Official Receiver on 17th December 1912.

The question for determination is whether the trust-deeds are void against the Official Receiver, and whether the latter is entitled to an order calling upon the trustees to deliver over the properties of the insolvents in order that he may distribute it among the creditors. Mr. Srinivasagopalachariar contends that the effect of the making of the adjudication order was to vest all the properties of the insolvents in the Official Receiver under section 16 of the Provincial Insolvency Act, that the Official Receiver is alone entitled to administer the estate, and that the District Judge was in error in holding that the trustees were "transferees in good faith and for valuable consideration." The District Judge has not dealt with the question whether the trust-deeds were void in a satisfactory manner, and merely observes that "the consideration was the obtaining of as much as possible of their claims for the whole body of creditors."

It appears to be clear that the trustees acted in good faith. The word "purchaser" in the section is used, not in the ordinary legal sense of one who has bought a property under a contract of sale and purchase, but means a person who has given valuable consideration [*Hance v. Harding* (6)].

I was at first inclined to doubt whether the trustees could be regarded as transferees or purchasers for valuable consideration, but on further consideration I agree with my learned brother that the undertaking of the duties of trustees was a good consideration. The act or promise in the definition of consideration in section 2, clause (d), of the Contract Act has been described in

(6) (1888) 20 Q. B. D. 732 at p. 736; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629.

EUSUFFZEMAN SARKAR v. SANCHIA LAL NAHATA.

certain English cases which have been followed in India as something advantageous to the promisor or to a third person or which is onerous or disadvantageous to the promisee. [See *Currie v. Misa* (7) and *Mahammadunissa Begum v. J. C. Bachelor* (8).]

The learned Vakil for the appellant has referred us to *Manmohandas Ramji v. N. C. Macleod* (2), in which it was held that the assignment of the whole of his property by a trader to trustees for the benefit of creditors was void as against the Official Receiver, but in that case the assignment took place within three months of the petition for adjudication which was presented by a creditor. It appears to be clear from section 4 (c) of the Provincial Insolvency Act that a creditor cannot treat a transfer by a debtor of his property to a third person as constituting an act of insolvency entitling the creditor to present the insolvency petition, unless such transfer has occurred within three months before the presentation of the petition.

Exhibits II and III were executed nearly two years before the presentation of the insolvency petition and I do not think that their Lordships of the Privy Council in *Khoo Kwai Siew v. Woon Tai Hwat* (3) intended to lay down that a transfer by debtors to trustees for the benefit of creditors should in all cases be treated as void as against the creditors and the assignee. I agree that the term "void" in section 36 of the Provincial Insolvency Act means "voidable."

There is a further difficulty in this case. No order appears to have been passed by the District Court under section 18 of the Provincial Insolvency Act. So far as experience goes, it is the practice in the mofussil to forward insolvency petitions presented by debtors to the Official Receiver, and after the adjudication order, the properties are treated as having vested in the Official Receiver, no order appointing a Receiver being passed by the Court under section 18 of the Act.

This practice appears to be illegal, and I think that the word "Receiver" in section

19 (2) means a Receiver appointed under section 18 (1) and that the words "Receiver as hereinafter provided in section 16 (2) (a)" refer to the succeeding section 18. I agree that the transfers, Exhibits II and III, having been made *bona fide* and for valuable consideration, cannot be cancelled and that the District Judge's order should be confirmed, and in the order as to costs which my learned brother proposes to make.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 11 OF 1913.

June 14, 1915.

Present:—Justice Sir John Woodroffe, Kt.,
and Mr. Justice Newbould.

EUSUFFZEMAN SARKAR AND OTHERS—
JUDGMENT-DEBTORS—APPELLANTS

versus

SANCHIA LAL NAHATA AND OTHERS—
DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2
—Certification, how to be made—Record of certification,
where unnecessary—Payment of interest on judgment-
debt, notified to Court by an application for execution,
if saves limitation—Limitation Act (IX of 1908),
ss. 19, 20.

Order XXI, rule 2, of the Civil Procedure Code, does not stand in the way of payment of a sum by the judgment-debtor to the decree-holder by way of interest on the judgment-debt operating to save limitation, when that payment, though not certified separately, was notified to the executing Court by a subsequent application of the decree-holder for execution and was acted upon by that Court. [p. 607, col. 1.]

The certification which may be given by a decree-holder under Order XXI, rule 2, of the Civil Procedure Code, need not be a certification on some days or at some time different from that on which the application for execution is made; a decree-holder may apply to certify payment on his application for execution of the decree and where such application is acted upon by the Court, no formal recording of certification is necessary. [p. 607, col. 1.]

Appeal against the order of the District Judge, Rungpur, dated the 23rd September 1913, reversing that of the Munsif, Rungpur, dated the 29th January 1912.

Babu Purna Chandra Ray, for the Appellants.

(7) 10 Ex. 153 at p. 162.

(8) 29 B. 428; 7 Bom. L. R. 477

MAHARAJA OF VENKATAGIRI v. VELIKANTI RAMI REDDI.

Babu Mohini Mohan Chakravarti (with him Bubu Abinash Chandra Chakravarti), for the Respondents.

JUDGMENT.—The point in this appeal is very narrow and very technical. It is the case of a decree-holder applying for execution of his decree. At the time of the application for execution, he notified to the Court by his application that he had received a certain sum from the judgment-debtor, and the finding of the Court is that that sum had been paid in fact by the judgment-debtor by way of interest on the judgment-debt.

The decree-holder relies upon this payment as saving limitation and the judgment-debtor replies that it cannot have that effect, because the payment of Rs. 10 by the judgment-debtor was not certified; and in the next place, it did not operate to extend the limitation under the provisions of sections 19 and 20 of the Limitation Act. The first point practically is this, that the certification which may be given by the decree-holder under Order XXI, rule 2, must be a certification on some days or at some time different from that on which the application for execution was made. It appears to us that the decree-holder may either apply to certify payment before execution or may do so on his application for execution of the decree. In the present case, he did notify to the Court that he had received this sum of Rs. 10; and that is all that he has to do in order to certify payment. It is, however, said that the Court should then have recorded this certification. It does not seem to us necessary under the circumstances, seeing that the application for execution was made and the Court acted on such application by allowing such execution to issue. Moreover, the section speaks of "certified" or "recorded." We are, therefore, of opinion that Order XXI, rule 2, does not stand in the way.

As regards the other point, it has been found that Rs. 10 was in fact paid by the judgment-debtor himself by way of interest. That finding is sufficient.

The fact of the endorsement and the question as to who made it and the authority by which it is made, are immaterial. The appeal fails and is dismissed with costs. We assess the hearing fee at three gold mohurs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 211 OF 1913.

March 7, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

UNDE RAJAH RAJE SIR RAJAH
VELUGOTI Sri RAJAGOPALA
KRISHNA YACHENDRA BAHADUR,
K. C. I. E., PANCHAHAZAR,
MUNSUBDAR, MAHARAJAH OF VEN-
KATAGIRI—PLAINTIFF—APPELLANT

versus

VELIKANTI RAMI REDDI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Landlord and tenant—Waste lands—Lease for pasturage—Lessee, whether 'ryot'—Right of occupancy—Burden of proof—Suit for ejectment—Jurisdiction of Court—Madras Estates Land Act (I of 1908), ss. 3 (16), 6 (4), 189.

Where waste lands in an estate have not been cultivated for years but have been used for pasturing cattle, the presumption is that they belong to the zemindar, and the onus of proving either that they are cultivable or that occupancy rights have been acquired therein lies on the party asserting it. [p. 608, cols. 1 & 2.]

A lessee of waste land let out for pasturing or grazing purposes is not a 'ryot' within the meaning of clause 6 (4) of the Madras Estates Land Act and a suit to eject him is cognizable, not by a Revenue Court under section 189 of the Madras Estates Land Act, but only by a Civil Court. [p. 608, col. 2.]

Rajah of Venkatagiri v. Jayampu Ayappa Reddy, 21 Ind. Cas. 532; (1913) M. W. N. 919; 14 M. L. T. 405; 25 M. L. J. 578; 38 M. 738, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Original Suit No. 14 of 1912 (Original Suit No. 47 of 1910 on the file of the District Court of Nellore).

Messrs. T. Rangachariar and A. Krishnaswami Aiyar, for the Appellant.

Messrs. T. V. Venkatarama Aiyar, T. V. Muthukrishna Aiyar and K. Krishnaswami Aiyangar, for the Respondents.

JUDGMENT.—This is a suit in ejectment brought by the Rajah of Venkatagiri against the villagers of Velikallu and others to recover possession of certain lands which he had leased to them. The defendants pleaded that they were sole owners of these lands, subject to the payment of an annual rent to the plaintiff and that the annual auctions held by the plaintiff were merely auctions of the right to collect the fees which they paid for grazing their cattle; and later on, in the written statement they alleged that they were

MAHARAJA OF VENKATAGIRI v. VELIKANTI RAMI REDDI.

either owners or entitled to rights of occupancy in the plaint lands.

We think that the Subordinate Judge's finding on the facts is to a certain extent vitiated by his belief that the estate records were deliberately manufactured in anticipation of the passing of the Estates Land Act. The respondents' Vakil is unable to support this belief and we think that the facts of the case must be taken to be as follows. The suit lands called the *kaucha* of the village had been leased out annually for grazing for 15 or 20 years, before the passing of the Act, from 1894 to 1899 to one Narayana-swami Naidu, and afterwards to a number of *pattadars* of Velikallu village—the rent being at first Rs. 500 and finally Rs. 600.

There is nothing to support defendants' contention that the lease was a lease of the right to collect grazing fees, and from plaintiff's documents and the admissions of defendants' witnesses it is clear that the lease was of the right of grazing and not of the right to collect grazing fees.

Now in this state of things, the *zemindar* is *prima facie* the owner of the waste lands in his *zemindari* and the evidence which has just been referred to shows that he is the owner. Then all we have to deal with, is the question as to whether the defendants have shown that they are *ryots* with an occupancy right or even that they are *ryots* without occupancy right.

According to the Act a 'ryot' is a 'person who holds for the purpose of agriculture *ryoti* land in an estate.' We find difficulty in holding that lands held by the defendants for purposes of pasture only are held for the purpose of agriculture within the meaning of this definition. But even if they are, it is necessary that the defendants should hold '*ryoti* land' to make them 'ryots' and '*ryoti* land' is defined as meaning 'cultivable land in an estate other than private land.' It has recently been held by a Bench of this Court in *Rajah of Venkatagiri v. Jayampu Ayappa Reddy* (1) that land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not *ryoti* land. In this case for a great many years the suit land has not been cultivated and has only been

used for pasturing cattle and we think that the defendants have failed to show that it is cultivable land, and that in the state of the evidence, the onus is on them to show it, if they can. Section 6, sub-section 4, of the Madras Estates Land Act throws considerable light upon the meaning of this definition of *ryoti* land. It deals with waste land generally. Now waste land, which I take it according to common understanding is land not under cultivation, may be cultivable land or it may not be cultivable land. And the sub-section 4 accordingly provides that waste land merely by letting for pasturage does not become *ryoti* land, that is to say, if it was not otherwise *ryoti* land or cultivable land, it does not become so merely because it is let for pasturage. And further the sub section provides that where the waste is *ryoti* land, the mere admission for purposes of pasturage does not confer a right of occupancy.

The contention put forward for the defendants by Mr. Venkatarama Aiyar was that any land is cultivable land on which a blade of grass can be made to grow. Practically it came to that. We were unable to accept that contention which is, as I have already said, inconsistent with the decision in *Rajah of Venkatagiri v. Jayampu Ayappa Reddy* (1). We think that in this case, the land was not '*ryoti* land' and, therefore, the defendants are not 'ryots'; and, therefore, no question of the jurisdiction of the Revenue Court arises under section 189 of the Madras Estates Land Act. The suits which are brought under that section, so far as material now, are suits for the ejectment of *ryots* and, according to our finding, the defendants in respect of these lands are not *ryots*. The Subordinate Judge disposed of the suit mainly on the ground that the lands were *ryoti* lands and that the Court had no jurisdiction. But the evidence was taken upon all the issues and was also discussed by him and we think that the plaintiff is entitled to judgment. The Subordinate Judge has not recorded any finding on the question of damages, but Mr. Rangachari for the plaintiff has intimated his willingness to accept Rs. 600 a year by way of damages, which he explained was a very low figure, and that figure has been accepted by Mr. Venkatarama Aiyar on behalf of the defendants. There

(1) 21 Ind. Cas. 532; 38 M. 738; (1913) M. W. N. 919; 14 M. L. T. 405; 25 M. L. J. 578.

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

will, therefore, be the usual decree for ejectment and for damages at this rate up to the date of delivery of possession with interest at 6 per cent. and with costs in both Courts.

Appeal allowed; Suit decreed.

V. R. P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 40 OF 1914.

May 17, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

KRISHNA CHARAN BARMAN AND
OTHERS—DEFENDANTS—APPELLANTS

versus

SANAT KUMAR DAS, MINOR, REPRESENTED
BY Sreemati KUKHOMOYEE DASSI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Interest—Penalty, stipulation by way of—Mortgage—Mortgagors ignorant cultivators—Interest at 75 per cent. per annum—Oral agreement making mortgagors individually liable, admissibility of—Evidence Act (I of 1872), s. 92.

A mortgage-bond provided for interest at the rate of 75 per cent. per annum and it was found that the mortgagors were ignorant cultivators who were in urgent need of money and the lands hypothecated were amply sufficient as security:

Held, that the stipulation for payment of interest at the said rate was penal. [p. 613, col. 1; p. 615, col. 1.]

Khagaram Das v. Ram Sankar Das Pramanik, 27 Ind. Cas. 815; 21 C. L. J. 79; 19 C. W. N. 775; 42 C. 652; *Bouwang Raja Challapharoo v. Banga Behary Sen*, 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 408; *Gopeswar v. Jadab Chandra*, 32 Ind. Cas. 537; 22 C. L. J. 352; 20 C. W. N. 689, followed.

Per Sanderson, C. J.—A subsequent verbal agreement entered into by the mortgagee and mortgagors by which the mortgagee agrees to hold each of the mortgagors liable only for his share of the mortgage-debt, is not admissible in evidence under section 92 of the Evidence Act, when the mortgage-bond by its terms provides that each one of the mortgagors would be liable for the whole amount of the mortgage. [p. 611, col. 2.]

Under the Indian Law, a release by the creditor of one of the mortgagors, jointly and severally liable, without expressly reserving his remedies against the other mortgagors, does not release the others. [p. 614, col. 1.]

Per Mookerjee, J.—A covenant for payment of interest on a mortgage-debt at a high rate may be, in the circumstances of a case, a stipulation by way

of penalty and a Court is competent to grant relief to the debtor whenever the rate of interest appears to be penal, although the provision in the mortgage-bond for payment of interest mentions one rate only and not alternative rates in different contingencies [p. 615, col. 1.]

It would be clearly wrong for a Court to lay down a rigid definition of a legal expression and thereby to crystallise the law, when the Legislature for the best of reasons, has not defined the expression. [p. 615, col. 2.]

What stipulation for payment of interest on a debt may be decreed a stipulation by way of penalty, should not be defined by judicial decisions. [p. 615, col. 2.]

When under the contract embodied in a registered mortgage-bond the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage-debt, a variation in that contract to the effect that each mortgagor is liable only in respect of a proportionate share of the debt, could be effected only by another written and registered instrument, so that the entire mortgage contract would thereafter be found in two instead of one document. [p. 616, col. 1.]

Lalit Mohan Ghose v. Gopal Chauk Coal Co., Ltd., 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55, followed.

Where in a mortgage suit the primary case of the mortgagors-defendants was that the mortgage contract was split up by a subsequent oral agreement between the mortgagee and the mortgagors, the defendants could not, on its being held that the agreement was not admissible in evidence, turn round and set up the inconsistent case that the mortgage contract had been split up because one of the mortgagors had been released by the mortgagee without the consent of the other mortgagors. [p. 616, col. 1.]

Appeal against the following judgment of Mr. Justice Teunon, in Appeal from Appellate Decree No. 56 of 1911, dated the 27th February 1914:—

“This is an appeal by the plaintiff in a suit brought on a mortgage-bond, dated 7th Pous 1304 (21st December 1897).

The bond was executed by six Cacharis in favour of one Noaram Das, the predecessor-in-interest of the plaintiff. It secures the repayment of a sum of Rs. 200 with interest at the rate of one anna in the rupee per month, that is, 75 per cent. per annum and provides that the mortgagors shall be jointly and severally liable.

Of the six original debtors two are now dead and the suit (instituted on the 28th January 1909) is brought against the representatives of those two and the four survivors. Their case was that though the bond was a joint bond yet there was a contemporaneous

KRISHNA CHARAN BARMAN V. SANAT KUMAR DAS.

oral agreement with the mortgagee, that each mortgagor should be separately liable for 1/6th of the sum advanced and the interest accruing due thereon, and that on the payment by any one of them of the amount due on his share, he and the property mortgaged by him would be released from all further liability. They further pleaded that each of the debtors had at different times paid the amount due from him and had thereupon secured his discharge.

In the plaint payments aggregating Rs. 443 have been credited to interest, and the claim was for a balance due of Rs. 1,419-8-0. Both the Courts below have found that a further payment of Rs. 20 had been made by the 2nd defendant Biswanath on the 4th *Sraban* 1306, and that on payment of a sum of Rs. 40 on the 17th *Fulgoon* 1304 (that is, two months after the execution of the bond) one of the debtors Girandao had in fact secured his discharge and the release of the property mortgaged by him. On these findings in the Court of first instance the learned Subordinate Judge decreed the suit for Rs. 1,307 against the five remaining mortgagors or their representative-in-interest. On appeal the District Judge held that the oral arrangement providing for the separate liability of each of the debtors in proportion to his one-sixth share had been proved, and that after the discharge of Girandao the mortgagee had procured the several payments subsequently made by the remaining five debtors by his representations and promises that each would be treated as separately and severally liable to the extent of 1/6th of the loan. He further found that the bargain was unconscionable and, acting under section 16 (2) (b) of the Contract Act reduced the rate of interest to 15 per cent., that being in his opinion the reasonable rate in this locality on secured loans. An account being taken on this footing, it was found that each of the mortgagors had paid sums in excess of what was justly due and the plaintiffs' suit was, therefore, dismissed.

The plaintiffs now appeal to this Court, but in their appeal have limited their claim to the sum of Rs. 774-13-7. Their contentions before me are (1) that the defendants having admitted the voluntary execution of the bond and having pleaded no circumstances which would bring the case within

the scope of section 16 (2) (b) of the Contract Act, the District Judge was in error in reducing the rate of interest and (2) that evidence of any contemporaneous or subsequent oral agreement modifying the terms of the registered mortgage-bond or releasing the properties mortgaged from the liability thereunder was inadmissible.

The first contention of the appellants is clearly well founded. The appellants admitted their free and voluntary execution of the bond. No issue on the question of undue influence was raised in the first Court. No doubt the defendants were in urgent need of money, apparently in order that they should be enabled to fulfil their obligation under the law to supply transport coolies for the purposes of a frontier expedition. But it does not appear that they were already in debt to this money-lender and the circumstances relied on by the District Judge are not such as suffice to show that the money-lender was in a position to dominate their will. In this state of facts, as the law stands, the Courts can grant no relief against the exorbitant rate of interest agreed upon. In support of this view I may refer to the cases of *Sundar Koer v. Rai Sham Krishen* (1), *Umesh Chandra Khasnaris v. Golap Lal Mustafi* (2); *Prayag Kapri v. Shyam Lal* (3) and *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (4).

That a contemporaneous oral agreement varying or modifying the terms of the bond cannot be proved is clear from the language of section 92 of the Evidence Act. Similarly under proviso (4) to the same section, in the case of transactions which the law requires to be in writing or where a disposition of property has been registered a subsequent oral agreement modifying and rescinding the contract may not be proved, and the doctrine of estoppel on which apparently the District Judge relies may not be invoked for the purpose of nullifying statutory provisions.

The release from liability of Girandao and of the property mortgaged by him being in writing has not been questioned before me.

(1) 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 O. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9.

(2) 31 C. 233; 7 C. W. N. 876.

(3) 31 C. 138.

(4) 26 C. 39; 25 I. A. 179; 2 C. W. N. 633.

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

In the result the decree of the District Judge is set aside. There will be a decree for the sum of Rs. 774-13-7. If within one month from this date the defendants Nos. 1 to 7 do not pay to the plaintiffs the sum decreed with interest at the bond rate on the principal sum, namely, 5/6ths of Rs. 200, the mortgaged property other than the property appertaining to *patta* No. 16 in the name of Girandao will be sold. In view of the exorbitant rate of interest on the bond and all the facts I direct that from and after the date fixed above for payment, no interest shall run, and that the plaintiffs-appellants shall pay their own costs throughout; defendants-respondents Nos. 8 and 9 shall have their costs throughout with interest at 6 per cent. from the plaintiffs-appellants.

Babus Manmathanath Mookerjee and Satendranath Mookerjee, for the Appellants.

Babu Gobind Chandra Dey Roy and Babu Biraj Mohan Mozoomdar (for the Deputy Registrar), for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This case, in my judgment, raises a question of considerable importance, and we are much indebted to the three learned Vakils, who have argued the question before us, for their assistance.

It appears that so long ago as 1897, the mortgage in question was executed by six individuals, some of whom are defendants, and the others are now dead and their representatives are the other defendants in this case.

The mortgage was to secure a loan of Rs. 200, and it contained a provision that the loan should be repaid within two months with interest at the rate of one anna in the rupee per mensem, and in case of default the interest was to run at that rate till payment. Each of the six borrowers mortgaged a *hal* of land to secure the loan. Certain payments were made by some of these six individuals, so that the result was that within a little more than six years from the date of the loan, the lender received Rs. 463, that is to say, the whole of his principal Rs. 200 and Rs. 263 by way of interest, which is considerably more than 100 per cent. He postponed bringing his action until 1909 and then the mortgagee sued for Rs. 1,419-8 annas, which he alleged was the amount owing to him upon the

mortgage, after deducting the payments which had been admittedly made.

The Court of first instance gave the plaintiff a decree but not for the full amount of his claim, but for Rs. 1307. Then the defendants appealed to the District Judge, who dismissed the suit altogether. He came to the conclusion that a collateral verbal agreement had been made between the plaintiff on the one hand and the defendants on the other, whereby the plaintiff gave the defendants to understand that he would hold each of them liable for his own share only and that when he accepted the various payments which were made, he verbally agreed to that effect. The learned Judge after reviewing the evidence carefully came to the conclusion that that agreement had in fact been made, and that consequently the original agreement which was contained in the mortgage-bond was varied, and that having regard to that varied agreement the defendants had individually discharged their liabilities, and that consequently there was nothing owing to the plaintiff under the mortgage-bond, and, therefore, he dismissed the suit altogether. The plaintiff appealed to this Court, and Mr. Justice Teunon upon that point held that evidence of the verbal agreement upon which the District Judge had relied was not admissible, having regard to section 92 of the Evidence Act: and, in my judgment, the learned Judge was right in coming to that decision. I think that the District Judge ought not to have admitted evidence of the verbal agreement, because it did in material respects vary the contract which was contained in the mortgage-bond and I may point out one respect in which it varied the mortgage-bond, that is to say, the mortgage-bond by its terms provided that each one of the mortgagors was liable for the whole amount of the mortgage, namely, Rs. 200 and interest, but the alleged verbal agreement provided that each individual who had executed the mortgage-bond was liable for one-sixth of the Rs. 200 only and, therefore, it is obvious that in a material respect, namely, in the provision for the repayment of the loan, the contract contained in the mortgage-bond was varied by the alleged verbal agreement, and consequently, to my mind, the learned Judge was quite right in saying that evidence ought not to

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

have been admitted to prove the alleged verbal agreement, having regard to section 92 of the Evidence Act.

It was then argued by the learned Vakil for the appellants that even if the evidence to the alleged verbal agreement could not be admitted to show the agreement, he could prove that he had made certain payments and those payments had been accepted by the plaintiff in full satisfaction of the claim. But that argument cannot be maintained, because when one examines the facts one cannot say that the plaintiff accepted these payments in full satisfaction of the contract, for he was at the same moment insisting on his right to be paid not only the principal but interest at 75 per cent. and the payments, in fact, did not cover the principal and the interest at 75 per cent. but only covered the principal and interest at 15 per cent. Therefore, the learned Judge was right in allowing the appeal upon that point.

Then comes the important question of the power of the District Judge to interfere with the agreement which was made between the parties as to the rate of interest, namely, 75 per cent.

Now I do not intend to decide in this case that the circumstances amounted to undue influence within the meaning of section 16 of the Contract Act. I do not think it is necessary for the purpose of my judgment to come to any conclusion on that point, and I do not express any opinion upon it. But I do think that this case comes within section 74 of the Indian Contract Act, interpreted as it has been by the decision of this High Court, with which decision I have no reason to quarrel. Section 74 provides: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for." Now in this case the contract has been broken. The question is whether it contains any stipulation by way of penalty. If it does, then the party who

is entitled to sue for the breach of the contract is entitled to recover nothing more than reasonable compensation, and, what is reasonable compensation must be settled by the Tribunal before which the case comes. There is a provision in the section that reasonable compensation must not exceed the amount so named or, as the case may be, the penalty stipulated for. It is obvious to my mind, as I have said, that what is reasonable compensation must be settled by the Tribunal trying the case. In arriving at a conclusion as to whether this contract contains a stipulation by way of penalty, I am assisted by the decision in *Khagaram Das v. Ram Sankar Das Pramanik* (5), in which my learned brother Mr. Justice Mookerjee gave a judgment which was concurred in by my learned brother Mr. Justice Beachcroft: and it is therein stated at page 662* as follows: "It is not of much moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under section 74 of the Indian Contract Act as amended in 1899. It is sufficient to observe that although the section was originally proved to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of cases now before us, because it covers all cases where the contract contains any stipulation by way of penalty. The question consequently reduces in any concrete case to this; does the contract contain a stipulation by way of penalty. In the solution of this question, the observations of Lord Mersey in *Webster v. Bosanquet* (6) may be usefully borne in mind. The test is, was the agreement to pay the damages for the breach of covenant or contract unconscionable and extravagant, such a Court ought to allow to be entered into." Now when one is considering whether the agreement to pay interest at 75 per cent. is a stipulation by way of penalty, one has to take into consideration all the facts of the case. In this case it is found that the loan was intended as a merely temporary loan, intended to be repaid in two months. We

(5) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 70; 19 C. W. N. 775.

(6) (1912) A. C. 394; 106 L. T. 357; 28 T. L. R. 271; 81 L. J. P. C. 205.

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

know it had to be raised by the defendants who were men in poor circumstances—all of them, with one possible exception, were ignorant men—for the purpose of providing *begar* transport coolies for the Lushai Expedition. Rs. 200 was the total amount of loan and ■ considerable amount of land, according to the finding of the District Judge, was mortgaged to secure this loan. As I read his judgment the land was considerably in excess of the principal sum of Rs. 200 and any possible interest which could become recoverable within the space of two months or within any reasonable time: and, therefore, when I consider all these facts, can I say that the borrowers under those circumstances having agreed to pay interest at 75 per cent. were doing anything but agreeing to pay ■ *penalty*? In my opinion there can only be one answer. The District Judge said: "The plaintiff's claim is certainly one that shocks the conscience." The learned Judge of the High Court said that in his view the rate of interest was *exorbitant*, and in that view he did not allow the plaintiff any costs.

In my opinion under the circumstances of this case the agreement to pay interest at 75 per cent. was ■ stipulation by way of penalty. But I wish to make it quite clear that I am deciding that this agreement is a stipulation by way of penalty having regard to the circumstances of this case and this case only, because it may well be that in other cases 75 per cent. is a perfectly proper rate, or at any rate it may not be a stipulation by way of penalty.

As I have said, I think under the circumstances of this case the insertion of the provision ■ to the rate of interest was a stipulation by way of penalty. Therefore, we have to consider what is reasonable compensation within the meaning of section 74.

I think that the rate of interest which was allowed by the District Judge at 15 per cent. ought not to be disturbed. I should require further information to satisfy me that the decisions of the gentleman who was acting ■ the District Judge sitting in the district and who knew the local conditions and heard all the evidence, should be interfered with. I think he was eminently the right person to decide such ■ question. I, therefore, confirm his judgment that 15 per cent. would

be the reasonable compensation. The result of that will be that ■ further account will have to be taken unless the parties can agree ■ to the amount, for this reason. As I understand, the learned Judge of the first Appellate Court directed an account to be taken upon the basis that there was ■ verbal agreement, each individual mortgagor being liable to pay one-sixth of the principal and interest thereon: but I have come to the conclusion that evidence as to that verbal agreement ought not to be admitted and the only contract between the parties is the written mortgage-bond and the defendants are liable to pay the full amount of the principal which is Rs. 200 and interest at the rate of Rs. 15 per cent. down to the institution of the suit. It may be that what the parties have already paid covers the amount which they are liable to pay on that basis; on the other hand, it may be that what the parties have already paid does not cover the amount for which they are liable on that basis. It will depend upon the result of the account as to what will be the final form of the decree. The decree will be that the plaintiff is entitled to recover against the defendants jointly and severally $\frac{5}{6}$ ths of the principal money, namely, Rs. 200 and interest thereon at the rate of Rs. 15 per cent. per annum down to the date of the suit and from the date of the suit at Rs. 6 per cent. per annum until realization. The account will have to be taken, and if it turns out that the amount which the defendants have already paid was sufficient to cover the amount due upon the decree upon that basis, then the suit will be dismissed. On the other hand, if it turns out that the amount already paid is not sufficient, then there will be a decree in favour of the plaintiff for the balance. The final decree will be drawn up by the Bench Clerk upon this basis, who, no doubt, will have the assistance of the learned Vakils on both sides.

There is just one another matter which I ought to have mentioned. It was argued during the course of the case that inasmuch as the plaintiff had released one of the mortgagors, and had not at the same time expressly reserved his remedies against the other mortgagors, that in itself would release the other mortgagors. At one time I was impressed by that argument, because it

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

coincided with the view which is held in England with regard to such position as that; and if this matter had to be decided by the law as it stands in England at the present moment, that might have raised considerable difficulty in the way of the plaintiff, but my attention having been drawn to section 14 of the Contract Act which apparently was expressly inserted for the purpose of modifying the law as it stands in England, I do not think that point is a good one.

As regards costs I think that the appellants in this Court should have the costs of this appeal. With regard to the proceedings before Mr. Justice Teunon, each party will pay his own costs. With regard to the proceedings before the first Appellate Court and the Court of first instance, they will depend upon the result of the account, and the costs will be in proportion to the success of each party, and if the suit on such account being taken be dismissed, it will be dismissed with costs in those Courts.

Liberty to apply.

MOOKERJEE, J.—I agree that the judgment of Mr. Justice Teunon now under appeal cannot be supported.

The plaintiffs-respondents instituted this suit on the 28th January 1909 to enforce a mortgage granted by six persons in favour of their predecessor on the 21st December 1877 to secure an advance of Rs. 200 with interest at the rate of Rs. 75 per cent. per annum. The plaint stated that Rs. 443 had been paid towards the satisfaction of the debt and that Rs. 1,419-8-0 was still due. The plaintiffs accordingly prayed that the mortgaged premises might be sold for realization of this sum.

The Court of first instance found that the plaintiffs had released one of the six mortgagors on receipt of a proportionate share of the mortgage-money together with interest, but that they had not given full credit for the payments made by the other mortgagors. The result was that a decree was made in favour of the plaintiffs for Rs. 1,307 to be realized by sale of that portion of the mortgaged premises which had not been released. The defendants appealed against this decree.

The District Judge held, in the first place, that there was evidence to show that the mortgage contract had been split up by

agreement of all parties concerned and that the mortgagees had undertaken to receive from each of the mortgagors a proportionate amount of the mortgage-money and to release the corresponding share of the mortgaged properties. He held, in the second place, that interest was not justly recoverable at the rate of 75 per cent. per annum and that interest should be allowed only at the reduced rate of Rs. 15 per cent. per annum. Accounts were then taken on the basis described, and it transpired that the several mortgagors had paid up their respective shares of the mortgage-money with interest. Consequently, the ultimate decree of the District Judge was that the suit be dismissed.

The plaintiffs thereupon appealed to this Court and valued their appeal at Rs. 774-13-7, although a decree had been made in their favour by the Trial Court for a much larger sum. In support of the appeal which was heard by Mr. Justice Teunon, the plaintiffs argued, first, that oral evidence was not admissible, in view of the provisions of section 92 of the Indian Evidence Act, to prove that the mortgage contract had been varied in the manner alleged, and, secondly, that interest was recoverable at the contract rate of 75 per cent. per annum. Mr. Justice Teunon accepted these contentions and made a decree in favour of the plaintiffs, limited to the amount claimed in the appeal. He came to the conclusion, however, that the rate of interest specified in the bond was exorbitant and he consequently deprived the successful plaintiffs of their costs, as also of interest on the decretal sum after the date specified for redemption.

On the present appeal, which has been preferred under clause 15 of the Letters Patent, two objections have been urged on behalf of the defendant, namely, *first*, that interest is not payable at the rate specified in the bond, because the stipulation for payment of interest must be deemed a stipulation by way of penalty within the meaning of section 74 of the Indian Contract Act, and, *secondly*, that whatever decree, if any, is awarded to the plaintiffs it should be a decree, not jointly against the defendants for the entire sum found due, but severally against each of the mortgagors for a specified proportionate sum.

As regards the *first* contention, I am of opinion that the appellants have establish-

KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS.

ed their position. I base my conclusion on the ground that, in the circumstances of this case, the stipulation for payment of interest at 75 per cent. per annum was a stipulation by way of *penalty* within the meaning of section 74 of the Indian Contract Act. The District Judge has found, and his finding must be deemed conclusive by this Court, that the borrowers were ignorant Cachari cultivators, that they had been called upon to supply without remuneration transport coolies for the Lushai Expedition which they were bound by the Regulation to supply, and that for the wages of the coolies they had to resort to a money-lender. The plaintiffs advanced the money, and notwithstanding the fact that ample security was furnished by the borrower, they charged interest at the rate of 75 per cent. per annum, although that was the rate of interest usual only in cases of unsecured loans. The District Judge has held, in these circumstances, that the covenant for payment of interest at such a high rate as 75 per cent. per annum was a stipulation by way of *penalty* and that award of interest at the rate of 15 per cent. per annum would meet the justice of the case.

On behalf of the plaintiffs-respondents, the position has been maintained that the stipulation was not by way of *penalty*, inasmuch as the bond did not contain alternative provisions for payment of interest in different contingencies. The contention of the respondents in substance is that a stipulation for payment of interest cannot be deemed a stipulation by way of *penalty*, if the bond provides for payment of interest at one rate only, howsoever high and exorbitant that rate may be, and on this ground the decision in *Khagaram Das v. Ram Sankar Das Pramanik* (5) has been sought to be distinguished. No doubt, in that case the bond provided for payment of interest at alternative rates in varying circumstances; that, however, was not the reason for the conclusion adopted in that case. Upon a review of the earlier decisions in this Court and in the other High Courts the principle was adopted that a Court is competent to grant relief whenever the rate of interest appears to the Court to be penal, although the provision for payment of interest mentions one rate only. The doctrine was recently applied in the case of *Bouwang Raja Challapharoo v. Banga Behary*

Sen (7). Reference has been made in the course of the argument to another decision, *Abdul Majid v. Ksherode Chandra Pal* (8), which also apparently supports the contention of the appellants. With regard to that decision, however, I wish to guard myself against a possible inference that I accept all the propositions formulated in the judgment in that case; it appears to me that some of the statements therein may be open to just criticism. But I adhere to the view which after much deliberation and with the concurrence of Mr. Justice Beachcroft took in the case of *Khagaram Das v. Ram Sankar Das Pramanik* (5) and followed in *Bouwang Raja Challapharoo v. Banga Behary Sen* (7) with the concurrence of Mr. Justice N. R. Chatterjea and in *Gopeswar Saha v. Jadab Chandra* (9) with the concurrence of Mr. Justice Newbould, namely, that it is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation by way of.....*penalty*.

The respondents have invited the Court to define what may be deemed a stipulation by way of *penalty*. I do not think we should accede to this request. It would clearly be wrong for the Court to lay down a rigid definition and thereby to crystallize the law, when the Legislature, for the best of reasons, has not defined that expression. What constitutes a stipulation by way of *penalty* must be determined in each individual case upon its own special circumstances; and in the circumstances of this case, I hold without hesitation that the stipulation for payment of interest at the rate of 75 per cent per annum was a stipulation by way of *penalty*. If, consequently, the agreement for payment of interest is not enforceable, as I hold it is not, the plaintiffs are entirely in the hands of the Court; and I accept the view of the District Judge that 15 per cent. per annum is the proper rate in this case. The first point must consequently succeed.

As regards the *second* contention, it is clear that, in view of the provisions of section 92 of the Indian Evidence Act, oral

(7) 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C.W.N. 408.

(8) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

(9) 32 Ind. Cas. 537; 22 C. L. J. 352; 20 C. W. N. 689.

CENTRAL KARKEND COAL CO., LTD. v. KARTIC REWANI.

evidence was not admissible to prove the alleged agreement between the mortgagees and mortgagors, whereby, it is said, the mortgage contract was split up. The essence of the matter is that the entire mortgage contract must, under section 59 of the Transfer of Property Act, be comprised in one or more written and registered instruments. We have here a written and registered instrument by which the original security was granted. Under the contract embodied there, the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage-debt. A variation in that contract to the effect that each mortgagor is liable only in respect of a proportionate share of the debt, could be effected only by another written and registered instrument, so that the entire mortgage contract would thereafter be found in two instead of in one document [cf. the decision of the Full Bench in *Lalit Mohan Ghose v. Gopal Chauk Coal Co., Ltd.* (10)]. If we were to accede to the contention of the appellant, the statutory provisions of section 92 of the Indian Evidence Act could be easily evaded and completely nullified. When the difficulty of the situation was realised by the appellants the contention was, as a last resort, faintly put forward that the defendants might invoke the assistance of the doctrine that as one of the mortgagors has been released, the entire mortgage contract has been thereby split up. But it is plain that the appellants are not entitled to rely on this position, which is inconsistent with their original case. Their primary case was that the mortgage contract had been split up by agreement of all the parties concerned, namely, the mortgagees and the mortgagors. Oral evidence, it has been held, is not admissible in proof of the alleged agreement. The defendants cannot now turn round and set up the inconsistent case that the mortgage contract has been split up, because one of the mortgagors has been released by the mortgagees without the consent of the other mortgagors. In this view, it is unnecessary to consider the application of the principle enunciated in *Hakim Lal v. Ram Lal* (11) and *Debendra*

Nath Sen v. Mirza Abdul Samed Seroji (12). Consequently the decree in this case must be a joint decree in favour of the plaintiffs, for such sum, if any, as may be found due upon the mortgage accounts against all the defendants (other than the mortgagor who has been released).

Appeal allowed.

(12) 1 Ind. Cas. 264; 10 C. L. J. 150.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3397 OF 1914.

March 31, 1916.

Present:—Mr Justice Mullick.

CENTRAL KARKEND COAL Co., LTD.

DEFENDANT—APPELLANT

versus

KARTIC REWANI—PLAINTIFF—
RESPONDENT.

Ejectment, suit for—Title with neither party but with stranger—Claim based on long possession—Defendant's possession not derived from owner—Owner supporting defendant in litigation—Permissive occupation—Finding that defendant trespasser—Question of law—High Court—Appeal, second.

Where, in a suit for ejectment, the title to the property is admittedly with a third party and plaintiff's claim is based only on long possession, the plaintiff cannot succeed unless he proves the defendant to be a trespasser. [p. 617, col. 1.]

The fact that the defendant's possession is not derived by any settlement with the owner will not constitute him a trespasser, when, ■■■ matter of fact, he is supported by the owner in the litigation. The defendant must then be considered ■■■ permissive occupant and in possession co-ordinate to that of the plaintiff and not liable to be ejected by the latter. [p. 617, col. 1.]

The term 'trespasser' is a term of law, and it is competent for the High Court to examine in second appeal whether the finding of the lower Court that a person was a trespasser, is correct on the evidence tendered at the trial. [p. 617, col. 1.]

Second appeal from the decision of the Additional Sub-Judge, Manbhum, dated the 2nd September 1914, affirming that of the Munsif, Dhanbad, dated the 28th January 1914.

Mr. Pugh, for the Appellant.

Mr. Baikuntha Nath Mitter, for the Respondent.

JUDGMENT.—The plaintiff ■■■■ for a declaration of title to, and recovery of possession of, a tank of which the Raja of Jharis is the admitted landlord. The defendant

(10) 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55.

(11) 6 C. L. J. 46.

RAGHUNATHA CHARI v. ARAVAMUTHAIYANGAR.

is a coal company and pleads permissive occupation from the landlord. Both the Courts below have found that the plaintiff has been unable to prove the title which he set out in his plaint, namely, that he has a *niskar* tenancy in the tank, but they have found that the plaintiff and his predecessors have been in possession of the tank for more than twelve years and that, the defendant being a trespasser, the plaintiff is entitled to get the relief which he claims. It is admitted by the learned Vakil for the respondent before me that the case rests upon the plaintiff's title by long possession only. Now in order to succeed on the strength of long possession the plaintiff must show that the defendant is a trespasser. It is true that the learned Court of Appeal below finds that no settlement was made in favour of the defendant by the assistant manager of the Raja and that the defendant is actually a trespasser; but the term "trespasser" is a term of law and in second appeal it is competent for me to examine whether the defendant may in law be described as a trespasser. Now the learned Subordinate Judge himself states in the concluding part of his judgment that the defendant is being supported in these proceedings by the landlord. If that is so, it is impossible to see how the defendant can be called a trespasser. The defendant must be considered a permissive occupant and in possession co-ordinate to that of the plaintiff. The case, therefore, that the plaintiff makes of long possession cannot prevail against the defendant. In this view of the case the decree of the learned lower Court must be set aside and the appeal decreed with costs. The suit will be dismissed with costs.

Appeal decreed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 142 OF 1911.

February 29, 1916.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Phillips.

P. A. RAGHUNATHA CHARI—
DEFENDANT No. 2—APPELLANT

versus

N. S. ARAVAMUTHAIYANGAR AND
OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1
AND 3 TO 8—RESPONDENTS.

Vendor and purchaser—Sale—Suit by vendee to recover possession—Long delay in instituting suit—Inference—Sale in fraud of creditors, proof of—Sale nominal transaction—Burden of proof—Promissory note antedated—Presumption as to date, whether arises—Negotiable Instruments Act (XXVI of 1881), s. 118.

Plaintiff sued in 1909 to recover possession of property under a sale-deed executed in his favour on the 10th July 1897 by the 1st defendant, alleging that he had taken possession under the sale and remained in possession till May 1902 when defendants (father and son) trespassed upon the land and dispossessed him. The vendor's son, the 2nd defendant, contended that the sale was part of a scheme to defraud the creditors of the 1st defendant and was merely nominal and without consideration:

Held, Phillips, J., (dissenting) (1) that in order that the sale might be binding on the 2nd defendant, it was necessary to show that it was a real and not a nominal sale and that it was for antecedent debts; [p. 618, col. 2.]

(2) that there was satisfactory evidence on the record of the antecedent indebtedness of the 1st defendant to the plaintiff and although the plaintiff had been so long in enforcing his rights and had not accounted satisfactorily for not being in possession of the sale-deed, yet the fact that a part of the consideration recited in the sale-deed was true and real was sufficient to rebut the presumption to the *benami* nature of the transaction; [p. 619, col. 1; p. 620, col. 1.]

(3) that under the circumstances the plaintiff was entitled to the relief claimed. [p. 620, col. 1.]

Per Phillips, J.—(1) Where the plaintiff has brought his suit just within the period of limitation in some circumstances no adverse inference may safely be drawn from delay in bringing the suit, but when each day's delay entails additional monetary loss on a plaintiff, his omission to bring a suit until just before the expiry of the period of limitation requires some explanation and the absence of any reasonable explanation must throw some doubt on his case. [p. 620, col. 2; p. 621, col. 1.]

(2) The burden of proving that a sale is a nominal transaction lies primarily on the person alleging it; but the facts that the vendee can produce none of the documents on which his case depends and that there is no satisfactory evidence as to possession, cast the utmost doubt on the case and shift the burden of proof on to him. [p. 622, col. 2.]

(3) Where there is evidence to show that a promissory note is antedated, no presumption arises

RAGHUNATHA CHARI v. ARAVAMUTHAIYANGAR.

under section 118 of the Negotiable Instruments Act that it was executed on the date it bears. [p. 623, col. 1.]

(4) Though the presumption as to consideration arising under section 118 may, in the case of a promissory note executed by a father, also bind the son, yet where the document itself is proved to be false, no presumption arises even against the father. [p. 623, col. 2.]

Seetharam Naidu v. Balkrishna Naidu, 22 Ind. Cas. 638; 26 M. L. J. 604; 15 M. L. T. 78; *Gangiseti Ramaya v. Kallika Peraya*, 16 Ind. Cas. 411; (1912) M. W. N. 959; *Bisheswar Dayal v. Harbans Sahay*, 6 C. L. J. 659; 3 M. L. T. 38; *Tirbeni Pershad v. Ram Narain*, 20 Ind. Cas. 951; 11 A. L. J. 713, referred to.

Appeal against the revised decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 33 of 1909.

Messrs. T. Narasimha Aiyangar, with him Mr. C. Padmanabha Aiyangar, for the Appellant.

The Advocate-General (with him Mr. N. R. K. Thatha Chariar), for the Respondents.

This appeal and the memorandum of cross-objections filed by the 1st respondent, coming on for hearing on the 21st, 24th, 25th and 26th January 1916 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—This is a case in which the parties have so conducted themselves as to make it difficult to arrive at the exact truth. The main consideration for the sale-deed, Exhibit A, which was executed on the 13th July 1897 though dated the 10th, is a promissory note, Exhibit B, which there is evidence to show was antedated and was really executed on the same day as the sale-deed, Exhibit A. Exhibit B was for Rs. 3,200 made up of five items, and on the same day a conditional sale-deed of other items for Rs. 1,150, Exhibit GG, was executed, and there is evidence that a third sale-deed of other items for Rs. 500 was prepared but not executed. These deeds purport to show an indebtedness of Rs. 5,150 on the part of the 1st defendant to the plaintiff. The defendants pleaded that the sale-deed sued on was *benami*, and the 2nd defendant, the son, also pleaded that in any case it was not executed for antecedent debts, but to defraud creditors from whom the 1st defendant had borrowed for immoral purposes. At the trial the case set up for the 2nd defendant was that Exhibit A was part of a scheme to defraud the creditors of the 1st defendant

and that Exhibit A was nominal and without consideration, while Exhibit GG was in satisfaction of the only real indebtedness of the 1st defendant, but purported to be for debts which were non-existent. The 1st defendant made a statement to this effect when examined by the Subordinate Judge at the first hearing, but he did not appear at the trial to contest the suit, and he has not appealed against the decree which gives the plaintiff his share in the lands and charges the share of the 2nd defendant with the balance of the consideration found to have actually passed. The fact that he has not appealed may be due to his having become an insolvent, but as the Subordinate Judge points out the Vakil who originally appeared for him afterwards appeared at the trial for his son, the 2nd defendant, and he would no doubt have been put into the box if it had been thought that his evidence would help the 2nd defendant. In order that the sale may be binding on the 2nd defendant it is, of course, necessary to show that it was a real and not a nominal sale and that it was for antecedent debts. Even then it would not be binding if they were incurred for immoral purposes, but no attempt has been made to dispute the finding of the Subordinate Judge that this has not been proved. The question whether the sale deed is supported by consideration of antecedent debts to the extent found by the Subordinate Judge may be dealt with first. If the promissory note Exhibit B, as I am disposed to think, was executed at the same time as the sale-deed, it cannot be regarded as creating an antecedent debt, and it is for the plaintiff to prove as against the 2nd defendant that at the date of Exhibits A and B the 1st defendant was indebted to the plaintiff in the sums which are set out as the consideration for Exhibit B. Two of these items are admitted but it is said that they were satisfied by Exhibit GG and that the items of consideration mentioned in that document were non-existent. When, however, the 1st defendant was sued for these lands by a vendee from the plaintiff, he filed a written statement, Exhibit JJ, in which he pleaded that out of the consideration payable by the plaintiff under Exhibit A Rs. 450 had not been paid, and it had been arranged it was to be treated as paid under

RAGHUNATHA CHARI v. ARAVAMUTHAIYANGAR.

Exhibit GG so ■ to entitle the 1st defendant to a re-conveyance of the lands sold under Exhibit GG on payment of the balance of Rs. 700. This is altogether inconsistent with the story that the sale-deed Exhibit A was *benami*, and, as it appears from Exhibit JJ that the plaintiff and the 1st defendant had then fallen out, it does not appear likely that the 1st defendant would then have made in the plaintiff's favour an admission of having received all the consideration but Rs. 400 under Exhibit A, if in fact he had received nothing at all, or very much less.

The 2nd defendant's case is that the 1st and 3rd items of consideration for Exhibit B, Rs. 930 and Rs. 210 or Rs. 1,190 in all, were really discharged by Exhibit GG, but there is no satisfactory explanation why Exhibit GG is a sale for Rs. 1,150 and not for Rs. 1,190. On the other hand, it is said that the plaintiff has not proved that the items of consideration mentioned in Exhibit GG are genuine. One of the items, Exhibit LL, is ■ promissory note, dated 5th July 1896, in respect of an alleged advance by the plaintiff to the 1st defendant for the discharge of Court decrees and a payment under a lease to Srirangam Sellappa who has not been called. As regards the other item, an alleged advance on a pledge of *kammals*, though P. W. No. 5 proves that plaintiff pledged a jewel with him, Exhibit YY, and though Exhibit FFF shows that subsequently to the date of Exhibit GG the 1st defendant pledged *kammals* to a third party, we have only the plaintiff's evidence that the money raised by him on pledge was for the use of the plaintiff, apart of course from the recital in Exhibit GG and the fact that the defence have not put the 1st defendant into the box to contradict him. However this may be, it is, in my opinion, clear that at the date of Exhibits A and GG, the 1st defendant was indebted to the plaintiff in respect of other items besides those mentioned in Exhibit GG and, therefore, the story that Exhibit GG was taken in full discharge cannot be accepted.

Coming now to the other items of consideration mentioned in Exhibit B, Exhibit M is the register of ■ suit, Original Suit No. 47 of 1896, against the plaintiff, 1st and 2nd

defendants on a mortgage, dated 28th June 1892, executed by plaintiff and the 1st defendant for Rs. 400 in which the plaintiff obtained a decree for principal and interest. Rs. 90 was realized by the sale of the plaintiff's house which was re-conveyed to him later, and Rs. 600 was collected by rateable distribution in Original Suit No. 296 of 1896 out of assets realized by sale of the plaintiff's properties, and Rs. 100 was paid on 20th February 1898 and is said to have been borrowed by plaintiff under Exhibit PP. On 6th June 1895 the 1st defendant and plaintiff put in a petition that satisfaction might be entered up, saying they had paid Rs. 450 in April 1898, far more than was then due, but this was contested and the petition was dismissed. Lastly on 12th August 1898 satisfaction was recorded. Exhibit K is a promissory note of even date with the mortgage sued on, in which 1st defendant admits that the money was borrowed for his own use, and Exhibit L, dated 27th June 1895, is a renewal of Exhibit K. There is no reason to doubt that this item of consideration is perfectly genuine, as the debt was the 1st defendant's and the decree was discharged by the plaintiff. Exhibit HHH is a decree, dated 25th September 1896, against 1st defendant and plaintiff on ■ promissory note for Rs. 580 executed by them on 19th January 1896 for Rs. 680-4-3. Exhibit R shows that in satisfaction of the decree the plaintiff's properties were sold for Rs. 1,501, subject to a mortgage for Rs. 2,500 and to a claim on ■ security-bond. Out of the Rs. 1,501, Rs. 600 was paid as already mentioned in rateable distribution under Original Suit No. 47 of 1896. Exhibit O, dated 30th October 1897, is a receipt in favour of 1st defendant and plaintiff for Rs. 44-14-3, the balance due under the decree. The 1st defendant has not been put into the box to contradict the plaintiff's story that the consideration for the promissory note sued on went to the 1st defendant, and the plaintiff's case is supported in this and other respects by Exhibit H, a memorandum of accounts in the 1st defendant's own writing, dated 2nd March 1897, that is to say, three weeks before the date which appears on Exhibit B, and four months before the date of Exhibit A. It includes Rs. 900 with interest to 30th Masi Rs. 974, which corresponds to the item Rs. 980 in Exhibit

RAGHUNATHA CHARI v. ARAVANUTHAIYANGAR.

B; about Rs. 900 under Original Suit No. 47 of 1896; Rs. 200 under Small Cause Court No. 38 of 1897, item 3 in Exhibit B; Rs. 700 for the decree in Original Suit No. 296 of 1896; Rs. 185 borrowed to pay decree of Tirumalai Aiyangar and Ayyavier and Brothers and items bringing up the total to Rs. 3,117 and certain further items bringing the amount up to Rs. 3,165-12-0. It is, in my opinion, satisfactory evidence of the antecedent indebtedness of the 1st defendant who has not been put into the box to explain it. It, no doubt, seems strange that the plaintiff should have advanced so much money to the 1st defendant, and incurred such liabilities on his behalf, that he should have delayed so long to enforce his rights under Exhibit A, if it is a genuine sale-deed, and that he has not accounted satisfactorily for not being in possession of the original sale-deed, but on the whole after careful consideration of the evidence I see no sufficient reason for differing from the conclusion at which the Subordinate Judge has arrived. In view of the conclusion I have arrived at on the evidence as to consideration, the question of possession is of less consequence, but I am not satisfied that the plaintiff had failed to get possession before 1902, when he alleges his possession was disturbed. Some of the documents may be explained with reference to his possession of lands sold to him under Exhibit GG, but Exhibit CC in the 1st defendant's writing seems to me to show that the 1st defendant had paid rent to the plaintiff for some of the items in Exhibits A and GG and owed a balance of Rs. 57 on that account. The rest of the document shows that the 1st defendant was to pay rent for the item in Exhibit GG, and to vacate one of the items in Exhibit A and that the plaintiff's lessee was to pay rent for Sallakulli which consists of items in Exhibit A. In this state of things I do not think there are sufficient grounds for interfering with the decree of the lower Court and would dismiss the appeal with costs.

PHILLIPS, J.—This is a suit to recover possession of property under a sale-deed executed by appellant's (2nd defendant's) father (1st defendant in favour of plaintiff (1st respondent) on 10th July 1897 and has been brought in 1909, just before the expiry of the

period of limitation available. The two questions for consideration are:—

(1) Whether the sale-deed is merely nominal and executed in order to defeat 1st defendant's creditors; and

(2) Whether when the sale was effected, there were antecedent debts due by 1st defendant and whether the property passed to the vendee as consideration for their discharge so as to bind 1st defendant's son (appellant).

Plaintiff alleges that the sale was effected in July 1897, and that he got possession of the plaint property and remained in possession till about May 1902, when defendants trespassed upon the land and dispossessed him. In January 1901 plaintiff prosecuted 1st defendant and others for trespassing upon his threshing floor and stealing the crop harvested from some of the plaint lands. 1st defendant then pleaded that he was in possession of the lands in question and the accused were discharged. Plaintiff does not state in what circumstances he was dispossessed in May 1902, nor did he take any steps to recover possession until he brought this suit seven years later in 1909. His only explanation for the delay is that he was staying at Cuddapah "as well as want of funds to file the suit." The sale-deed sued upon as well as the connected documents are said to have been stolen from plaintiff by 1st defendant in 1901 at the time of the alleged rioting and theft, but plaintiff made no complaint about the loss of his documents. No doubt he says he told the Police, but that is obviously a false story, for no action was taken upon what he told them, although the Police instituted a case of theft of their own belts, sandals, &c., which is said to have occurred at the same time. Plaintiff, therefore, starts this case under somewhat suspicious circumstances. He cannot satisfactorily explain his inability to file the original documents upon which he relies, and tells an obviously false story of their theft, and he does not give an adequate explanation for allowing the defendants to enjoy the mesne profits of the lands from 1902 to 1909 without disturbance, although he was himself the real owner. No doubt he has brought his suit within the period of limitation, and in some circumstances no adverse inference could safely be drawn from

RAGHUNATHA CHARI v. ARAVAMUTHAJIYANGAR.

delay in bringing a suit, but when each day's delay entails additional monetary loss on a plaintiff, his omission to bring a suit until just before the expiry of the period of limitation requires some explanation, and the absence of any reasonable explanation must throw some doubt on his case. In the present case that doubt is stronger than it need sometimes be, because plaintiff and 1st defendant have been on bad terms since 1901, and plaintiff has allowed his enemy peaceful enjoyment of stolen property for no less than 7 years, during the whole of which period he has made no attempt to recover the title-deeds stolen from him and has not attempted now to explain his omission to do so. These two circumstances lend considerable force to appellant's contention that the suit sale under Exhibit A was a nominal transaction. This contention would be still further strengthened if appellant can prove his assertion that plaintiff never got possession of the suit lands. Defendant No. 1 sold the plaintiff lands under the original of Exhibit A on 10th July 1897, and some other lands in the same village on 12th July 1897 under the original of Exhibit GG, both sales being in favour of plaintiff. It is found by the learned Subordinate Judge, and not seriously disputed in appeal, that both the sale-deeds were executed on the same day, and admittedly the sale under Exhibit GG was a genuine one and the lands passed to plaintiff. The learned Subordinate Judge has found that plaintiff did get possession and relies for this conclusion on Exhibits Y, Z, SS series, WW, WW1, CC, DDD and DDD1. Exhibit Y is a copy of a receipt given to plaintiff for quit-rent on some of the suit lands, but admittedly the numbers of the suit lands found no place in the original and this copy, Exhibit Y, was first produced in the criminal case of 1901 and was obviously altered to differ from the original for the purposes of that case, and no reliance can be placed on it. Exhibits Z, SS series, WW, and WW1 no doubt show that plaintiff had to pay rent for lands in the suit village, but there is nothing to show that it was for the suit lands. Plaintiff was in possession of the lands mentioned in Exhibit GG, and, although he executed a sale-deed for them to P. W. No. 10 on 22nd June 1900 (Exhibit HII), the purchaser did not get

possession until sometime after August 1902 (*vide* Exhibits JJ and KK). The lands referred to in the above documents may well be the lands sold under Exhibit GG. Exhibit CC is a rough note said to be in 1st defendant's handwriting, but it is not at all clear what it really means. It is suggested that it proves that one Ariyar, who took a lease of the plaintiff lands on 16th August 1897 under Exhibit D, was actually in possession and paid rent. There is nothing in the document to support this conclusion, and in my opinion the document is of very little value without some proper explanation of its meaning. The rate of rent mentioned in Exhibit CC cannot be made to tally with the rent provided in Exhibit D. Consequently it cannot be said that Exhibit CC proves payment of rent under Exhibit D. It does, however, show that 1st defendant was in possession of one of the suit lands at least until 11th April 1899, but I think the document must be disregarded as being unintelligible. Exhibits DDD and DDD1 are depositions of P. W. No. 11 (4th defendant) in the criminal case in 1901, and do not materially help plaintiff. Then we see that all the documents relied on by the Subordinate Judge are really of very little value. In addition to these 1st respondent relies on Exhibits AA, T series, SS series, TT and ZZ. Exhibit AA does not specifically mention the suit land, but the reference in it to a dispute between 1st defendant and Ratna Naik, the purchaser under Exhibit GG, would show that it referred to land sold under that document. Exhibits T series refer to the plaintiff lands and are *samba* and *kar* outturn accounts of Aravamudu Aiyangar (plaintiff) of 1898 and 1899. All the lands are in the names of third parties and cultivated by sundry tenants. P. W. No. 12, who prepared some of them, was a prosecution witness in the criminal proceedings and says in examination-in-chief that plaintiff was present when they were prepared and had the *patrai* made, but does not know who took away the paddy and in cross-examination he admits that before 1901 plaintiff and 1st defendant would come to the village together and 1st defendant would either lease out the land or get some one to cultivate. As plaintiff

RAGHUNATHA CHARI v. ARAVAMUTHAIYANGAR.

iff and 1st defendant were at that time close friends, this seems very reasonable and I can see no reason why this witness should be treated as hostile to plaintiff. Plaintiff would have it that all his witnesses who make statements in favour of defendants are hostile, and the Subordinate Judge treats their statements in plaintiff's favour as admissions, but there is nothing on record to show why all these witnesses should perjure themselves in favour of defendants, or give evidence hostile to plaintiff unless it were true. Exhibits SS series are merely arrears lists for *Faslis* 1310 and 1311, and no details of lands are given. As the latest date in the documents is May 1902, there is no reason why plaintiff's arrears mentioned therein should not relate to lands in Exhibit GG. Exhibits TT and T1 are attachment lists prepared by P. W. No. 6, and they show that in *Fasli* 1310 some of the suit lands were in the enjoyment of plaintiff, but these documents were prepared at the time of the criminal litigation and about the same time that the false document Exhibit Y was prepared. The only other document is Exhibit ZZ and this is explained by P. W. No. 6, who obtained the unregistered lease-deed Exhibit E from plaintiff on 13th April 1901. He is also said to be hostile, but no reason for the hostility is assigned, and he distinctly says that he could not get possession under Exhibit E. Plaintiff is unable to produce any receipts, except Exhibit Y referred to above, and he does not even produce the original of the lease-deed, Exhibit D. That document recites that all payments of rent under it should be endorsed on the document itself, and its non-production is, therefore, very suspicious as there is no other document to show that the lease ever took effect. There was no reason why plaintiff should have had this document with him when his documents were stolen, unless he carried all his documents with him on that occasion, in which case it is strange that Exhibit B was not also stolen. We then see that Exhibits T and T1 are the only documents which recite plaintiff's possession of the suit lands. No doubt defendants do not produce any receipts, but it is likely from the fact that plaintiff prosecuted the 1st defendant unsuccessfully in 1901 that 1st defendant was then in possession, and the oral evidence is in defendants' favour. Plaintiff and 1st defendant are first cousins and there is no

adequate reason alleged for treating all plaintiff's witnesses as hostile. Exhibits FF series and W show that since 1902 1st defendant claimed the suit lands, and several of the documents filed by plaintiff, such as Exhibits AA and SS, are as much evidence of 1st defendant's possession as of plaintiff's possession. It is suggested that they favour 1st defendant because he belongs to the original *shrotri-emdar's* family, but the close relationship between plaintiff and 1st defendant refutes that suggestion, when there is no evidence to support it. Defendant No. 2's case is undoubtedly prejudiced by the fact that 1st defendant has not gone into the witness-box, and quite possibly he has failed to do so in the interests of his son, but on the other hand it is possible that he has kept in the background because the allegation that he incurred debts for immoral purposes is true and he is unwilling either to admit or deny the charge. The burden of proving that Exhibit A is a nominal transaction lies on appellant, but I think that sufficient circumstances have been proved to show that plaintiff has acted in such an extraordinary manner as to cast the utmost suspicion on the truth of his story. The fact that he can produce none of the important documents on which his case depends and the absence of any satisfactory evidence as to his possession require explanation. He admits that he had to bring a criminal case in January 1901, but says that he continued in possession until about May 1902, and yet he cannot show how he was dispossessed. None of the witnesses can speak to plaintiff's possession, but on the contrary support 1st defendant's possession. There is no reason to suppose that the whole village is hostile to plaintiff, unless it is on the supposition that they think he is putting forward a false claim. He says he went away to Cuddapah but admits that he used to come to the suit village once in four months. It is very difficult to believe that he would have quietly acquiesced in his dispossession for seven years, if the lands had really been sold to him. I would, therefore, hold that there are very strong reasons for holding the sale to be a nominal one.

This finding is supported by a reference to the evidence as to the consideration for the sale-deed Exhibit A. The deed is for Rs. 3,500 i. e., Rs. 3,312 due under the promissory note Exhibit B and Rs. 188 paid in cash. The

RAGHUNATHA CHARI U. ARAVAMUTHAIYANGAR.

consideration for Exhibit B consists of 5 items.

(1) Rs. 980 due on the bond Exhibit J.

(2) Rs. 915 due under the decree in Original Suit No. 47 of 1896.

(3) Rs. 210 due under the decree in Small Cause Suit No. 38 of 1897.

(4) Rs. 700 due under the decree in Original Suit No. 296 of 1896.

(5) Rs. 395 borrowed to pay debts to discharge the decree due to V. Tirumalachari and Ayya Iyer.

It is contended for plaintiff that, as Exhibit B is a promissory note and execution is admitted by 1st defendant, presumptions arise under section 118 of the Negotiable Instruments Act that it was executed for consideration and on the date it bears, and that, therefore, the burden of proof is on 2nd defendant to show that there was no consideration binding on him. The second presumption is negatived by the oral evidence of the three attesting witnesses to Exhibit B that it was executed on the same day as Exhibit A, and plaintiff has failed to examine several of the attesting witnesses to Exhibits A and GG to disprove this statement. There is other evidence tending to show that Exhibit B was not executed on 22nd March 1897 and consequently the sole evidence of plaintiff that it was executed on that date must be rejected. As Exhibit B is shown to be a false document in that it bears a false date, the presumptions under section 118 are rebutted, and the burden of proof is on plaintiff to show that the consideration is real, and that there were antecedent debts due by the father which would justify the alienation of the son's property and make the alienation binding upon him. No doubt in *Malayandi Goundan v. Subbaraya Vanavaraya Gaundan* (1) it was held that the son had to make out that the money for a mortgage-deed executed by the father had not been advanced in a case where the father had allowed judgment to go by default, and it was held that his liability must thereby be taken to have been established. Whether the same burden would have been cast upon the son if the father's liability had not been held to have been established, is not

stated, but the question is discussed in *Seetharam Naidu v. Balakrishna Naidu* (2) by the learned Chief Justice and he held that when there is a question of an antecedent debt the burden of proving it lies on him who asserts it, and this principle was recognised in *Gangiseti Ramaya v. Kallika Peraya*, (3) and in *Bisheswar Dayal v. Harbans Sahay* (4) and *Tirbeni Pershad v. Ram Narain* (5) and in the last case it was held that the recital as to consideration in the mortgage-deed was not evidence as against another member of the mortgagor's family whose interests were affected. I have no doubt, therefore, but that the onus is on plaintiff in this suit to prove an antecedent debt, and as I understood the learned Advocate-General's argument he did not dispute this proposition, but contended that if the debt was proved against the father it was proved against the son. This contention is, I think, quite correct, but I do not think that the presumption to be drawn from the execution of the promissory note can be said to be proof against the father when that presumption is rebutted by proof that the document is itself a false one.

On the same day that Exhibit A was executed 1st defendant executed another sale-deed (original of Exhibit GG) to plaintiff for Rs. 1,150, reciting as consideration Rs. 590 due on a pledge of a pair of diamond *kammals* and Rs. 560 due on a promissory note Exhibit LL, dated 5th July 1896. It is defendant's case that Rs. 1,150 were really due, i. e., items 1 and 3 in Exhibit B amounting to Rs. 1,190 and that the items in GG are fictitious. The first point that strikes one is that plaintiff was not in a position to find all the money alleged to have been lent to 1st defendant. On 9th October 1896 plaintiff's house was sold for Rs. 90 (Exhibit M) and in March 1897 all his lands were sold for Rs. 1,501 (Exhibit Q) and from the fact that this money was applied in rateable distribution towards his decree-debts, which were not thereby fully

(2) 22 Ind. Cas. 638; 26 M. L. J. 604; 15 M. L. T. 78.

(3) 16 Ind. Cas. 411; (1912) M. W. N. 959.

(4) 6 C. L. J. 659; 3 M. L. J. 38.

(5) 20 Ind. Cas. 951; 11 A. L. J. 713.

(1) 8 Ind. Cas. 854; 21 M. L. T. 521; 9 M. L. T. 163; (1911) 1 M. W. N. 50.

RAGHUNATHA CHARI v. ARAVAMUTHAIYANGAR.

satisfied, it is evident that he was in ■ bad financial position towards the end of 1896 and beginning of 1897 and could not meet his debts in March 1897. It is alleged that Rs. 500 was lent on the *kammals* on 5th January 1896, and yet on 19th January 1896 plaintiff and 1st defendant borrowed Rs. 500 from V. Ramasami Aiyar and in August 1896 plaintiff was indebted to Pichai Rowther and increased this indebtedness on 14th April 1897 (*vide* Exhibit YY) to Rs. 860.

As regards the item of Rs. 395 in Exhibit B plaintiff, realizing that the recital in Exhibit B that it had already been paid could not be proved, says ■ P. W. No. 1 that it was paid on the day the note was executed, and yet at that very time all plaintiff's immovable property was being sold for his debts. Again when Exhibit A was executed Rs. 188 is said to have been paid in cash. The Subordinate Judge has discredited these cash payments and I agree that he is quite right in his finding. Plaintiff seeks to corroborate Exhibit B by Exhibit H, a memorandum of account said to be in 1st defendant's handwriting. It is proved by plaintiff and he says it is an account of what 1st defendant owed to him on 2nd March 1897, and forms the basis of Exhibit B. The debts referred to in Exhibit GG find no place in Exhibit H, and plaintiff's explanation of the omission is very unconvincing. The first item in Exhibit H "principal Rs. 900" is said to refer to Exhibit J, a simple bond of 27th May 1892 for Rs. 700. The next item is "interest 30th Masi Rs. 74-4-0". The amount that would have been due on Exhibit J on 2nd March 1897 is about Rs. 970, but it is not at all clear why Rs. 900 of this amount should be treated as principal. In Exhibit H there is also an item *devasthanam* Rs. 75, which finds no place in Exhibit B, and the amounts paid for the decrees for Thirumalai Aiyangar and Ayyavier and Brothers come only to Rs. 185, ■ sum which had evidently been already paid when Exhibit H was written. There is also an entry of Rs. 36 interest of Pichai Rowther, which finds no place in Exhibit B. Items in B 2—4 are for decrees obtained jointly against 1st defendant and plaintiff. Admittedly item

No. 2 was 1st defendant's own debt and to evidence this and to secure himself plaintiff took the promissory note Exhibit K from 1st defendant. No such security is taken for item No. 4, and the evidence of the creditor P. W. No. 3 goes to support appellant's case that the loan was borrowed by plaintiff with 1st defendant ■ a surety, and we see that it was to satisfy this debt that all plaintiff's lands were brought to sale. Plaintiff relies on an alleged admission of 1st defendant in his written statement in a suit filed against him by Ratna Naik to recover possession of the lands sold to him under Exhibit HH, i. e., the lands sold under Exhibit GG (Exhibit JJ). In it 1st defendant refers to another sale-deed (besides Exhibit GG) executed on 12th July 1897 and says a balance of Rs. 400 was due under it by plaintiff. There is oral evidence that not only Exhibits A and GG were executed on that day but also a third sale-deed, and I think to make this ■ relevant admission against 2nd defendant, it must be construed strictly. It might refer to Exhibit A or to this other sale-deed, but if it refers to the former it is not possible to explain in what way Rs. 400 could have been due to 1st defendant under it. The third sale-deed is not before us, and so one cannot say whether the figure of Rs. 400 would apply to its conditions or not. I, however, think that if Exhibit JJ is strictly construed, it cannot be held to be an admission of receipt of the whole consideration under Exhibit A except Rs. 400, for that would read, into the admission, words which are not there. There is thus strong reason for supposing that the debts mentioned in Exhibit GG are not real. Item 5 in Exhibit B is undoubtedly false. The evidence as to item 4 is also not at all satisfactory, and even assuming that 1st defendant was liable jointly with plaintiff to the creditors for this debt he cannot be treated as owing it all to plaintiff. Items 1—3 may be true, but Exhibit GG discharges items 1 and 3 and only item 2 remains. Exhibits RR series show that the debt to Kasturi Rangan Chetti was not discharged till 1893 when plaintiff and 1st defendant jointly paid Rs. 600. It cannot have been discharged by plaintiff alone before Exhibit

GOPAL PROSHAD BHAGAT V. RAJENDRA LAL PANJA.

B. The inability to prove the consideration coupled with the fact that two separate sale-deeds were executed on the same day between the same parties and that a spurious promissory note was also got up on the same day, strengthens my conviction that the sale-deed Exhibit A was a purely nominal transaction. An indemnity deed (Exhibit MM) was executed at the same time as Exhibit A by 1st defendant, but plaintiff has even lost the original of that. In these circumstances, I would set aside the Subordinate Judge's decree and dismiss the plaintiff's suit with costs throughout.

BY THE COURT. — The appeal is dismissed with costs. The memorandum of cross-objections is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 198 OF 1915.

July 20, 1915.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Roe.

GOPAL PROSHAD BHAGAT AND OTHERS
—DECREE-HOLDERS—PETITIONERS

versus

RAJENDRA LAL PANJA AND OTHERS—

JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 148—Enlargement of time by implication—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Step-in-aid of execution—Application by decree-holder certifying partial satisfaction of decree.

An application by a decree-holder certifying payment of a portion of the decretal amount out of Court, is a step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act, provided the payment was actually made and even though the decree-holder by his application also prayed that the execution case might be struck off. [p. 626, col. 1.]

Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya, 12 C. 608; *Sujan Singh v. Hira Singh* 12 A. 399; A. W. N. (1890) 125; *Wasi Imam v. Poonit Singh*, 20 C. 696 and *Chhoto Rakhul Das v. Jogendra Narain*, 3 Ind. Cas. 391; 10 C. L. J. 467 at p. 470, followed.

Where an application for execution was made just within the limitation period but was returned by Court for amendment of certain formal defects within a certain time and the application after amendment was re-filed after that time and beyond the limitation period, with a prayer that the delay might be excused in view of the circumstances stated therein and the Court accepted and acted upon the application:

Held, that the Court had in effect enlarged the time in the exercise of its discretion under section 148, Civil Procedure Code, and that, therefore, the application was not time-barred. [p. 626 col. 2.]

Budhan Shah v. Sita Nath Shah, 7 Ind. Cas. 578; 13 C. L. J. 78, distinguished.

Rule against the judgment of the Subordinate Judge, Midnapur, dated the 24th October 1914.

Babu Satcowri Pati Roy, for the Petitioners.

Babu Surendra Nath Ghoshal, for the Opposite Party.

JUDGMENT.—This Rule was granted upon an application under section 25 of the Provincial Small Cause Courts Act.

The main question raised in the Rule is, whether an application by a decree-holder certifying partial satisfaction of a decree is a step-in-aid of execution of the decree within the meaning of Article 182 (5) of the Second (First?) Schedule of the Limitation Act.

The question has been considered in several cases and answered in the affirmative. In *Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya* (1) the learned Judges held that such an application is a step-in-aid of execution of the decree, and observed: "when a judgment-creditor comes into Court and certifies to the Court the payment of a sum, that proceeding takes place in consequence of an arrangement as to payment between him and the judgment-debtor, and because if he had not certified, the judgment-debtor could, under the law, compel him to do so. The effect of the certificate is to satisfy the decree so far as the sum certified is concerned." The same view was taken by a Full Bench of the Allahabad High Court in *Sujan Singh v. Hira Singh* (2). Mahmud, J., in that case observed that the rule laid down by this Court in the case of *Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya* (1) is "a sound rule of law," because "where a decree-holder has not only out of Court acquired a partial satisfaction of the decree, but where he also comes to certify such partial satisfaction under section 258 of the Civil Procedure Code, he is taking a step by which

(1) 12 C. 608.

(2) 12 A. 399; A. W. N. (1890) 125.

VARADARAJA APPA RAO v. GONEPALLE PUNNAYYA.

he asserts enforcement of his decree in the exercise of those powers which are vested in him because he is a decree-holder."

A similar view has been taken in subsequent decisions of this Court. [See *Wasi Imam v. Poonit Singh* (3) and *Chhoto Rakhal Das v. Jogendra Narain* (4).]

It is contended on behalf of the opposite party, that in the present case the decree-holder by his application certifying payment also prayed that the execution case might be struck off, and this fact was relied upon strongly by the learned Subordinate Judge. No doubt an application to the Court to strike off an execution case cannot possibly be a step-in-aid of execution, but if an application certifying payment to the Court is a step-in-aid of execution, the mere fact that there is a prayer in the application that the execution case might be struck off after satisfaction, cannot take away the effect of certifying payment to the Court.

Having regard to the authorities cited above, we must hold that an application by the decree-holder certifying payment of a portion of the decretal amount out of Court is a step-in-aid of execution of the decree within the meaning of Article 182 (5) of the Limitation Act provided, of course, the payment asserted has actually been made. In the present case it is not disputed that the payment was actually made.

It is pointed out on behalf of the opposite party that although the present application for execution was originally filed on the 22nd May 1914 which was within three years from the date of the application certifying payment to the Court referred to above, it was returned on the 9th June for amendment (of certain formal defects) within five days from that date, and the application was not re-filed within the time allowed, but on the 27th June. It is contended that there is no express order under section 148, Civil Procedure Code, enlarging the time for amendment, and the case of *Budhan Shah v. Sita Nath Shah* (5) is relied upon. But in the

present case, the decree-holder filed a petition on the 27th June, stating the reason why the application had not been filed within the period allowed and praying that the delay might be excused. There was thus an application for enlargement of the period allowed and the order of the Court, taken along with the above petition, goes to show that the circumstances under which the application for execution was re-filed after the period originally allowed were considered and the Court in the exercise of its discretion enlarged the time.

We are of opinion that the application for execution of the decree was not barred by limitation. The Rule is accordingly made absolute, and the case sent back to the Court below for proceeding with the execution. Costs one gold mohur.

Rule made absolute.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 236 TO 246 OF 1914.

CIVIL REVISION PETITIONS NOS. 365 TO 369 OF 1915, 676 TO 680 OF 1914, 49 TO 54 OF 1915 AND 58 TO 64 OF 1915.

December 21, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Sri Raja VARADARAJA APPA RAO
BAHADUR ZEMINDAR GARU—

APPELLANT IN ALL

versus

GONEPALLE PUNNAYYA (DIED) AND
OTHERS—DEFENDANTS—RESPONDENTS IN A.

A. O. No. 236 OF 1914.

Jurisdiction of Civil or Revenue Court—Suit for rent by zemindar as ryotwari owner—Permanent Settlement—Partible estate—Whether may be diminished or increased by agreement between zemindar and Government—Ryotwari assessment—Inam—Personal or private services—Government's right to resume inam—Relinquishment by inamdar—Resumption by zemindar—Effect of zemindar's ideas about his rights—Immaterial.

The area of a permanently settled partible estate may be diminished or increased by agreement between a zemindar and the Government, when the rights of third persons are not affected thereby. [p. 630, col. 1.]

There is nothing in law to prevent a zemindar from consenting to the Government imposing ryotwari

(3) 26 C. 696.

(4) 3 Ind. Cas. 391; 10 C. L. J. 467 at p. 470.

(5) 7 Ind. Cas. 578; 13 C. L. J. 78.

VARADARAJA APPA RAO v. GONEPALLE PUNNAYYA.

assessment ■ the whole or portions of his *zemindari* lands, provided the existing rights of others in such lands are not affected thereby. [p. 630, col. 2; p. 632, col. 1.]

A suit by ■ *zemindar* as *ryotwari* owner for recovery of rent from his tenants is cognisable by the Civil Courts and not by the Revenue Courts. [p. 631, col. 1.]

Per *Sadasiva Aiyar, J.*—Where the nature of the services to be performed by an *inamdar* are only personal or private to the *zemindar*, the burden of proving that the income therefrom was not included when fixing the *jama* at the Permanent Settlement ■ on the person who sets up the Government's right to resume the *inam*, and in the absence of proof to the contrary, it must be held that the *inam* lands were not *lakshiraj*. [p. 628, col. 2.]

Where the *zemindar* himself resumes the lands when an *inamdar* executes the relinquishment deed expressing his inability to perform the services thereafter, the lands become ordinary *ryoti* lands of the *zemindari* estate. The *zemindar's* ideas about his rights cannot, however, alter the nature of the lands or his legal rights therein. [p. 629, col. 1.]

Appeals against the orders of the District Court of Kistna, dated the 10th March 1914, in Appeal Suits Nos. 429 to 438 and 706 of 1913, preferred against the decrees of the Court of the Additional District Munsif of Masulipatam, in Original Suits Nos. 245, 361 to 366, 408, 409 and 436 of 1911 and 50 of 1912.

Petitions Nos. 365 to 369 of 1915, under section 115 of Act V of 1908, praying the High Court to revise the decrees of the Court of the Temporary Subordinate Judge, Masulipatam, dated the 1st February 1915, in Miscellaneous Appeals Nos. 44 to 48 of 1914, preferred against the decrees of the Court of the District Munsif, Gudivada, in Original Suits Nos. 4 and 185 to 188 of 1913.

Petitions Nos. 676 to 680 of 1914 and 49 to 54 and 58 to 64 of 1915, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the Subordinate Judge of Bezvada, in Small Cause Suits Nos. 409, 410, 413, 883, 1089 of 1913; 679, 680, 682 to 685 of 1913; and 91, 93 to 96, 131 and 270 of 1914.

Messrs. L. A. Govindaraghava Aiyar and P. Nagabushanam, for the Appellant.

Mr. V. Ramadoss, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Plaintiff is the appellant. He is the *zemindar* of Gannavaram (one of the Nuzvid *zemindars*). The suits out of which this appeal and the connected

appeals and certain connected revision petitions have arisen were brought by him (not ■ *zemindar* but as ■ *ryotwari* owner of certain lands under the Government) for recovery of the arrears of the rents of the lands from his tenants. The suits were brought in the District Munsif's Court of Gudivada. The District Judge on appeal returned most of the plaints in these suits, on the ground that the tenants are entitled to treat the plaint lands as situate in an "Estate" under the Madras Estates Land Act and that the suits ought to have been filed in the Revenue Court.

The principal contentions argued before us are found in the grounds 3, 4 and 11 of the memorandum of second appeal which are as follows:

3. "The lands in dispute having been dealt with at the time of the *Inam* Commission as *inam* lands in which the Government possessed the reversionary interest and having been enfranchised in favour of the then holders, the lower Appellate Court should have presumed that these lands were excluded from the *zemindari* at the time of the Permanent Settlement."

4. "It being ■ pure question of fact, whether the full rental value of these lands was included or not in the assets of the *zemindari* at the time of fixing the *peishcush*, the lower Appellate Court should have addressed itself to this question of fact and decided it on the evidence or ordered ■ further enquiry if necessary."

11. "The lower Appellate Court has misunderstood the legal effect of such a resumption and the re-grant to the plaintiff under a *seri patta* on the rights of the defendants, assuming that they were holding the lands at the time of the resumption."

In 1859, the *Inam* Commissioner seems to have thought that he had jurisdiction to deal with these *ranura* service *inam* lands and he issued the title-deed, Exhibit O, and three similar title-deeds to the four *inamdars*.

The first and second paragraphs of the title-deed (O) are ■ follows:—

"On behalf of the Governor-in-Council of Madras I acknowledge your title to *zamin-dar's* service *inam* situated in the village of Chorajudi in Taluk at Gallopalli in the District of Masulipatam, claimed to be of

VARADARAJA APPA RAO v. GONEPALLE PUNNAYYA.

acres of one hundred and ninety four of dry lands held for rendering service to the *zemindar*."

"2. This *inam* is confirmed to you and your successors, subject to the existing quit-rent of Rs. 166-12-5 per annum to be held without interference so long as the conditions of the grant are duly fulfilled."

The 1st paragraph clearly admits that the service to be rendered was to the *zemindar*. The quit-rent mentioned in the 2nd paragraph was payable to the *zemindar* and not to the Government. That it is a pre-Settlement *inam* is admitted. I cannot find anything in this title-deed to indicate that the Government possessed any reversionary interest in these lands. The statement in the 3rd ground of the appeal memorandum that the lands were enfranchised in favour of the then holders is not supported by this title-deed. Exhibit O can, therefore, only be treated as a document which recognised the grant in *inam* of these lands, which grant had been made by the *zemindar* before the Permanent Settlement.

In the Privy Council case of *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (1) the questions of the nature of *chaukidari chakran* service under a Bengal *zemindar* and the right of the Government to resume and assess the lands given as *inam* to the service-holders were considered. At page 727 their Lordships say: "The lands in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors." The respondents are the *zemindars* and as such they have the *prima facie* title, to use the language of the Board in *Rajah Sahib Perulud Sein v. Maharajah Rajender Kishore Sing* (2), "to the full enjoyment of every parcel of land within their *zemindaris* for which they pay revenue to Government. It rests on the defendant to show that when the *zemindaris* were confirmed to the plaintiffs' ancestors, it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it."

(1) 26 Ind. Cas. 676; 42 C. 710; 28 M. L. J. 457; 17 M. L. T. 1; 2 L. W. 11; 17 Bom. L. 32; 19 C. W. N. 65; 21 C. L. J. 31.

(2) 12 M. J. A. 292 at p. 331; 12 W. R. 6 (P. C.); 2 B. L. R. 111; 2 Suth. P. C. J. 225 at p. 239; 2 Sar. P. C. J. 430; 20 E. R. 349.

Having regard to the nature of the service to be performed by the *inamdars* in this case (namely, the guarding of the *zemindari* treasury and the escorting of the money remittances sent by the *zemindar* to the Government Treasury), I think that the learned District Judge was justified in finding on the evidence that the service was personal or private to the *zemindar* and that as the burden of proving that the income therefrom was not included when fixing the *jama* at the Permanent Settlement was on the plaintiff (who sets up the Government's right to resume the *inam*) and as sufficient evidence has not been adduced to prove the negative proposition, it must be held that the lands were not *lakhiraj* lands. [See *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State* (3).]

It is not shown that the District Judge failed to consider any of the material evidence in the case before he arrived at his conclusions on the facts, those conclusions being that the lands were not *lakhiraj* at the time of the Permanent Settlement and that the correct inference to be drawn from the nature of the services is that the services were personal and private to the *zemindar* and did not partake of a public character.

Further, in the judgment Exhibit P in the suits of 1897 between these same parties, the following statement appears in paragraph 26: "The service tenure held by them was created for the purpose of doing the private work of the *zemindar* and the grant was not for the performance of any public service." This finding of fact seems also to be *res judicata* in the present suits. I am, therefore, of opinion that the contentions in the 3rd and the 4th grounds of the appeal memorandum cannot be accepted.

Coming to the 11th ground of the appeal memorandum, it is clear from what I have already stated that the right of resumption of the *inam* was vested in the *zemindar* and not in the Government. [See section 4 of Regulation XXV of 1802 and *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State* (3).] The acts of the Government in 1903, therefore, which professed to resume the lands as if they had been excluded from

(3) 21 Ind. Cas. 871; 38 M. 620; 26 M. L. J. 39; 14 M. L. T. 514; (1913) M. W. N. 959.

VARADARAJA APPA RAO v. GONEPALLE PUNNAYYA.

the Permanent Settlement, are of no legal efficacy.

In the present case the *zemindar* himself clearly resumed the lands when the *inamdars* executed the relinquishment deeds (D series) between 1889 and 1895 in his favour, expressing their inability to perform the services thereafter. He having accepted such relinquishment deeds, the *inam* then came to an end [see *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (4)] and the lands became ordinary *ryoti* lands of the *zemindari* estate. The *zemindar* seems to have had for some years subsequently no clear ideas as to the legal effect of his own resumption of the lands, for he seems to have continued to call them *ranuva navukari inam* lands and to have let them as such on temporary leases to the old *inamdars'* sub-lessees. The *zemindar's* ideas about his rights cannot, however, alter the nature of the lands or his legal rights therein.

By the year 1895 then, all the lands had become ordinary *ryoti* lands in the *zemindari* but nobody had acquired any occupancy rights therein. In fact, the *zemindar* sued the *inamdars'* lessees and obtained decrees in ejectment against them, ejected them in execution of such decrees and then re-let the lands on temporary leases. (See Exhibits P1, 2 and D series.)

Then we get to the documents (Exhibit G series) which are of very great importance. Exhibit G is a *yadast* dated 15th March 1902 sent by the Tahsildar to the *zemindar*.

The material portions are as follows: "Petition No. 178, dated the 3rd October 1901, put in by you that the *ranuva navukari* (militia service) *inams* in the village of Chora-judi should be specified in your name was received. *Pattas* bearing Nos. 938, 940, 941 and 942 were granted by the *Inam* Commissioner for the *inam* land of acres 448.15 cents mentioned in the said petition. By this it is evident that the said *inams* are the *inams* granted before the *bara fasli* i. e., *Fasli* 1200) and are not subsequent *inams*. When the *inamdars* cannot do the service and when you do not require any service, you have no authority at all to get the said *inams* relinquished in your favour by the

(4) 5 C. 198 at p. 209; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Refique & Jackson's P. C. No. 58; 2 Ind. Jur. 426; 3 Shome L. R. 1.

inamdars. You have no such authority with respect to the *inams* subsequent to the *bara fasli* and not at all with respect to the previous *inams*. When the *inams* are service *inams* granted previous to *Fasli* 1200, the Government only have the right to resume the said *inams* and nobody else has any right." "It is, therefore, hoped that the reply will be sent immediately why the Government should not resume the lands mentioned in your petition." Then on 28th May 1902 a reminder G1 was sent by the Tahsildar to the *zemindar* and we are led to infer that negotiations went on between the *zemindar* and the Government Revenue Officers about the Government's rights to treat the lands as *ryotwari* lands and to impose full assessment thereon and the *zemindar* seems to have been persuaded by the Revenue Authorities to admit the claims of the Government and to treat himself as a *ryotwari* tenant of the lands under the Government. The Collector wrote to the Board of Revenue on 1st June 1903 that the lands may be charged full assessment less the *jodi* which was payable to the *zemindar*. The Board of Revenue passed proceedings G6 on 29th July 1903 accordingly. The Tahsildar finally sent the *yadast* (Exhibit G3) on 24th September 1902 to the *zemindar* of Gunnavaram, in which he says that the Board of Revenue had resumed the lands covered by the *inam* title-deeds 938, 940, 941 and 942 and ordered the levy of full assessment less the *jodi* and that the *inams* will thereafter be treated as *ryotwari* lands. The *zemindar* evidently accepted this decision of the Board. Then Exhibit G4 dated the 30th March 1904 says that it had been decided that the *seri patta* for the lands will be granted in the *zemindar's* name. It is not denied that the *zemindar* has since then treated the lands as his private *ryotwari* lands and has been letting them on temporary leases to the defendants and others. It seems to me clear that from about the end of 1903 by arrangement between the *zemindar* and the Government the lands which till then were part of the permanently settled estate were taken out of that estate. The Government's right to impose full assessment having been accepted by the *zemindar*, who was the only person then interested in contesting the right of the Government to impose full assessment, and the order of the Board of

VARADARAJA APPA RAO V. GONEPALLE PUNNAYYA.

Revenue having become final through the *zemindar's* not having sued within one year (see section 14 of the Limitation Act) to set aside that order of the Board imposing full assessment, these lands could no longer be treated as permanently assessed. I am unable to accept the argument of Mr. Ramadoss that the area of a permanently settled estate cannot be diminished or increased even by agreement between the *zemindar* and the Government, when the rights of third persons are not affected thereby.

Whether in the case of an impartible estate a diminution could be made by agreement between the then holder of the estate and the Government so as to affect the rights of the succeeding *zemindars* after the enactment of the Impartible Estates Act, need not be considered in this case as the Gunnavaram estate is admittedly a partible estate. The plaintiff in this case was the sole owner of the *zemindari* including the plaint lands in 1903. He was entitled to agree to the imposition of full assessment on the plaint lands, provided the then existing rights of no other person could be affected thereby. No such other person and no rights of any other such person existed then. When full assessment was imposed therefore under those circumstances, these lands ceased in my opinion to form part of the permanently settled *zemindari* estate. The learned District Judge says that the arrangement between the *zemindar* and the Government "might estop the Government from selling the plaint land as part of the estate should arrears of *peishcush* arise and that the arrangement might estop the *zemindar* in any claim between him and the Government as to its nature." But he proceeds to say that this could not affect the rights of third parties, that is, the tenants who were cultivating the lands in 1903. But those tenants had no rights then which could be affected by the acts of the *zemindar* and of the Government in taking away these lands out of the lands included in the Permanent Settlement, except the right to enjoy the lands under their prior leases till 1904, and that right of enjoyment was fully exercised by them till the 1st of July 1904, and was in no way affected or intended to be affected by the arrangement between the *zemindar* and the Government.

The learned District Judge was not justified in treating the lands as continuing to be parts of the permanently settled estate till the Estates Land Act came into force on 1st July 1908 and in their granting to the defendants who had come in as the tenants of *ryotwari* lands the benefit of section 1 of the Madras Estates Land Act. In this connection I have to notice that while in the *muchilikas* C to C27, C47, C57 and C58 executed between the years 1893 and 1899, the lands described as *renuva inam* lands, in all the *muchilikas* executed after the Government and the *zemindar* had agreed to treat the land as Government *ryotwari* lands (see Exhibits C28 to C46, C48 to C56, C59 and C60, that is after the year 1903, the lands described mostly as the plaintiff's *savaram* lands or "own" lands. No provision of any Statute Law has been pointed out (and I have not been myself able to find any) which prevents a *zemindar* from consenting to the Government imposing *ryotwari* assessment on the whole or portions of his *zemindari* lands, provided the existing rights of others in such lands are not affected thereby. Some reliance was placed by the respondents' learned Vakil on the form of the *sanad* issued to *zemindars* before 1870 (see the standing orders of the Revenue Board, Volume II, page 153). The second paragraph has the words, "The British Government..... has resolved.....to fix for ever a moderate assessment of public revenue on such lands which shall never be liable to change under any circumstances." It is clear that the first two paragraphs of this *sanad* are not the operative part thereof. The second paragraph at the end says that the Government have resolved to secure the free exercise of the religious institutions and domestic usages of their ancestors "to the Government's native subjects." Further, the rights granted to the *zemindars* were the latter's private rights as is indicated by some other words in that same paragraph, namely, that the Government was resolved to institute Courts of Judicature for the protection of these valuable rights. The *zemindar's* private rights, however valuable, can be surrendered to the Government unless such surrender is prohibited by Statute Law. It is significant, again, that this paragraph (two) of the old form of *sanad* has been

VARADARAJA APPA RAO V. GONEPALLE PUNNAYYA.

omitted from the new form of *sanad* (page 154) as inappropriate to a title-deed.*

In the result I would hold that the suit is cognisable by the District Munsif and setting aside the order of the District Judge returning the plaints for presentation to the Revenue Courts, I would remand the suit for rehearing of the Appeal No. 429 of 1914 presented to it, and for fresh disposal on the other points raised in the appeal grounds in the memorandum presented to the District Court other than the questions raised by the 3rd and 4th issues framed in this suit. This judgment governs all the connected cases, one of the results being that similar orders will be issued in Civil Miscellaneous Appeals Nos. 237 to 246 of 1914.

The memorandum of objections in these appeals relates to the District Court's orders as to costs. As the District Court's orders have been wholly set aside it is unnecessary to deal with the objection memoranda.

Civil Revision Petitions Nos. 365 to 369 of 1915 and 58 to 64 of 1915 are allowed and the Subordinate Judge's orders in these suits directing the plaints to be presented to the Revenue Court will be set aside and the Court of first instance will be directed to dispose of these suits itself.

Civil Revision Petitions Nos. 676 to 680 of 1914 and Nos. 49 to 54 of 1915 will stand dismissed with costs.

Costs in the civil miscellaneous appeals and the other civil revision petitions incurred hitherto will abide.

NAPIER, J.—The first point taken before us in this second appeal is that the learned Judge has not decided as a question of fact what ought to have been so decided but has considered himself bound by the decision in *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State* (3) to hold that the services of the *inam* are such as to make it certain that the whole *melvaram* interest in the land was taken into consideration for the purposes of Permanent Settlement. For the respondent, our attention is invited to paragraphs 7 and 9 where a number of Exhibits are considered. It is unfortunate that the District Judge did not realize that the question of the nature of the services was one of the points for determination within the meaning of Order XLI, rule 31, and state it accordingly. From the fact that he has not done so, I am strongly

inclined to think that he considered the above decision to have disposed of that question, all the more so as it was on appeal from his Court. In paragraph 3 he refers to the fact that the District Munsif has well discussed the duties in his judgment and accepts his conclusions drawn, but I cannot find anywhere a decision on the question whether those duties were so personal and private to the *zemindar* as to lead to a presumption in one direction. Still less do I find any examination of the evidence to see if that presumption is rebutted or strengthened. He states only two questions. The first is whether the resumption of the *inam* by the Government even though acquiesced in by the *inamdar*, or the *zemindar*, would have the effect of converting the land into *ryotwari*. This assumes that the consent of the *inamdar* would affect the position which is the very point in issue, for if it was an excluded *inam*, the right of Government to resume on the admitted discontinuance of the duties would be unaffected by the consent or refusal of either the *inamdar* or the *zemindar*. He then says that the service was one "that affected the *zemindar* only to safeguard his collections," and assumes that a presumption of inclusion would arise. Having raised that presumption he passes away from the question altogether and considers the effect of resumption and of the consent of the *zemindar*. He then goes to the question what rights had the tenants in 1903, and it is to decide that question that he examined the evidence in the case and not for the purpose of answering the important question of inclusion. In my opinion he should have examined the evidence and not relied on a presumption unless the evidence was inconclusive.

In *Venkatarangayya v. Poranki Appalarazu* (5), a case from the same district, the learned Judges had to deal with a case of minstrel service, a much more private service than that in this case, and stated the presumption of inclusion strongly but they remitted it to the District Court for a finding whether the land was *lakhiraj*, and in *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State* (3) the question is stated to be purely one of fact. I have dealt with this point at length, because I find myself unable to agree with the view expressed by my learned brother that we

(5) ■ Ind. Cas. 546; 20 M. L. J. 728; ■ M. L. T. 429.

DWIJAPADA KARMAKAR v. MISS. BAILEAU.

should accept the finding of the lower Appellate Court, and the further view that the finding is correct. On this latter point, I desire to express no opinion. I have a great dislike to deciding questions of fact on presumptions where there is evidence and I differ with my learned brother in thinking it *prima facie* unlikely that Government would have consented to exclude these service *inams* at the time of the Permanent Settlement. I should require more evidence as to the nature of the armed police force available at that time to guard the revenue, two-thirds of which belonged to Government, and I think care should be exercised lest one unconsciously applies one's knowledge of conditions existing at present to a state of affairs fifty years before any organised police force came into existence. There is, however, no necessity to express an opinion on the point or to call for a finding, as I agree with my learned brother that these lands have become *ryotwari* by agreement between Government and *zemindar*. Like my learned brother, I express no opinion whether an agreement made after the Madras Estates Land Act would operate in the same manner or whether it would have had any effect if the lands in question had been held by tenants having at the time rights of permanent occupancy and if so, what effect. Such questions do not arise here. But I can see no reason why apart from those considerations ■ *zemindar* or *inamdar* should not be at liberty to agree to waive his special rights and submit to ordinary *ryotwari* assessment. The *zemindar* has clearly done so and he accepts the position. I, therefore, agree with the order proposed by my learned brother.

Appeals allowed; Suit remanded; Petitions Nos. 365 to 369 and 58 to 64 of 1915 accepted and others rejected.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 486 OF 1914.

May 31, 1915.

*Present:—*Mr. Justice Woodroffe

and Mr. Justice Richardson.

DWIJAPADA KARMAKAR—PLAINTIFF—

APPELLANT

versus

MISS BAILEAU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Hindu Law—Apostacy—Guardianship of fatherless

infants, mother's right to, when she wishes to become Christian—Guardian of Hindu infants, duties of.

When the widowed mother of Hindu infants becomes a Christian, that will not of itself be a ground for removing her from the guardianship of the infants, provided that she be in a position to satisfy the Court that she will be able to carry out the obligations which the law imposes upon her of bringing up her children in the faith of her husband. [p. 633, col. 1.]

The fact that a false charge of immorality was made against the mother of infants by the brother of her deceased husband in his application for guardianship of the infants, must necessarily be taken into consideration in any order which might be made by Court in regard to the guardianship, for the mother cannot be expected to live with the family who have made such a charge against her. [p. 632, col. 2.]

Appeal against the order of the District Judge, Nadia, dated the 17th August 1914.

Babu D. N. Bagchi, for the Appellant.

Mr. Avetoom (with him Mr. J. W. Chippendale), for the Respondents.

JUDGMENT.—This is an appeal which arises out of an application for guardianship of the persons and property of two minors, Gobinda Karmakar and Monindra Chandra Karmakar. Gobinda, who is now stated to be 9 years old, is stated to be just over 7 years of age in the judgment under appeal. Monindra is now said to be 5 years of age. The application was opposed by Subasini Dasi, the mother of the two minors. The petitioner, Dwijapada Karmakar, the uncle of the minor, sought to remove the mother from the guardianship on two grounds: *first* of all, on the ground that she ■■■■ woman of bad moral character and *secondly*, that she had herself gone over to the Mission House and had made up her mind to adopt the Christian religion and also to get her sons baptised. The mother denied the allegations which were made against her moral character and those have been held not to be established in the judgment now under appeal; and there is no attempt made in this Court to controvert the findings upon this point. Though, in fact, the charge of immorality made against the mother has not been proved, the fact that this charge was made must necessarily be taken into consideration in any order which we make in this matter, for under such circumstances the mother cannot be expected to live with the family who have made this charge against her. As regards the *second* ground it appears

DWIJAPADA KARMAKAR v. MISS. BAILEAU.

from the record that Subasini has expressed a wish to become a Christian although as a matter of fact she has not yet been baptised. It is not at the present moment certain whether she will become a Christian or not. Even if she had already become a Christian, that would not in itself be a ground for removing her from the guardianship provided that she was in a position to satisfy the court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband, whatever may be the faith she herself may adopt. A difficulty has, however, arisen in this case by reason of the fact that it does appear that in the course of these proceedings she expressed her intention to convert her two sons also to Christianity; and had that intention been persevered in, it is possible that we might have made an order different from that which we now pass; for in so changing her children's faith she would be acting contrary to the obligations which the law imposes upon her, that is to say, of bringing up the children in the Hindu faith of her deceased husband.

An undertaking has, however, been given by her Counsel, Mr. Avetoom, before us that she will not baptise the children and will bring them up as Hindus. That being so, there is, therefore, no ground at present for removing her from her position as guardian. It would in any case be a strong order for any Court to pass to take a child of 5 years of age from his mother. The point which I next consider is how best this undertaking of hers may be carried out. We have to consider in this matter the interest of the minors themselves in its several aspects. The mother has practically no means, but we have been informed that she has received an offer from a stranger to these proceedings which, if accepted by her, will enable her to give her two sons an education. That offer is to pay all the expenses of the education of the two children at the Hindu Hostel in Krishnagar, attached to the Church Missionary Society there. It has been stated to us that the boys at this Hindu Hostel are all Hindu boys and that no attendance is required by such boys at any of the Bible classes or other classes teaching the Christian religion; and that no attempt will be made to interfere in any way with their Hindu faith. It is on the understanding that the mother will educate her children under these conditions

that we make the order. At the same time we think, seeing that the mother has expressed a desire to become a Christian, and that if she does become a Christian she will not be in a position to effectively see to the education of the boys so far as their Hindu faith is concerned, we think we ought to associate with the mother, as guardian, the applicant Dwijapada Karmakar, who in such guardian will be in a position to see that the undertaking which is given by the mother that the children should be brought up in the Hindu faith is properly carried out. The order that we then make is that the mother remains the guardian of the person and property of the children and that with her be associated as guardian the applicant Dwijapada Karmakar.

The younger boy is too young, in our opinion, to be sent to a school at once. He should, therefore, remain in custody of his mother until he is seven years old, when he also will be put into school at the Hindu Hostel in Krishnagar, but it is understood and undertaken that he will not be baptised nor other acts done to make him a Christian. The elder boy will go to the Hostel at once. Facilities must be given to both the guardians and the other relatives of the children to see the latter whenever they desire to do so subject to the rules of the Hostel. If the male guardian has any reason to complain that any of the directions or undertakings given in this order have not been carried out or that their terms are in any way infringed, it will be open to him to apply to the District Judge of Nadia who will then make such further order in the matter as he thinks fit. Subject to the rules of the Hostel the children while at the Hostel will be allowed to visit their relatives, including their uncle and others, at their houses.

We make no order as to costs of this appeal.

Order modified.

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE AND ORDER
No. 43 of 1915.

December 21, 1915.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

Srimati MATHURA SUNDARI DASSI—
PLAINTIFF—APPELLANT

versus

HARAN CHANDRA SHAHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. IX, r. 9, O. XLIII, r. 1, cl. (c)—Order refusing to restore suit dismissed for default by Judge on Original Side—Legal advisers, mistake or laches of—Party, whether should be penalized for—Appeal, if maintainable—Order, if judgment—Letters Patent, cl. 15.

An order of a Judge of the High Court in its original jurisdiction rejecting an application under Order IX, rule 9, Civil Procedure Code, for the restoration of a suit dismissed for default, is a judgment within the meaning of clause 15 of the Letters Patent and is appealable. [p. 635 cols. 1 & 2; p. 637 col. 1; p. 638, col. 1; p. 639, col. 1.]

Per Sanderson, C. J., and Mookerjee, J.—Such an order is appealable under Order XLIII, rule 1, clause (c), of the Civil Procedure Code, as the Code and the rules made under it apply to an appeal from a decision of a Judge of the High Court on the original side. [p. 635, col. 2; p. 638, col. 1.]

Per Mookerjee J.—Where the competency of an appeal is in question it is incumbent upon the appellant to establish that he has a right of appeal, for a right of appeal does not exist in the nature of things but must be given by express enactment. [p. 637, cols. 1 & 2.]

Rangoon Botatoung Company Limited v. Collector of Rangoon, 16 Ind. Cas. 188; 39 I. A. 197; 40 C. 21; 16 C. W. N. 961; 16 C. L. J. 245; (1912) M. W. N. 781; 12 M. L. T. 195; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150 (P. C.), followed.

Sandback Charity Trustees v. North Staffordshire Railway Company, (1877) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391; 26 W. R. 229, followed.

Even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs. [p. 640, col. 1.]

Oriental Finance Corporation Ltd. v. Mercantile Credit and Finance Corporation Ltd., 2 Bom. H. C. R. 267; *Burgoin v. Taylor*, (1878) 9 Ch. D. 1; 47 L. J. Ch. 542; 38 L. T. 438; 26 W. R. 568; *Southampton Steamboat Co. v. Rawlins*, (1865) 34 L. J. Ch. 287; 11 Jur. (N. S.) 230; 13 W. R. 512; *Mitchell v. Wilson*, (1877) 25 W. R. 380; *Birch v. Williams*, (1876) 24 W. R. 700; *Hale v. Lewis*, (1838) 2 Keen 318; 48 E. R. 651; *Muruga Chetty v. Rajasami*, 14 Ind. Cas. 823; (1912) M. W. N. 332; 11 M. L. T. 280; 22 M. L. J. 284, referred to.

Appeal against the decree and order of Mr. Justice Imam, sitting on the Original Side

of the High Court dated the 5th February 1915.

Messrs. S. R. Das, B. C. Mitter and N. Gossain, for the Appellant.

Messrs. W. Jackson, N. Sarkar, N. Bhose, S. C. Bhur and M. N. Bose, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—With regard to the preliminary objection which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under Order IX, rule 8, which deals with default of appearance, and, therefore, I propose, whatever may have been the real position, to deal with the argument which was presented to us by the learned Counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under Order IX, rule 8. That order was made on the 5th of February 1915. Then an application was made on the 25th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned Counsel for the defendant that no appeal lies from such an order.

It was argued by the learned Counsel for the defendant, Mr. Jackson, *first*, that the order in question was not a 'judgment' within the meaning of clause 15 of the Letters Patent; and, *secondly*, that if it is not within clause 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Court.

As to the *first* point, namely, whether the order in question was a 'judgment' within the meaning of clause 15, personally I should not have had much doubt or hesitation in holding that the order was a 'judgment' within the meaning of that clause, if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under Order IX, rule 8. In fact, the rule expressly says, "where the defendant appears and the plaintiff does not

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA.

appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed." The Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, in this case, be a matter of great importance: It is no less than whether the plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Clause 15 obviously refers to 'judgments' which in common parlance may be called orders. In my opinion, the decision so arrived at on such a question as above stated would be a 'judgment' within the meaning of the word 'judgment' in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them: the most important are *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* (1) and *Gobinda Lal Das v. Shiba Das Chatterjee* (2). I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported case, and I am informed that many such appeals, as this, have been heard in the Court of Appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the plaintiff does, in my opinion, decide a question which affects the rights of the plaintiff. He alleges that he should be allowed to prosecute his claim. A refusal of the application debars him for all time. If he had put in a plaint which was ill-framed and that had been struck out by the learned Judge, according to the decision in one of the cases, he would have a right of

appeal within the very terms of the judgment in that case—that was an illustration in the case in *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* (1)—yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal.

I should be very loth to hold that this order is not a 'judgment' within the meaning of clause 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it because I think, on the second point, the Code does give a right of appeal. By clause 44 of the Letters Patent it is provided as follows: "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." By the terms of section 117, the Code is made applicable to the High Court, and Order XLIII, rule 1, gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that Order IX, rule 8, applies. That Order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to Order IX, rule 8, and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which—when his application for re-instatement has been refused—gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

This case has given me a considerable amount of anxiety, and I think the safest thing for me to do in giving judgment, having regard to the course which we intend to adopt, is to say as little as possible

(1) 10 I. A. 4; 9 C. 482; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406.

(2) 33 C. 1323; 10 C. W. N. 986; 3 C. L. J. 545.

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA.

about the case itself, on the merits or demerits of the case, because if I do say anything, it may be taken to prejudice either the one side or the other. I have come to the conclusion that the safest course for this Court will be to order this suit to be re-entered—I am not grounding my judgment upon what happened before January or February this year, but I take a few facts, namely, that this case was fixed to be tried by Mr. Justice Imam on the 4th of February; that, apparently, according to the evidence which was before the Court on the 3rd, the plaintiff, the lady, who had been suffering to some extent from colic for sometime was taken worse; that on the 4th that matter was mentioned to the learned Judge, and that an application would be made for adjournment. When the case was called on the 5th what happened is shown by the entry in the learned Judge's note and is as follows: "Mr. Das withdraws from the case, that he has only instructions to apply for adjournment and he does not appear any more in the case." I do not know exactly what the position was as regards Mr. Das—unfortunately, he is not here to-day; he is out of Calcutta as I understand—but having regard to the admission which has been made by the learned Counsel for the appellant, Mr. S. R. Das, to the effect that the learned Counsel who appeared in the Court below took a wrong course, it seems to me that we must conclude that he ought to have gone on with the case, when the learned Judge gave him an opportunity of calling his other witnesses, and if necessary asking for an adjournment in order that the plaintiff might be examined at a subsequent time. It is, therefore, admitted that the learned Counsel made a mistake, in the course which he and his junior adopted. The only question is, whether the plaintiff in consequence of that mistake is to be debarred for all time from prosecuting her suit. It is a suit for a large sum of money: there are serious issues in it, and I think that if I had been in the position of Mr. Justice Imam, I would have allowed the case to be re-entered upon terms: and, inasmuch as there is an appeal (we have decided already that there is an appeal in a matter of this kind), I had to apply my mind and try to ascertain what I should have done had I been in the position of Mr. Justice Imam. In my judgment, this case should

be re-entered and the conditions of re-instatement are these: The plaintiff must pay the taxed costs of the defendants, viz., such costs as were thrown away by the case not proceeding on the day when it should have, and she must also pay the taxed costs of the defendants upon the application before Mr. Justice Imam for restoration, and also the taxed costs of the respondents in this appeal, except for the first day which I think occupied by the argument on the preliminary objection that there was no appeal, upon which question we have decided against the respondent. The plaintiff must pay such costs as I have intimated as a condition precedent to the case being re-entered: And, upon the point mentioned by Mr. Das, although at one stage of the proceedings there were only two sets of costs, still it seems to me that the defendants are entitled to appear here by separate Counsel and as regards this appeal there will be separate sets of costs as regards each defendant, who appeared.

Further, inasmuch as the taxation of costs may take sometime, we think that the plaintiff ought to bring into Court within three weeks from this date the sum of rupees two thousand, and it is to be clearly understood that the case will not be re-entered until the costs have been taxed and paid: they must be paid within one month from the certificate of costs. The appellant will have the costs of the first day of the appeal which was taken up in the preliminary point, and these costs will be set off, on taxation, against the costs which she will have to pay.

We direct that the taxation be expedited.

If the sum of Rs. 2,000 be not paid into Court and if the taxed costs payable by the appellant as aforesaid, after the taxation and the set-off, be not paid by her within the time fixed, the case will not be restored, and in that event the appellant will be liable to pay the taxed costs of this appeal after the set-off which has been allowed.

WOODROFFE, J.—I need not in this case consider the question whether section 104 of the Civil Procedure Code touches the right of appeal given by the Letters Patent, for, if the order appealed from is a judgment within the meaning of the Letters Patent, the question does not arise. It has doubtless been held that an order dismissing an appeal for default is not a judg-

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHHA.

ment [see *Mansab Ali v. Nihal Chand* (3)]. But we are not concerned here with an order under Order IX, rule 8, only but with an application for restoration under Order IX, rule 9. Whether or not as a question of jurisdiction an appeal lies under clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code, I think it may be said that there are *prima facie* grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for the fact that the Legislature has in the Code allowed an appeal in a particular case, affords to my mind *prima facie* ground for supposing that that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction [see *Musammatt Brij Coomaree v. Ramrick Dass* (4)]. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a 'judgment' under the Letters Patent. I do not consider that the case reported as *Gobinda Lal Das v. Shib Das Chatterjee* (2), which was on another section, is any bar to my so holding.

On the facts of this appeal I have myself doubts whether we should allow it. But as my learned colleagues are prepared to give an indulgence to the plaintiff and that indulgence is to be on the term that all costs should be paid as a condition precedent, I do not dissent from the order proposed.

MOOKERJEE, J.—This appeal is directed against an order under rule 9 of Order IX of the Civil Procedure Code, whereby Mr. Justice Imam has refused to set aside an order of dismissal of a suit made by him under rule 8.

As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the appellant to establish that she has a right of appeal [*Minakshi Naidu v. Subramanya Sastri* (5)], for as Lord Bramwell said in *Sandback Charity Trustees v. North Staffordshire Railway Company* (6), "an appeal does not exist in

the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment"—words quoted with approval by Lord Macnaghten in *Rangoon Botatoung Company Ltd. v. Collector of Rangoon* (7). She relies upon Order XLIII, rule 1, clause (c), Civil Procedure Code, as also upon clause 15 of the Letters Patent. Order XLIII, rule 1, clause (c), provides that "an appeal shall lie from an order under Order IX, rule 9, rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit." The question, consequently, arises, whether Order XLIII, rule 1, clause (c), is applicable to an order under Order IX, rule 9, made by a Judge on the Original Side of this Court.

On behalf of the appellant, reliance has been placed upon section 117 of the Code, which lays down that "Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861." The only provision in part IX, which may have any possible bearing, is that contained in section 120, which obviously does not touch the present question. The provision in part X, which deals with this matter, is contained in section 129; this also does not militate against the contention of the appellant. The term "Rule," which finds place in section 117, is defined in clause 18 of section 2 of the Code to mean "a rule contained in the First Schedule or made under section 122 or section 125." Our attention has not been drawn to any such rule which makes Order XLIII, rule 1, clause (c), inapplicable. On the other hand, Order XLIX, rule 3, which excludes the operation of other rules, lends support to the contention of the appellant that Order XLIII, rule 1, clause (c), is applicable to the present appeal.

But it has been argued on behalf of the respondents, on the authority of the decision of the Judicial Committee in *Hurrish Ohunder Chowdhry v. Kali Sunderi Debi* (1), that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal pre-

(3) 15 A. 359; A. W. N. (1893) 113.

(4) 5 C. W. N. 781.

(5) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393.

(6) (1877) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391; 26 W. R. 229.

(7) 16 Ind. Cas. 188; 39 I. A. 197; 40 C. 21; 16 C. W. N. 961; 16 C. L. J. 245; (1912) M. W. N. 781; 12 M. L. T. 195; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150.

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA.

ferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in *Toolsee Money Dassee v. Sudevi Dassee* (8), but it is not necessary for my present purpose to determine its bearing in all its implications, because, in my opinion, the law has been substantially altered since that decision was pronounced. Section 104 of the Code of 1908 is materially different from section 588 of the Code of 1882. It provides that "an appeal shall lie from the orders mentioned in the first clause of that section and, *save as otherwise expressly provided in the body of the Code or by any law for the time being in force*, from no other orders." The effect of section 104 is thus, not to take away a right of appeal given by clause 15 of the Letters Patent, but to create a right of appeal in cases even where clause 15 of the Letters Patent is not applicable. I may here observe parenthetically that in the case of *Toolsee Money Dassee v. Sudevi Dassee* (8), Prinsep, J., felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. Section 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of Appeal under section 13 of the Indian High Courts Act. I hold accordingly that this appeal is competent under clause (c), rule 1, Order XLIII of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under clause 15 of the Letters Patent. That clause allows an appeal from a "judgment," and, the controversy has consequently centred round this expression. Reference has been made to the now classical definition [*Musammatt Brij Coomaree v. Ramrick Dass* (4)] first formulated by Couch, C. J., in the case of *Justices of the Peace for Calcutta v. Oriental Gas Co.* (9); "judgment" in clause 15 means

a decision "which affects the merits of the question between the parties by determining some right or liability; it may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." Substantially the same view was adopted by Sargent, C. J., in *Sonbai v. Ahmellhai Habibhai* (10) and was later on applied by Couch, C. J., himself in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed* (11), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. Reference may also be made to the decision of this Court in *Kally Soondery Dabia v. Hurrish Chunder Chowdhry* (12) subsequently affirmed by the Judicial Committee *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* (1), where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do not profess to give an exhaustive definition of the term "judgment," and other definitions of a very comprehensive scope have, from time to time, been attempted, for instance by Scott, C. J., in *Ahmed v. Ayeshabai* (13), by Bittleston, J., in *De Souza v. Coles* (14), and by White, C. J., in *Tuljaram Row v. Alagappa Chettiar* (15). In the opinion of Bittleston, J., the term 'judgment' includes "any decision or determination affecting the rights or the interest of any suitor or applicant," and that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White, C. J., this is too wide, and the test is "not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or

(10) 9 Bom. II. C. R. 398.

(11) 13 B. L. R. 91; 21 W. R. 303.

(12) 6 C. 594; 7 C. L. R. 543.

(13) 2 Ind. Cas. 167; 11 Bom. L. R. 248.

(14) 3 M. H. C. R. 384.

(15) 8 Ind. Cas. 340; 35 M. 1; 8 M. L. T. 453 (1910) M. W. N. 696; 21 M. L. J. 1.

(8) 26 C. 361; 3 C. W. N. 347.

(9) 8 B. L. R. 433; 17 W. R. 364.

MATHURA SUNDARI DASSI v. HARAN CHANDRA SHAHA.

proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is ■ judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment"—although I may add that I am not disposed, ■ Maclean, C. J., was not disposed [*Musammatt Brij Coomaree v. Ramrick Dass* (4)] to favour an attempt to place ■ narrow construction on the term "judgment,"—it is plain that the order in this case is ■ "judgment" within the definition formulated by Couch, C. J., in *Justices of the Peace for Calcutta v. Oriental Gas Co.* (9). The order under appeal does affect the merits of the question in controversy between the parties by the determination of ■ right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under rule 9. The effect of the subsequent order is accordingly to give ■ character of finality to the primary order of dismissal, by a determination that the applicant had failed to establish grounds in support of his alleged right to an order under rule 9 of Order IX. Such determination is, in my opinion, a "judgment" within the meaning of clause 15 of the Letters Patent.

I am not unmindful that the contrary view may receive an apparent support from some dicta in reported decisions, for instance, *Rughoo Bibee v. Noor Jehan Begum* (16) and *Gobinda Lal Das v. Shiba Das Chatterjee* (2). As regards the former case, which ruled that an order dismissing an application for review is not a "judgment," it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform [*Ramhari Sahu v. Madan Mohan Mitter* (17), *Aubhoy Churn Mohunt v. Shamont Lochan Mohunt* (18) and *Mulji Virji v. Bangabashi Saha* (19)]. As regards the latter

case, stress is laid upon the following passage in the judgment of Ghose, C. J., "an order, which terminates a proceeding, is a judgment within the meaning of clause 15, but it must be a proceeding,..... in the course of a suit or in relation thereto, and in which some question or other ■ to the right or liability of any party is raised, and not a proceeding in respect of ■ matter, which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the law, for the qualification formulated plainly carries us beyond the definition of the term "judgment" as given by Couch, C. J., and if the question arises in another case precisely on all fours with the decision mentioned, and if it comes before me, I shall not hesitate to refer the matter for consideration to ■ Full Bench. It is not necessary, however, to adopt that course on the present occasion, as admittedly there is no decision which precisely covers the case before us; and the class of cases which rule that an order refusing [*Tara Chand Biswas v. RadhaJeebun Mustofee* (20), *Manly v. Patterson* (21), *Lutf Ali Khan v. Asgur Reza* (22) and *Kishen Pershad Pandey v. Tiluckdhari Lall* (23)] or granting [*Musammatt Amirruneessa v. Baboo Behary Lall* (24) and *Mowla Buksh v. Kishen Pertab Sahi* (25)] an application for leave to appeal to His Majesty in Council, or for stay of execution [*Mohabir Prosad Singh v. Adhikari Kunwar* (26) and *Chitto Sheik v. Muzzur Hossain* (27)] is not ■ "judgment," plainly stands on a different footing.

As regards the merits, I am clearly of opinion that the application under rule 9 of Order IX should have been granted. We have not had the advantage of hearing from Mr. C. R. Das his version of what took place in Court when the suit was dismissed for default. But, on the materials

(20) 24 W. R. 148.

(21) 7 C. 339; 9 C. L. R. 166.

(22) 17 C. 455.

(23) 18 C. 182.

(24) 25 W. R. 529.

(25) 24 W. R. 150; 1 C. 102.

(26) 21 C. 473.

(27) 2 Hyde, 212.

(16) 12 W. R. 459; 4 B. L. R. A. C. J. 10.

(17) 23 C. 339.

(18) 16 C. 788.

(19) 9 C. W. N. 502.

HAR BAKHSH SINGH V. LALLA.

before me, I see no escape from the conclusion that there was a grave error of judgment on his part and that he should have proceeded with the suit. The question then reduces to this: should his client be penalized for his error of judgment, if so, to what extent. The client will be penalized by the order which the Court of Appeal is about to make in so far as the payment of costs is concerned; but I am not prepared to hold that the client should be penalized to the extent of dismissal of her claim without investigation. Judicial decisions of high authority favour the view, that even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs [*Southampton Steamboat Co. v. Rawlins* 28], *Michell v. Wilson* (29), *Birch v. Williams* (30), *Hale v. Lewis* (3), *Muruga Chetty v. Rajasami* (32)], but reference need be made specially to one case in this country, *Oriental Finance Corporation Ltd. v. Mercantile Credit and Finance Corporation Ltd.* (33), and to another in England, *Burgoinc v. Taylor* (34). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

Appeal allowed; Suit restored.

(28) (1865) 34 L. J. Ch. 287; 11 Jur. (N. S.) 230; 13 W. R. 512.

(29) (1877) 25 W. R. 380.

(30) (1876) 24 W. R. 700.

(31) (1838) 2 Keen 318; 48 E. R. 651.

(32) 14 Ind. Cas. 823; 22 M. L. J. 284; (1912) M. W. N. 332; 11 M. L. T. 280.

(33) 2 Bom. H. C. R. 267.

(34) (1878) 9 Ch. D. 1; 47 L. J. Ch. 542; 38 L. T. 438; 26 W. R. 568.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 63 OF 1915-16 OF
HARDOI DISTRICT.

April 19, 1916.

Present:—Mr. Campbell, J. M.

HAR BAKHSH SINGH—PLAINTIFF—
APPELLANT

versus

LALLA AND ANOTHER—DEFENDANTS—
RESPONDENTS.

[*Res judicata*—*Recovery of occupancy, suit for.*

Where a tenant's suit to contest a notice of ejectment is dismissed owing to his failure to adduce evidence in support of his allegations, the decision in that suit operates as *res judicata* in a subsequent suit brought by him for recovery of occupancy based on the same allegations, although he is now ready to prove them.

Appeal from the decree of the Commissioner, Lucknow, dated the 3rd November 1915, upholding the order of the Assistant Collector, Hardoi, dated the 7th July 1915.

FACTS.—The defendants-landlords issued a notice of ejectment against the plaintiff-tenant, who contested it on the ground that he was not liable to ejectment by notice inasmuch as he had been holding under a lease given in accordance with Circular No. 16/2234 of 1874, which conferred heritable rights upon the lessee. The lease was not produced and the case was decided against him. An application for review of judgment was, however, made and the lease was produced along with the application, but it was refused. This order of refusal was upheld even in appeal. Thereupon the plaintiff brought the present suit under section 108 (10) of the Oudh Rent Act for recovery of occupancy, on the ground that he had been illegally ejected as he was a tenant with heritable rights under the above-mentioned circular. The defence set up was that the previous decision in the suit to contest notice of ejectment operated as *res judicata* in the present suit.

Mr. St. C. Thompson, for the Appellant.

Mr. Harnarain Das, for the Respondents.

JUDGMENT.—I see no reason to interfere. It was distinctly in issue, and decided adversely to appellant in a suit in 1914, whether appellant was a tenant under the Circular No. 16 of 1874. The question could not be re-opened by the present suit. Appellant was not illegally ejected but in due course of law. I uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

SHER SINGH v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 138 OF 1916.

January 22, 1916.

Present:—Mr. Justice Leslie Jones.

SHER SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Foreigners Ordinance (III of 1914), ss. 3, 4, 7—Infringement of order under s. 3—Procedure for trial of offender—Appeal, right of—Criminal Procedure Code (Act V of 1898), ss. 5, 408.

An ordinance is a law and an infringement of its provisions is an offence. Consequently an inquiry into such an offence must, under section 5 of the Criminal Procedure Code, be dealt with according to the provisions of that Code, unless there is any other enactment in force prescribing a different method of inquiry into such an offence and in the case of an offence under Ordinance III of 1914, unless there are rules promulgated in exercise of the power conferred by section 7 of the Ordinance [p. 642 col. 1.]

Where, therefore, the petitioner was charged with having infringed an order under section 3 of Ordinance III of 1914, and the District Magistrate held a regular trial under the Criminal Procedure Code and convicted the petitioner:

Held, that the District Magistrate was bound, as he did, to conduct the trial in accordance with the provisions of the Criminal Procedure Code and that accordingly an appeal lay to the Sessions Judge under section 408 of the Code. [p. 642, col. 1.]

Criminal revision from the order of the Sessions Judge, Sialkot, dated the 30th August 1915.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—It was reported to the District Magistrate of Sialkot that the petitioner Sher Singh had infringed an order under section 3 of Ordinance No. III of 1914. The District Magistrate first heard all the evidence without allowing Sher Singh to be represented by Counsel and without framing any charge. Before, however, signing his order he decided that as no procedure was laid down for such cases it was wiser to hear the case as a warrant case under the Code of Criminal Procedure. He, therefore, re-heard all the evidence in the presence of Counsel for the accused and framed a charge. As the result of these proceedings Sher Singh was ordered to undergo rigorous imprisonment for the term of one year.

Sher Singh then appealed to the Sessions Judge of Sialkot, who held that he

had no jurisdiction to hear the appeal. Sher Singh has now preferred a petition for revision to this Court. Mr. Herbert, who has appeared for the Crown, has argued that if the District Magistrate had not employed the provisions of the Criminal Procedure Code, the Sessions Judge would have been perfectly right, but he has stated further that in his opinion the fact that the District Magistrate held a regular trial under the Criminal Procedure Code, gave the petitioner a right to appeal to the Sessions Judge under section 408 of that Code and that for that reason he is unable to support the order of the Sessions Judge.

It seems to me, however, that if no trial was necessary and the District Magistrate was not bound to observe the provisions of the Code, the mere fact that he did so would be unessential. If he could punish the petitioner without a trial, the mere holding of an unnecessary trial would not give a right of appeal.

I prefer, therefore, to base my decision on different grounds.

The contention of the petitioner is that the act of which he was accused, if committed, amounted to an offence as defined in section 4 (o) of the Criminal Procedure Code, where an offence is described as meaning any act or omission made punishable by any law for the time being in force.

He then goes on to refer to section 5 (2) of the same Code, in which it is laid down that "all offences under any other law (*i. e.*, under the Indian Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Section 7 (1) of Ordinance III of 1914 gives power to the Governor-General in Council to make rules for the purpose of carrying into effect the provisions of that Ordinance, but apparently no such rules have yet been promulgated.

It is true, as is remarked by the learned Sessions Judge, that the Ordinance in question is not an Act of the regular Legislature, but it is nevertheless a law

KARM SINGH v. EMPEROR.

enacted by authority with power to enact it and is nonetheless a law because in order to distinguish it from Acts of the Legislature it is described as an Ordinance.

It is true, again, that the word "offence" is not used in section 4 of the Ordinance, but I do not know how it is possible to describe in one word the contravention of the provisions of any order made under section 3 otherwise than by the use of the word "offence," and it is noticeable, as has been pointed out to me by the learned Assistant Legal Remembrancer, that the word "offence" has been used in section 4 of Ordinance No. VII of 1914 which amends section 4 of Ordinance III of 1914.

If, then, as I must hold, the Ordinance is a law and the infringement of its provisions is an offence, it follows that the inquiry into such an offence must be dealt with according to the provisions of the Criminal Procedure Code, unless there is any other enactment in force prescribing a different method of inquiry into such an offence. It is possible that if any rules had been promulgated in exercise of the power conferred by section 7 of Ordinance III of 1914, a different procedure might have been laid down; but since there are no such rules it appears to me to be clear that the Criminal Procedure Code must be followed. It is impossible, I think, to suppose that in the application of this Ordinance it was intended to dispense with all forms of trial, any more than it is possible to suppose that the failure of the Ordinance to define the authority which is empowered to pass orders under section 3 or 4 would justify the exercise of such authority by any irresponsible person who elected to arrogate it to himself. The Courts empowered to try such offences are named in Schedule II of the Criminal Procedure Code, under the heading of offences against other laws.

For these reasons I hold that the District Magistrate was bound, as he did, to conduct the trial in accordance with the provisions of the Criminal Procedure Code, and that accordingly an appeal lay to the Sessions Judge under section 408 of that Code. I accordingly accept the petition for revision and remand the appeal to the Court of the Sessions Judge for decision on its merits.

Petition accepted.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 287 of 1916.

May 23, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

KARM SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 24, 25—Confession to zaildar in consequence of inducement, whether admissible—Retracted confession, value of—Corroboration necessary.

Where a person suspected of having committed murder made a confession to the zaildar, in consequence of the latter dropping a remark to the effect that his own brother had committed a murder but had got off on making a clean breast of the matter

Held, that the zaildar, although not in charge of the investigation, was a leading man holding a responsible post, and that this remark of his was a distinct inducement to the accused to make a confession which rendered the confession inadmissible in evidence; [p. 644, col. 1.]

that inasmuch as the Police were in the immediate vicinity at the time of the confession and the accused, though not handcuffed, was in Police detention as a suspect, he was to all intents and purposes in Police custody and the confession could not be proved unless made to a Magistrate. [p. 644, col. 1.]

Where a retracted confession is the sole evidence against an accused, it can be of but little value, especially remembering the race for a pardon which sometimes occurs when a number of persons are suspected of an offence and others have already confessed or are believed to have already confessed. [p. 644, col. 2.]

As against a co-accused, a confession which has been retracted at the first opportunity should not be relied upon, unless corroborated by independent testimony. [p. 644, col. 2.]

The mere fact that a blood-stained garment is found in a house is not sufficient proof that any particular member of the family residing in that house is guilty of a murder which has recently been committed in the village. [p. 644, col. 2.]

Appeal from the order of the Sessions Judge, Rawalpindi, dated the 20th March 1916, convicting the appellant.

Rai Sahib Lala Mul Chand, Public Prosecutor, for the Respondent.

JUDGMENT.

CHEVIS, J.—This judgment will cover the three connected appeals Nos. 288, 289 and 290 of 1916.

The four appellants Gurmukh Singh, Ishra Singh, Karm Singh and Amolak Ram have been convicted of the murder of Bhagat Singh, and have been sentenced to death. Karm Singh and Amolak Ram have appeal-

KARM SINGH v. EMPEROR.

ed through Jail, and Ishra Singh and Gurmukh Singh through Counsel. The [redacted] of each convict is also before us under section 374, Criminal Procedure Code, for orders [redacted] to confirmation of the death sentence.

The following facts are not disputed. Bhagat Singh lived at village Kazian, some 7 miles from Gujar Khan. He was murdered on the night of the 29th December 1915, by blows of a sharp-edged weapon. The deceased was sleeping that night in a room by himself. He had recently been married, but his wife had not yet come to live with him. His father, [redacted] *patwari*, was living in the Jhelum district. Deceased was a young man of about 18 years of age. He was sleeping in [redacted] room by himself on the night of the murder. His sister *Musammât Soma Wanti*, aged about 14 or 15, and his younger brothers and sister were sleeping in another room in another part of the same compound. The murderer, or murderers, after killing Bhagat Singh, attempted to hide traces of the crime by setting fire to the deceased's bedding and to a neighbouring hut in which *bhusa* was stocked, but *Musammât Soma Wanti* was awakened by smoke entering the room in which she was sleeping, and she went out and gave the alarm and the neighbours came and the fire was extinguished. Report of the murder was sent off to the *thana*, and the usual Police investigation began. The only question is, whether it is proved that the present appellants committed the murder.

In this report made at the *thana* it was stated that nothing was known as to who had committed the murder.

The motive now alleged is that the deceased had been carrying on an intrigue with Gurmukh Singh's sister and that Gurmukh Singh got the other three appellants to join him in committing the murder. The four appellants are apparently not related to one another in any way. Apart from the alleged motive, it is not stated that any of them had any reason to bear ill-will towards the deceased. On the contrary Ishra Singh and Karm Singh are said to have been on friendly terms with him and to have taken tea with him on the evening preceding the murder. A statement by Soma Wanti as to the tea drinking led to Ishra Singh and Karm Singh being sent for by the Police and

questioned. Further, a post card, dated 17th December, addressed to Karm Singh who had been to a place in the Bhawalpur State fell into the hands of the Police. This card told him to return quickly, as his mother was ill. This card is said to have aroused further suspicion, [redacted] the card purported to have been written by Seva Ram, brother of Karm Singh, and the learned Government Advocate tells us that Seva Ram is illiterate, that Karm Singh's mother was not really ill, and that the card was really written by the deceased. If this really be so, though it is not proved by the evidence on the record, it would rather go to support the idea of Karm Singh and deceased being on friendly terms than to help the theory of any enmity.

Then we are told that on the evening of the 31st December 1915 *Qazi Bagh Ali*, the local *zaildar*, joined the investigation and after he had dropped a remark to the effect that his own brother, Muhammad Hussain, had committed [redacted] murder but had got a pardon on telling the whole truth, the suspect-Karm Singh said he would tell the *zaildar* all about it if everybody else left the room. The Police then left the room, and Karm Singh confessed to the *zaildar*, implicating himself and the other three appellants. The Police were then recalled and then Karm Singh led the party to a place about 150 paces from the village where he dug up the head of a hatchet buried in [redacted] field.

Ishra Singh's house was then searched and two blood-stained articles, *viz.*, [redacted] pair of *pyjamas* and a piece of muslin were there found. The report of the Imperial Serologist shows that human blood was found on these articles.

Nothing was found in the houses of Gurmukh Singh and Amolak Ram, but on the 11th January Amolak Ram, who had been arrested on the 2nd January, was produced before a Magistrate and made [redacted] confession.

We will first deal with the confession of Karm Singh to the *zaildar*, which the learned Sessions Judge has found to be admissible. This confession seems to us open to objection on three grounds. *First*, we have the fact that the *zaildar* dropped [redacted] remark that his brother had committed [redacted] murder and had got off on making [redacted] clean breast of the matter.

KARM SINGH v. EMPEROR.

The *zaildar* was not in charge of the investigation, but he is a leading man, holding a Government post and this was distinct inducement to Karm Singh to make a confession. Next it seems clear that the Police were in the immediate vicinity at the time of the confession and it is doubtful whether the confession was not practically made to them. Lastly, it seems clear that though not handcuffed Karm Singh was in Police detention as a suspect, and was not free to leave the place even had he wanted to do so, and so he must be regarded as to all intents and purposes in Police custody, and in such a case the law is clear that no confession can be proved unless made to a Magistrate. We think then that the evidence as to Karm Singh's confession to the *zaildar* must be ruled out.

Then as to the alleged intrigue between deceased and Gurmukh Singh's sister. As already remarked, no mention of this is made in the first report. The prosecution case here rests on the evidence of the *zaildar's* relation Muhammad Hussain, described in the *zaildar's* evidence as a brother of the *zaildar*, though apparently not a brother as the two are sons of different fathers according to the record. This man says he several times saw deceased and the girl talking together. This witness was some years ago arrested in a murder case, but got off on a pardon. His evidence, even if true, does not go far; he is the sole witness on the point and after looking up his first statement to the Police, as stated in the Police diaries, we have no hesitation in rejecting it. We note that the Sessions Judge has not recorded any finding as to whether he relies on it.

Disregarding the evidence now ruled out, we find the evidence against each appellant to amount to the following:—

(1) Against Karm Singh there is the production of the head of a hatchet, and the retracted confession of Amolak Ram.

(2) Against Ishra Singh, the finding of the blood-stained *pyjamas*, and Amolak Ram's confession.

(3) Against Amolak Ram, his own confession.

(4) Against Gurmukh Singh, Amolak Ram's confession.

As to the hatchet head no blood was found on it, and so there is no proof that it

was the head of the weapon with which the murder was committed. The head found was notched, and the medical evidence renders it further doubtful if this is the head of the weapon with which the murder was committed. The evidence of Mangal Singh (P. W. No. 16) as to having seen deceased and Karm Singh together while the latter sharpened this particular axe head on the night of the murder, we regard as of no value whatever. The witness says he had never seen an axe head like this before, and so took it in his hand, but what the peculiarity in this particular axe head was is nowhere made clear from the evidence.

As to the blood-stained *pyjamas* and piece of muslin found in Ishra Singh's house, this would be of more value if we were told how many people live in this house, but the Sub-Inspector, the Circle Inspector and even the *zaildar* (though the last lives in the same village) are unable to tell us how many brothers Ishra Singh has, or whether they all live in the same house. The mere fact that a blood-stained garment is found in a house is not sufficient proof that any particular member of the family residing in that house is guilty of a murder which has recently been committed in the village. There is no clear proof that either the *pyjamas* or the piece of muslin belong to Ishra Singh.

Then as to Amolak Ram's retracted confession and first as to its value when considered as against himself. When such a confession is the sole evidence against a man it can be of but little value, especially remembering the race for a pardon which sometimes occurs when a number of persons are suspected of an offence, and others have already confessed or are believed to have already confessed. In such a case even innocent men may think the best way out of the difficulty is to make a confession and hope for a pardon. And the value of such a confession as against the co-accused is even less, for if in practice it is generally held that the evidence of an approver, who is put on oath and subjected to the test of cross-examination should not be relied on unless corroborated, still more so should this be the rule in case of a confession of a co-accused retracted at the first opportunity. We may further remark that the confession in question shows

In the matter of JUGAL CHANDRA.

the motive for the confessor's joining in the murder to be a bribe of Rs. 100, none of which was paid in advance and none of which has yet been paid, further, that the confession hardly fits in with the discovery of an axe head buried in a field, as according to the confession both head and handle of the axe were left at the scene of the murder.

We consider the evidence far too weak to warrant the conviction of any one of the appellants, and we accept all four appeals and reversing finding and sentence we acquit the four appellants and order them to be released.

Appeals accepted.

**PATNA HIGH COURT.
FULL BENCH.**

REFERENCE No. 3 OF 1916.

June 1, 1916.

*Present:—*Sir Edward Chamier, Kt., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Atkinson.

In the matter of Babu JUGAL CHANDRA MAZUMDAR, PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 13—Pleader—Misconduct—Instructions from unauthorized person without enquiry.

A Pleader, who receives instructions from an unauthorized person, who is neither the recognized agent of the party for whom he is retained, nor the guardian, servant, relative or friend of such party authorized to give instructions on his behalf, without making proper enquiry, is guilty of misconduct under section 13 of the Legal Practitioners Act. [p. 467, col. 1.]

Messrs. Pugh, K. P. Jayaswal and P. R. Dass, (with them Messrs. Sishir Kumar Mitra, Hari Bhushan Mukerji, Abani Bhushan Mukerji and Gour Chandra Paul), for the Petitioner.

JUDGMENT.—Jugal Chandra Mazumdar, Pleader practising in the Manbhum district, was charged under sections 13 and 14 of the Legal Practitioners Act, 1879, with having taken instructions in a case from one Baishnab Bhuiyan, who was neither the recognised agent of the parties for whom he was retained, nor their guardian, servant,

relative or friend, authorised to give instructions on their behalf. The Munsif after enquiry found that the charge was proved and he has reported the case to this Court through the District Judge of Manbhum, with a recommendation that the Pleader should be dismissed. The learned District Judge supported this recommendation, being of opinion that the facts not only establish the charge which was drawn up by the Munsif, but justify finding that the Pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty within the meaning of section 13 (b) of the Act. We may say at once that inasmuch as the Pleader was not charged with fraudulent or grossly improper conduct this finding must be disregarded. At the same time we may say that having examined the evidence, we should not have been prepared to find that charge proved. We shall confine ourselves to the charge framed by the Munsif. The facts are shortly as follows:—One Kedar Nath Moduk, his brother Bishanath Moduk and the latter's son, Mahendro, were members of a joint family. A mortgage was made by one Ban Bhuiyan in favour of Mahendro alone. After the death of Kedar a suit was brought by his heirs upon the mortgage against the sons of Ban Bhuiyan, who were infants and were described as being under the guardianship of their mother. Mahendro and his father Bishanath were impleaded as *pro forma* defendants. Before calling upon the defendants to file written statements, the Munsif issued a notice to the mother of the infant defendants presumably with the object of appointing her to be their guardian *ad litem*, and May 22nd, 1915, was fixed for her appearance. On that date the *pro forma* defendants Bishanath and his son Mahendro filed a written statement, in which they pleaded that the plaintiffs had no interest in the mortgage-money and further that the mortgage-bond had been discharged. The plaintiffs' case as set out in the plaint was that the mortgage-money had been advanced out of the funds of the joint family of which the father had been a member. On the same day a written statement very much like that filed by the *pro forma* defendants was filed on behalf of the infant defendants Nos. 1 and 2 by Jugal Chandra,

In the matter of JUGAL CHANDRA.

who signed his name on the back of the *vakalatnama*, on the written statement, and on a list of documents, with which was produced a receipt purporting to have been granted by Ban Bhuiyan for the mortgage-money. On December 21st, 1915, a written statement was filed through another Pleader on behalf of the minors by their mother in which she said that the money had been advanced by the joint family and that it had been repaid to Mahendro alone and she contended that the plaintiffs should have sued Mahendro. Along with her written statement she filed an affidavit and a petition in which she stated that Baishnab, who had signed the *vakalatnama* in favour of the Pleader Jugal Chandra, was not authorised to act on her behalf. The plaintiffs shortly after that withdrew their suit saying that they would sue Mahendro. On February 29th, 1916, (it does not appear why there was a delay of two months) the Munsif called for an explanation from the Pleaders who had filed the conflicting written statements and a few days later he framed a charge against Jugal Chandra as stated above. Upon that Jugal Chandra put in a petition, in which he stated that he had been retained in the case by Baishnab Bhuiyan who had told him that he was a relative of the minors and had produced a Court summons, a copy of the plaint in the case and a receipt supporting his statement that the mortgage-money had been repaid, and he (the Pleader) urged that there was nothing in the conduct or behaviour of Baishnab to lead him to think that he was not a relative of the minors or was not authorised to act on their behalf. A few days later Jugal Chandra was examined at length by the Munsif. He said that he had obtained the *vakalatnama* from Baishnab Bhuiyan, that the latter had told him he was a relation of the minors, that he had made enquiries of Mahendro, one of the defendants to the case, and that Mahendro also had told him that Baishnab was a relative of the minors. He described the circumstances in which Baishnab had come to retain him at the Court-house and he alleged that acting on the instructions of Baishnab he had drawn up a written statement on behalf of the minors, and had filed it in Court on their behalf, and that throughout he had acted in good faith relying on the statements of

Baishnab and Mahendro. We are unable to accept the statements of the Pleader as true. Baishnab appears to be a cartman who was driving a cart for Mahendro on the day on which the written statement was filed. He may have gone with Mahendro to the Pleader but he is, practically speaking, illiterate. He can with great difficulty sign his name. Mahendro is a literate man and there can be no doubt that it was at the instance of Mahendro that the Pleader accepted the *vakalatnama* and that Mahendro used Baishnab for his own purposes. The Pleader's statement that he drafted the written statement in the case is evidently untrue. His clerks know nothing about the matter at all. The bulk of the written statement is in the handwriting of a man whose identity has not been disclosed, and the opening words of the written statement have been proved to be in the handwriting of the man who framed out the written statement filed on behalf of Mahendro and who is a relation of Mahendro's Pleader. There can be little doubt that the written statement had been prepared before Mahendro and Baishnab went to Jugal Chandra and all that the latter did was to sign his name on it and on the *vakalatnama* and the list of documents. He took no trouble whatever to ascertain who Baishnab was and whether he was authorised to give instructions in the case. On his own showing he enquired of no one but Mahendro. In fact his own statement shows that he neglected his duty and disregarded the instructions issued by the High Court on the subject. It has been proved that the mother of the minors was not in the village when the summons to her was taken there. She left it five or six years ago and is living in a village some eight miles away. She says she gave no instructions to Baishnab and Baishnab says that he received no instructions from her. Baishnab says that he signed the paper at the instance of his landlord Mahendro and gave no instructions to the Pleader. Both the District Judge and the Munsif held that Baishnab did not receive instructions from the mother of the minors and we agree with the finding. It is clear that the Pleader not only did not take any pains to ascertain whether Baishnab was authorised to retain him, but he did not even examine the receipt

JIWANJI & CO. v. EMPEROR.

produced in support of the written statement. The receipt purports to have been signed on March 5th, 1907, but it bears a one-anna stamp of the time of the present King. It does not appear to be a document nine years old, and there was much in the affair which would have excited the suspicion of any man who had acted with ordinary care. In our opinion, there can be no doubt that Jugal Chandra Mazumdar made no enquiries as to the right of Baishnab to instruct him on behalf of the minors or their mother, that he did not prepare the written statement and that he accepted the *rakalatnama* at the instance of Mahendro.

Mr. Pugh who has appeared on his behalf has urged us to treat him leniently on account of his youth and inexperience. We have given due weight to these considerations. But we regret to say that the papers before us show that the Pleader's conduct in the enquiry held by the Munsif disentitles him to any special consideration at our hands. When he was called upon to answer the charge he put in a false statement. Not content with this he actively obstructed the Munsif in the enquiry. It appears that at the outset he said that he would not appear and would take no part in it. Later, when the Munsif wished to show him to one of the witnesses he declined to come into Court and the witness had to be taken out of the Court to him. It was suggested that the Pleader did in this case no more or less than is commonly done in similar circumstances in the *mofassil*. We trust that the conduct of this Pleader does not represent the standard of care exercised by Pleaders in such cases. It is unnecessary to enlarge upon the danger of Pleaders taking instructions from unauthorised persons. Pleaders who do not take care to ascertain that the persons instructing them are entitled to do so must understand that such conduct is most improper and that they expose themselves to severe punishment. In the present case it is not proved that any injury resulted from the conduct of the Pleader but conduct of this kind must be stopped. The order of the Court is that Jugal Chandra Mazumdar be suspended from practice for nine months from this date.

Pleader suspended.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS Nos. 138 AND 141 OF 1915.

October 29, 1915.

Present:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

JIWANJI & CO. AND ANOTHER—
APPLICANTS
versus

EMPEROR—OPPONENT.

Bombay Public Conveyance Act (Bom Act VI of 1863), s. 34 (a)—"All vehicles kept in readiness for hiring on demand", meaning of—Government Notification extending provisions of the Act to such vehicles, legality of—High Court, power of, to report erroneous conviction to Government where remedy by appeal or revision barred by Statute.

Bombay Government Notification No. 955 of 1895, applying the provisions of the Bombay Public Conveyance Act (Bombay Act VI of 1863) to "all vehicles kept in readiness for hiring on demand," is not inconsistent with the provisions of section 34 (a) of the Act and is, therefore, not *ultra vires*. The words 'on demand' seem to have been intended to imply that there is no solicitation for employment and are, therefore, equivalent to 'not ordinarily used for the purpose of plying for hire'. The words 'in readiness' seem to be a mere surplusage and do not limit the application of the Act to any particular class of vehicles. [p. 648, cols. 1 & 2.]

The words "all vehicles kept in readiness for hiring on demand" include vehicles let on monthly hire and kept in the stables of the hirer. [p. 648, col. 2.]

The owner of such a vehicle would be guilty of an offence under section 2 of the Act if he let the vehicle on hire without a license; but the driver of such a vehicle could not be convicted under section 3 of the Act for plying for hire, as the contract for hiring is between the owner and the hirer. [p. 648, col. 2; p. 649, col. 1.]

Where the High Court cannot interfere with an erroneous conviction owing to the rights of appeal and revision being barred by Statute, it may report the conviction to the Local Government with its recommendation. [p. 649, col. 1.]

Emperor v. Narindas Bhikchand, Sind Sadar Court Criminal Reference No. 2 of 1907, referred to.

Applications for revision against the order of the Additional City Magistrate, Karachi.

Mr. Wadhmal Oodharam, for the Applicants.

Mr. E. Raymond, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—In this case the owner of a livery stable and his driver Nawab Khan have been convicted—the former under section 2 of Bombay Act VI of 1863 for letting a carriage on hire without a license,

JIWANJI & CO. v. EMPEROR.

Bombay Act VI of 1863 imposes certain duties upon the owners and drivers of public conveyances, which are defined as vehicles that ply for hire. Section 34 gives power to extend the provisions of the Act to vehicles or any class of vehicles that do not ply for hire "but which are kept or ordinarily let for hire." This extension has been applied to Karachi by Notification No. 955 of 1888 published by the Commissioner-in-Sind in his Notification No. 471, dated 3rd April 1889, Sind Official Gazette, 1889, Part 1, page 363.

These Notifications apply the provisions of the Act to "all vehicles kept in readiness for hiring on demand."

It is not clear why the language of section 34 was varied.

The words in the section are:—

"Vehicles or any class of vehicles which are kept or ordinarily let for hire although such vehicles be not ordinarily used for the purpose of plying for hire".

The words in the Notification are:—

"All vehicles kept in readiness for hiring on demand."

The words "on demand" must be intended to imply that there is no solicitation for employment and are, therefore, equivalent to "not ordinarily used for the purpose of plying for hire."

But what does the phrase "in readiness" imply? Does it limit the Notification to a particular class of vehicles kept for hire?

It is urged that these words do import such a limitation and that the vehicles they refer to are vehicles (a) that stand for hire at public places but do not solicit employment or (b) that are kept at the owner's stable for hire for short distances. Class (a) is a fictitious class, for all vehicles that stand for hire at public places do solicit employment. This class may, therefore, be excluded. Then as to class (b) it is difficult to draw a distinction between vehicles hired for payment by distance and vehicles hired for payment by time. The period of hire may in the former case be greater than in the latter. Nor does the place where the vehicle is kept make any radical distinction, for during the period of hire the vehicle must be in the possession of the hirer. A vehicle is equally

kept in readiness for hire whether the period of hire is one hour or one month and whether the employment of hire is by distance or by time.

The words "in readiness" seem, therefore, to be mere surplusage and do not limit the application of the Act to any particular class of vehicles kept for hire.

The vehicle of which the accused in this case are the owner and driver is one that has been given on monthly hire and is kept in the stable of the hirer. It has been urged that different considerations apply to such vehicles and that there is not the same necessity for their regulation and control as there is in the case of vehicles which ply for hire or are kept hire at the owner's stable. That may be so but it is not for us to discuss the policy of the Act. It is sufficient to say that we cannot find that any such distinction has been recognised in the addendum made to section 34 by Bombay Act V of 1887 or by the terms of the Notification.

The amendment to section 34 by which the provisions of the Act are extensible to other vehicles is not very happily worded.

Power is given to apply all or any of the provisions of the Act but there is no saving clause as to inconsistency. Some of the sections of the Act cannot apply to livery stable vehicles. For instance section 22 refers to vehicles plying for hire but livery stables vehicles do not ply for hire. Again section 25 gives a Police Officer power to require a public conveyance to ply for hire. It surely cannot be intended that a Police Officer may enter a livery stable and insist on the owner plying it for hire.

Again the provisions of the Act are applied to the inanimate object—the vehicle. This is meaningless, unless it is intended to apply the provisions to the owners and drivers of such vehicles. This is not expressed, but that is the construction which must be put upon the section in order to avoid imputing to Legislature an enactment which in its application would lead to an absurdity.

Putting this construction upon the Act the conviction of the owner for keeping a vehicle for hire without having license is good under section 2.

But it is impossible to support the conviction of the driver under section 3. He did not ply for hire, for he did not solicit

JUMO ALLARAKHIO v. EMPEROR.

employment by hire. There is no evidence that he demanded or received a fare, for the contract of hiring is between the owner and the hirer and settled monthly. The Magistrate erred in thinking that driving ■ hired vehicle was the same thing as plying for hire.

We cannot interfere with the conviction in view of section 35, but the Pleader for the applicant wishes us to report the matter to the Local Government. This is all that we shall do, for there is precedent for this course in *Emperor v. Naraindas Bikkchand* (1) where Batty, J. C., reported a conviction to the Local Government with a recommendation that the fine be refunded. We recommended that the fine inflicted on the driver be refunded and would also suggest the advisability (1) of amending section 34 of the Act so as to make it clear in what sections vehicles that do not ply for hire though kept for hire should be regarded as public conveyances; and (2) of bringing the Notification into conformity with the terms of the section.

Interference declined; Matter referred to Local Government.

(1) Sind Sadar Court Criminal Reference No. 2 of 1902.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL SESSIONS APPEAL No. 12 OF 1914.

February 15, 1916.

Present:—Mr. Pratt, J. C.

JUMO ALLARAKHIO—APPELLANT

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), ss. 420, 114—
Cheating, abetment of—Conspiracy, evidence of—
Association with principal offender—Conduct of accused.

A charge of conspiracy may be established by evidence of the conduct of the accused and the surrounding circumstances both before and after the commission of the offence without proving any overt acts by the accused. [p. 650, col. 1.]

Reg. v. Duffield, (1855) 5 Cox. C. C. 404; *Emperor v. Annappa Bharamganda*, 9 Bom. L. R. 347; 5 Cr. L. J. 323; *Barindra Kumar Ghose v. Emperor*, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453, referred to.

Where a person charged with abetment of cheating was proved to have been in the company of the principal offender at the commission of the offence and both before and after, and during trial made ■ false defence and denied the said association:

Held, that he was liable to conviction for ■ offence under sections 420 and 114, Indian Penal Code. [p. 650, col. 1.]

Appeal against the order of the Additional City Magistrate, Karachi.

Mr. R. G. Mani, for the Appellant.

Mr. T. G. Elphinston, 1st Assistant Public Prosecutor, Karachi, for the Crown.

JUDGMENT.—The appellant Jumo and co-accused Dino have been convicted by the Additional City Magistrate, Karachi, of an offence under section 420, Indian Penal Code.

The facts of the ■ are clear. The complainant is ■ simple rustic from Kohistan. He was sitting outside his house, when Dino and Jumo came up and Dino showed him ■ block of yellow metal which he falsely represented to be gold and offered to sell for Rs. 500. The complainant believed him and agreed to buy it. He paid Rs. 120 that he had with him to Dino, who said he would return in three days for the balance. Both Dino and Jumo then left, but did not return. Complainant discovered that he had been cheated and he and his friends searched for the accused and found them both standing outside ■ hotel and handed them over to the Police.

Dino's appeal has been dismissed; but it is urged that Jumo at any rate is entitled to an acquittal. He did nothing and said nothing and it is urged that his mere presence in Dino's company does not amount to an offence.

The Magistrate said that the conduct of Jumo shows that he was aware of the cheating and was ■ party to it. The Magistrate's conclusion is, I think, correct.

There is sufficient evidence to warrant the conclusion that Jumo had conspired with Dino to commit cheating by the sale of the piece of yellow metal.

Erle, J., in his charge to the Jury in *Reg. v. Duffield* (1), cited in Russell on Crimes, fifth edition, at pages 191 and 192, said that direct evidence of conspiracy is hardly ever adduced but that "unlawful conspiracy is to be inferred from the conduct of the

(1) (1855) 5 Cox. C. C. 404.

JADUNANDAN PRASAD v. EMPEROR.

parties." Chandarvarkar, J., in *Emperor v. Annappa Bharamganda* (2) said that "a conspiracy may be proved by other than oral evidence—it may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime," and cited the case of *Reg. v. Esdaile* (3) that "there may be conspiracy without overt acts". So also in *Barindra Kumar Ghose v. Emperor* (4) Jenkins, C. J., said: "Though to establish a charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design."

Now although no avert acts are proved as against the accused Jumo, there is evidence of conduct. He came with Dino to the complainant and was present while Dino was cheating the complainant; he left with Dino; he was found in Dino's company when Dino was arrested; shortly before complainant was cheated Dino had offered the metal to witness Ahmed representing to be gold and Jumo was in Dino's company then also; lastly in Court he makes a false defence and denies his association with Dino.

His association with Dino created in the minds of the witnesses the impression that both he and Dino were selling the so-called gold.

I feel no doubt that the Magistrate's conclusion is correct that he had conspired with Dino and is liable under section 114, Indian Penal Code, as an abettor who was present when the offence was committed.

I confirm the conviction and sentence and dismiss this appeal.

Appeal dismissed.

(2) 9 Bom. L. R. 347; 5 Cr. L. J. 323.

(3) (1858) 1 F. & F. 213.

(4) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

PATNA HIGH COURT.

CRIMINAL REVISION No. 16 OF 1916.

April 3, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.
JADUNANDAN PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 239—Receiving stolen property—Joint trial of two persons in possession of portions of stolen property—Accused acting in concert and in joint control of property—Penal Code (Act XLV of 1860), s. 411.

Where part of a stolen property was found in the possession of one person and another part in the possession of another, and it was proved that both had been acting in concert and had joint control over the property:

Held, that their joint trial was not illegal.

Criminal revision from the order of the Sessions Judge, Gaya, dated the 2nd February 1916, confirming the judgment of the Deputy Magistrate, 1st Class, Gaya, dated the 23rd December 1915.

Mr. Mazharul Haque, for the Petitioner.

Mr. Sultan Ahmad (Deputy Government Advocate), for the Crown.

JUDGMENT.—The applicant Jadunandan Prasad and a man named Jugdeo were convicted by a Magistrate of having dishonestly retained property stolen from the house of Dr. Ibrahim. The first point taken in revision is that the joint trial of these two men was illegal. But the facts found are that the two men were acting in concert in retaining and concealing property which had been stolen. The truth is that if the facts are as found both by the Magistrate and the Sessions Judge on appeal, there is no room for any question of law. Part of the stolen property was found in the possession of the applicant and another part was found in the possession of Jugdeo. If that had been all it would probably have been illegal to try the two men together, but there is evidence, which has been believed by both the Courts below, that the two men were acting in concert and were in joint control of the stolen property.

There is no ground for interference. The application is dismissed.

Application dismissed.

PALANIYANDI PANDARAM v. PALANIAPPA THEVAN.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 368 OF 1915.

CRIMINAL REVISION PETITION No. 293
OF 1915.

October 4, 1915.

Present:—Justice Sir William Ayling, Kt.
PALANIYANDI PANDARAM AND OTHERS
—PETITIONERS

versus

PALANIAPPA THEVAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145 to 147—Temple, dispute as to possession and management of and right to perform puja in—Whether a dispute as to 'use of land' in s. 145 or 147—Order subject to reservations, whether valid—Jurisdiction.

Disputes with regard to the management of a temple and the right to the performance of puja therein are not disputes of the kind to which section 147, Criminal Procedure Code, applies, as the words 'land or water' in that section are used in their ordinary significance without the extended meaning assigned to them in section 145 (2). [p. 651, col. 2.]

Guiram Ghoshal v. Lal Behary Das, 6 Ind. Cas. 182; 14 C. W. N. 611; 11 Cr. L. J. 292; 12 C. L. J. 22; 37 C. 578, followed.

Muhammad Musaliar v. Kunji Chek Musaliar, 11 M. 323; 2 Weir 117, distinguished.

Kader Batcha v. Kader Batcha Rowthan, 29 M. 237; 4 Cr. L. J. 58; *Chidambara Gurukkal v. Sengoda Gounden*, 25 Ind. Cas. 999; 16 M. L. T. 427; 27 M. L. J. 587; 15 Cr. L. J. 671, dissented from.

As a temple is a 'building' within the meaning of section 145 (2), Criminal Procedure Code, a dispute as to the possession of a temple and for such indicia of its possession as the holding of its key is cognizable by a Magistrate under section 145. [p. 652, col. 1.]

Where a dispute is in effect for possession of the temple and the right to perform puja therein is only a portion of the larger relief claimed, a Magistrate can deal with it under section 145. [p. 652, col. 1.]

An order as to possession subject to reservations is not forbidden by clause (6) of section 145. [p. 652, col. 1.]

It is competent, therefore, for a Magistrate, while upholding one party's possession of a temple, to direct by his order that the opposite party be allowed to enter the temple and perform puja to one of the idols therein, without adopting the stringent procedure of attaching the temple under section 146. [p. 652, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Dindigul, in Miscellaneous Case No. 1 of 1915, dated the 4th May 1915.

Mr. A. Anantharama Aiyar, for the Petitioners.

Mr. P. R. Grant, for the Government.

Mr. N. S. Rangaswamy Aiyangar, for Mr. T. Narasimha Aiyangar, for the Respondent.

ORDER.—The first contention of petitioners (Palaniandi Pandaram and others) is that the dispute between the parties is not one falling within the purview of either section 145 or section 147 of the Code of Criminal Procedure. The Joint Magistrate has omitted to specify the provision of law under which his order is passed: but the dispute is described as follows: "a dispute.....concerning the management of Selva Vinayagar Temple and the lands attached thereto.....and with regard to the performance of puja in that temple."

The dispute regarding the lands undoubtedly comes under section 145 and petitioners' Vakil does not now seek to attack the order so far as it relates to the lands.

There remains the question of the management of the temple and the performance of puja therein.

To disputes of this kind, section 147 seems to me to be inapplicable. That section deals simply with disputes regarding "the use of any land or water." The words "land or water" are used in their ordinary significance without the extended meaning assigned to them as used in section 145 of the Code of Criminal Procedure, by clause 2 of that section. I entirely concur with the view taken in *Guiram Ghoshal v. Lal Behary Das* (1) that the words "use of any land or water" will not cover a right to perform puja in a temple; nor in my opinion would they cover the right of management of the temple itself. The ruling in *Muhammad Musaliar v. Kunji Chek Musaliar* (2) was passed under the former Code of Criminal Procedure, in which the section was differently worded: the words were "to do or prevent the doing of anything in or upon any tangible immoveable property." It appears, if I may say so without presumption, to have been followed in *Kader Batcha v. Kader Batcha Rowthan* (3) without noticing the alteration in the section; and also in a recent case quoted to me [*Chidambara Gurukkal v. Sengoda Gounden* (4)]. With the utmost respect I must dissent from the two more recent cases and hold section

(1) 6 Ind. Cas. 182; 14 C. W. N. 611; 11 Cr. L. J. 292; 12 C. L. J. 22; 37 C. 578.

(2) 11 M. 323; 2 Weir 117.

(3) 29 M. 237; 4 Cr. L. J. 58.

(4) 25 Ind. Cas. 999; 16 M. L. T. 427; 27 M. L. J. 587; 15 Cr. L. J. 671.

GURDIT SINGH v. EMPEROR.

147 of the Code of Criminal Procedure inapplicable.

On the other hand, I can see no reason why a dispute as to the management of the temple should not be dealt with under section 145 of the Code of Criminal Procedure. The Magistrate amplifies it in the body of his order into "the actual management of the temple building itself," and it is obviously to be understood in this sense. This dispute is in effect a dispute as to the possession of the temple, in so far as a temple is ordinarily susceptible of possession; and the evidence adduced on both sides deals with such indicia of possession as the holding of the temple key. It is needless to say that a "temple" is a "building," *vide* clause 2 of section 145 of the Code of Criminal Procedure.

If only the right to perform *puja* to a particular idol in the temple were in dispute, the matter might be different; but that in the present case is only a portion of the larger issue.

I, therefore, hold that the Magistrate's proceedings were covered by section 145 of the Code of Criminal Procedure.

I am clearly of opinion that his jurisdiction was not barred by reason of Exhibit I.

Lastly, it is argued that his findings do not amount to a decision as to possession, within the meaning of clause 6 of section 145 of the Code of Criminal Procedure.

The Magistrate's order is not very happily worded but it seems to me to amount to this; he finds (and confirms) respondent's possession of the temple subject to the single limitation of petitioners' right to enter and perform *puja* to a certain idol (referred to as the "old" idol). This latter right is found to have been exercised by petitioners, and they are confirmed in it.

Such a decision as to possession may be somewhat complicated; but any decision as to possession of a temple must be complicated by reservations, express or implied. I am not prepared to say that it is not a proper decision within the scope of clause 6. To hold otherwise would seem to involve the position that whenever the

possession of a party is subject to any limitation, the only course open to the Magistrate is to attach the property under section 146 of the Code of Criminal Procedure, a course which must involve considerable hardship, and which should not be resorted to unless there is no alternative open.

I find no ground for interference and dismiss the petition.

Petition dismissed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 670 OF 1915.
January 14, 1916.

Present:—Mr. Justice Shah Din.
GURDIT SINGH AND ANOTHER—CONVICTS—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 363—"Taking" of a minor from lawful custody, when complete—Girl kidnapped by one accused taken out of village by three—Liability of all.

The question whether the "taking" of a minor girl out of the custody of her lawful guardian is or is not complete at a given moment is a question for determination with reference to the circumstances proved in each particular case. [p. 653, col. 1.]

Chanda v. Queen-Empress, 6 P. R. 1894 Cr., followed.

The relation between the minor and the guardian implied by the word "keeping" is not dissolved so long as the minor can at will take advantage of the guardianship protection and place herself within the sphere of its operation. [p. 653, col. 2.]

Emperor v. Jetha Nathoo, 6 Bom. L. R. 785; 1 Cr. L. J. 931, cited and followed.

Where, therefore, a young girl of 10 years of age was kidnapped from the lawful guardianship of her uncle by one G. and taken to his *gurial* and subsequently to his threshing floor and was on the following day removed from the village by G. and his two co-accused:

Held, that the time that elapsed between her leaving her uncle's house in company with G. and her removal from the village by the three accused was so short and the liberty of movement which she enjoyed between these two points of time was so complete that until she left the village, she must be considered to have remained in the custody of her guardian and, therefore, the taking of the girl was not complete until after she had been removed from the village by all the three accused and that consequently they were all liable. [p. 653 col. 2.]

GURDIT SINGH v. EMPEROR.

Appeal from the order of the Magistrate, 1st Class, Gurdaspur, exercising enhanced powers under section 30, Criminal Procedure Code, dated the 24th June 1915, convicting the appellants.

Mr. Meakin, for the Appellants.

Mr. Jai Gopal Sethi (for the Additional Government Advocate), for the Respondent.

JUDGMENT.—This appeal and Criminal Appeal No. 679 of 1915 are connected and both will be disposed of in one judgment.

The three appellants concerned in these two appeals have been convicted by Mr. E. T. Bhan, Magistrate, 1st Class, Gurdaspur, of an offence under section 363, Indian Penal Code, for having on or about the 20th April 1915 kidnapped a girl, named Bhani, aged about 10 years, from the lawful guardianship of her uncle Jagu at village Momanwal, and they have been sentenced to various terms of imprisonment.

The facts as deposed to by the prosecution witnesses, have not been disputed by the Pleaders for the appellants in the two appeals; the sole point argued by them is that since the offence of kidnapping was complete as soon as the girl had been taken out of the custody of her lawful guardian by being taken by Gurdit Singh, appellant, to his *gurial*, and subsequently to his threshing floor, the other appellants are not guilty of an offence under section 363, Indian Penal Code. It is also urged that even if the convictions are justified, the sentences imposed upon the appellants are excessive and must be reduced.

As pointed out by Sir Meredyth Plowden in his judgment in *Chanda v. Queen Empress* (1), the question whether the "taking" of a minor out of the custody of her lawful guardian was or was not complete at a given moment is a question for determination with reference to the circumstances proved in each particular case. The learned Judge says in the body of his judgment at page 21: "It may, no doubt, be difficult in some cases of kidnapping from lawful guardianship to determine the precise moment at which the taking is complete. Speaking generally, the keeping of the guardian would be at an end, when the person of the minor had been transferred from the custody of the guardian, or some person on his behalf, into the custody of some person not entitled to custody of the

minor." As I read the evidence in this case, my view is that the girl had not been kidnapped from lawful guardianship, or in other words, the taking of the girl out of the custody of her guardian was not complete, until after she had been removed from the village by the three appellants. The time that elapsed between her leaving the house of her uncle in company with Gurdit Singh and her removal from the village by the three appellants on the following day was so short, and the liberty of movement which she enjoyed between these two points of time both at Gurdit Singh's *gurial* and threshing floor was so complete, that until she left the village she must be considered to have remained in the custody of her guardian; and, therefore, the offence of kidnapping was committed by all the three appellants together and not by Gurdit Singh alone. In this connection the observations of Batty, J., in *Emperor v. Jetha Nathoo* (2) have a material bearing upon this case. As observed by the learned Judge, the relation between the minor and the guardian implied by the word, "keeping" is "not dissolved so long as the minor can at will take advantage of it (the guardianship protection) and place herself within the sphere of its operation."

For the foregoing reasons, I hold that the three appellants have been rightly convicted of an offence under section 363, Indian Penal Code; and having regard to the circumstances of the cases, I do not think that the sentences passed upon them are too severe.

I accordingly maintain the convictions and sentences and dismiss both the appeals.

Appeal dismissed.

(2) 6 Bom. L. R. 785; 1 Cr. L. J. 931.

KHOHUA MORAN v. EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 237 OF 1916.

May 8, 1916.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Sheepshanks.

KHOHUA MORAN—ACCUSED—APPELLANT
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 35,
meaning of—Court's duty to determine whether sentences
to run consecutively or concurrently.*

Notwithstanding the use of the word "or" between
the terms "imprisonment" and "transportation" in
section 35, sub section (1), Criminal Procedure Code,
the section is intended to cover cases in which one of
the punishments inflicted is imprisonment whilst
the other is transportation.

A Court when sentencing an accused at one trial
to imprisonment as well as to transportation ought to
determine whether the sentence will run con-
secutively or concurrently, otherwise the sentence is
defective in form.

Criminal appeal against the conviction
and sentence by the Sessions Judge, Assam
Valley Districts, dated the 10th February
1916.

ORDER.—In this case the appellant has
been convicted by the Sessions Judge, upon
an unanimous verdict of the Jury, upon three
charges, namely, *first*, a charge under sec-
tion 302, Indian Penal Code, for murdering
Pamboo Bura, *secondly*, a charge under sec-
tion 324, Indian Penal Code, for causing hurt
to Rengai Gaondura, and, *thirdly*, a charge
under section 324, Indian Penal Code, for
causing hurt to Mosai. The sentence passed
upon the accused is in these terms: the "Court
accepting the unanimous verdict of the Jury
convicts the accused Khohua Moran under
section 302, Indian Penal Code, and sentences
him to transportation for life. The Court
also accepting the unanimous verdict of the
Jury convicts the accused under section 324,
Indian Penal Code, and sentences him upon
each of these counts, to one year's rigorous
imprisonment, the sentences to run *consecu-*
tively." The sentence is defective in form, as
the Judge has omitted to determine, whether
the sentences of imprisonment and transpor-
tation are to run concurrently or consecutive-
ly. Sub-section (1) of section 35, Criminal
Procedure Code, provides that when a person
is convicted at one trial of two or more distinct
offences, the Court may sentence him for
such offences to the several punishments

MIRAN BAKHSH v. BELI RAM.

prescribed therefor which such Court is com-
petent to inflict, such punishments, when
consisting of imprisonment or trans-
portation, to commence one after the expira-
tion of the other in such order as the Court
may direct, unless the Court directs that such
punishments shall run concurrently. We
are of opinion that section 35 is not restricted
to cases where the several punishments are
all of the same kind, that is, are all sentences
of imprisonment or all sentences of transpor-
tation. Notwithstanding the use of the word
"or" between the terms "imprisonment" and
"transportation," we think the section was
intended to cover cases of the description now
before us, where one of the punishments in-
flicted is imprisonment, while the other is
transportation. If this view were not adopt-
ed, the result would follow that the Legis-
lature had made no provision for cases of this
type. We direct accordingly that the two
sentences of imprisonment which the Judge
has ordered to run *consecutively* and which
consequently amount in substance to rigorous
imprisonment for two years, should run *con-*
currently with the sentence of transpor-
tation. The sentence, subject to this
addition, will stand, because on an examina-
tion of the record we are satisfied that the
propriety of the conviction is amply made
out.

Sentence modified.

PUNJAB CHIEF COURT.

CRIMINAL APPLICATION No. 596 OF 1915.

August 25, 1915.

Present:—Mr. Justice Shadi Lal.
MIRAN BAKHSH—APPELLANT

versus

BELI RAM—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 195
(1) (c)—Sanction to prosecute for producing false
receipt—District Judge hearing appeal, jurisdiction of.*

Where the defendant in a case produced a certain
receipt in answer to the plaintiff's claim, but this
receipt being found to have been fraudulent-
ly altered, the District Judge who heard and decided
the appeal granted sanction to prosecute the defend-
ant under section 471, Indian Penal Code:

Held, that the District Judge was fully authorised
to entertain the application for sanction to prosecute
the defendant for an offence alleged to have been

JAIRO V. EMPEROR.

committed by him in respect of a document produced in evidence in that suit.

In re Gopal Siddeshwar Deshpande, 32 B. 203; 10 Bom. L. R. 95; 3 M. L. T. 170; 7 Cr. L. J. 120, distinguished.

Application, under section 195 (6) of the Criminal Procedure Code, to revoke a sanction to prosecute the applicant granted by the District Judge, Amritsar, as per his order dated the 16th February 1915.

Mr. Rustomji, for the Petitioner.

Lala Dharm Das Suri, for the Respondent.

JUDGMENT.—The objection to the jurisdiction of the District Court, which granted the sanction to prosecute the petitioner, is clearly untenable. It is patent that the District Judge heard the appeal in the civil suit and his Court was, therefore, fully authorised under section 195, sub-section 1, clause (c), Criminal Procedure Code, to entertain the application for sanction to prosecute the petitioner for an offence alleged to have been committed by him in respect of a document produced in evidence in that case. The decision in *In re Gopal Siddeshwar Deshpande* (1) is distinguishable upon the facts of the present case, and I have no hesitation in holding that under the aforesaid provision of law, the Court below had jurisdiction to entertain and adjudicate upon the application.

Upon the merits, the lower Court has given very good reasons for holding that a *prima facie* case under section 471 read with section 416, Indian Penal Code, has been made out, and I am not prepared to dissent from the view taken by that Court. I accordingly decline to interfere and dismiss the application.

Appeal dismissed.

(1) 32 B. 203; 10 Bom. L. R. 95; 3 M. L. T. 170; 7 Cr. L. J. 120.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 140 OF 1915.

October 28, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

JAIRO AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), ss. 379, 429—

Theft of animal—Subsequent destruction—Separate convictions for theft and mischief, whether legal.

A person cannot be convicted separately under sections 379 and 429, Indian Penal Code, for stealing an animal and afterwards killing it. The wrongful loss to complainant is complete with the theft and the subsequent destruction of the animal, though it may benefit the offender, does not amount to mischief.

Reference by the District Magistrate, Thar and Parkar.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The accused committed theft of a bullock and then afterwards killed it.

He has been convicted of two offences (1) of theft under section 379 and (2) of mischief under section 429, Indian Penal Code, by the 2nd class Magistrate, Nangar Parkar, and for each offence the accused is sentenced to suffer rigorous imprisonment for two months, the sentences to run consecutively.

The District Magistrate refers the proceedings to us, on the ground that separate convictions and sentences under section 379 and 429 are improper.

The real question that arises is, whether the second offence of killing was an offence of mischief? We think it was not, because the essence of the offence of mischief is that the act of destruction should be caused with the intention of causing wrongful loss or damage to the public or to the owner of the thing destroyed. That was not the case here. The owner had already been deprived of the bullock by the theft and the object of destruction of the bullock was no doubt that of benefiting the offender and not of injuring the complainant. The killing, therefore, did not amount to an offence under section 429, Indian Penal Code.

We, therefore, reverse the conviction and sentence under that section but we maintain the conviction and sentence under section 379, Indian Penal Code.

Order accordingly.

GIRDHARIMAL v. EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 129 OF 1915.

October 14, 1915.

Present:—Mr. Pratt, J. C., and
Mr. Boyd, A. J. C.GIRDHARIMAL walad MULRAI—
APPLICANT

versus

EMPEROR—OPPONENT.

*Penal Code (Act XLV of 1860), s. 193—Perjury—
Deposition of witness—Innocent mistake, correction of
—Contradictory statements—Sanction for prosecution—
Dishonest intention—Criminal Procedure Code (Act V
of 1898), s. 476.*

A witness should be allowed to correct innocent mistakes in the record of his deposition. Every possible presumption should be made in favour of good faith and it is undesirable that the witness should be afraid to correct the mistakes for fear of rendering himself liable to a prosecution for perjury, as such fear would frustrate the object of cross-examination. It is only when the witness makes a false statement with a dishonest intention and afterwards tries to correct it that his prosecution can be directed by Court.

Quære:—Whether contradictory statements made in one and the same deposition can be the subject of a prosecution under section 193, Indian Penal Code.

Application for revision against the order of the Resident Magistrate, Naushahro.

Mr. Wadhmal Oodharam, for the Applicant.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application to quash an order made under section 476 by the Resident Magistrate, Naushahro. The Magistrate is enquiring into a case of criminal breach of trust by a carrier and the present applicant was the Investigating Officer. In giving his evidence he first stated that the two witnesses Dandu and Gehi had told him that all the three accused had made statements implying knowledge of the damage caused to goods which was the subject of the prosecution.

The *tipan* of the witness Dandu was then put into his hands and he read the statement made by Dandu in the plural, implying that three accused had made the statement.

The Magistrate examined the statement and found that it was in the singular. This was pointed out to the witness, who then corrected the former statement saying that Dandu had stated that the statement has been made by the accused Budho alone.

The Magistrate was of opinion that the Police Officer intended to deceive him as to the contents of the Police *tipan* and deliberately intended to convey the false impression that the witness had said that the statements had been made by the three accused. He accordingly directed the prosecution of the Police Officer under section 476, Criminal Procedure Code.

Now there has been a good deal of difference of judicial opinion as to whether contradictory statements made in one and the same deposition can be the subject of a prosecution under section 193, Indian Penal Code. The view of the majority of the Judges of the High Court of Calcutta and Madras is that such prosecutions are maintainable if the contradiction was made, not to correct a *bona fide* error, but with dishonest intention.

Habibulloh v. Queen-Empress (1) and *In the matter of Palani Pulagan* (2).

We need not enter into this question of law, for we are not satisfied that the applicant's intention was dishonest. Every possible presumption in favour of good faith should be made, for it would be most undesirable that a witness should be afraid to correct a mistake made in his deposition for fear of rendering himself liable to a prosecution for perjury. Such fear would frustrate the object of cross-examination.

Such a presumption is a fair one to make in the present case, for the *tipan* was at the time in Court and the witness could have no motive for deliberately giving false evidence when he knew that he could easily be contradicted at any moment by reference to the statement itself. Again, the word as written in the statement is not very clear and it is not impossible that even after referring to the statement the witness may have innocently read the singular as plural. The whole of the evidence he gave probably related to this statement, for it is very unlikely that he had any independent recollection of what the witnesses had said.

The statement was corrected a minute or two after it was made and that instant correction favours the theory of innocent mistake.

We accordingly quash the order made under section 476.

Order quashed.

(1) 10 C. 937.

(2) 26 M. 55; 1 Weir 166.

JITENDRA NATH PALIT v. LOKENDRA NATH.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 1384 OF 1914.

July 15, 1915.

Present:—Mr. Justice Imam and

Mr. Justice Greaves.

JITENDRA NATH PALIT—PLAINTIFF

versus

LOKENDRA NATH PALIT AND OTHERS—

DEFENDANTS.

Universities Act (VIII of 1904), ss. 3, 14—Calcutta University Act (II of 1857—Calcutta University—Acceptance of trusts—Grants burdened with conditions—Illegal conditions, effect of—University Regulations—Founding of chairs to be filled by Indian Professors—Management by a governing body, some of whom being founder's nominees—Ultra vires—Absence of Governor-General's sanction—Exclusion of one of several trustees, if occasions a failure of trust.

The powers of the Calcutta University under Act II of 1857 and Act VIII of 1904 to hold and possess property for its purposes are extensive and the University is empowered to accept trusts, grants or charitable gifts beneficial for its purposes, even where they are subject to conditions. The grant cannot fail, even if the conditions accompanying it are held to be invalid or incapable of fulfilment by the University. [p. 663, col. 2; p. 664, col. 1.]

The term 'students' in section 3 of Act VIII of 1904 is not confined to students of any one University in particular. There is nothing in the Act to prohibit the University giving their aid to research by students who may not belong to any University and yet, by their exceptional gifts, may well be requisitioned to extend the bounds of knowledge. [p. 664, col. 1; p. 671, col. 2.]

The exclusion of one of several trustees, by reason of legal disability, would neither occasion a failure of the trust, nor affect the status of the other trustees or their competence to carry out the directions in the trust-deed. [p. 665, col. 1; p. 672, col. 1.]

Per Imam, J.—If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift discharged from the conditions. [p. 663, col. 2.]

The object of Act VIII of 1904 is to extend the usefulness of the University and not to cramp it and to construe the term 'students' (in section 3) to mean the students of the University alone is to fall into a rigidity of interpretation that is neither justified by the words of the Act nor its purpose. [p. 664, col. 1.]

Neither Act II of 1857 nor Act VIII of 1904 fetter the discretion of the Calcutta University to accept gifts subject to conditions. It could never have been intended that a grantor should either hand over his property free to the University or not make a grant at all. [p. 664, col. 2.]

The Calcutta University Regulations which are derived from the Acts themselves, do not curtail the power of the University to accept endowments of Professorships made by donors subject to conditions. [p. 664, col. 2.]

Section 1 of the Regulations, read with section 1, does not mean that the University can accept

such Professorships only as are sanctioned by the Governor-General in Council. The qualifying word 'likewise' in the first line of section 2 does not govern the word 'accept' in the last but one line of that section. Section 2 clearly leaves it to the University to determine the fitness of an endowment for the purposes of their acceptance and it is not *ultra vires* of the University to accept fresh endowments subject to conditions. [p. 664, col. 2.]

Per Greaves, J.—(Obiter)—If it is within the power of the University to accept trusts or gifts under Acts II of 1857 and VIII of 1904, the fact that the internal Regulations of the University may not have been observed, as that the previous sanction of the Governor-General was not obtained, that the Senate did not accept the trust or that the seal was irregularly affixed to the indenture, cannot invalidate the gift, as no question of *ultra vires* arises and these are merely irregularities, which, if necessary, can be cured at any time. [p. 671, col. 2.]

One Sir Tarak Nath Palit granted, by two separate indentures and by his last Will and testament, certain properties to the Calcutta University for the diffusion of Scientific and Technical Education in Bengal. The grant was made subject *inter alia* to the following conditions, (1) that the University of Calcutta should found two Professorships or chairs, one of chemistry and the other of physics to be filled by Indian Professors, (2) that there should be a governing body to manage the trust, a proportion of them to be the nominees of the founder or his heirs and some members to be foreign to the University. Clause 9 of the Indenture provided that, during the settlor's lifetime, the trustees should never be less than three in number and by clause 11 it was declared that, during the settlor's lifetime, he, in conjunction with any of the trustees, should be competent to do all the acts required to be done by the trustees or to exercise all the powers conferred upon them. The indenture was executed by the parties thereto, the seal of the University being affixed by the Vice-Chancellor. The plaintiff, one of the sons of the grantor, brought the present suit against the executors of the testator's estate and the University of Calcutta for a declaration that the grant to the University was invalid in law and for an order that the executors do administer in due course of law the properties as assets of the late Sir Tarak Nath Palit. The plaintiff urged that it was beyond the powers of the University to accept the grant subject to the donor's conditions and in view of the constitution of the governing body which was to include members foreign to the University. He also took minor objections, as, that the Senate did not accept the grant, that the sanction of the Governor-General was not obtained and that the action of the Vice-Chancellor in affixing the seal of the University to the indentures was irregular. It was also urged by the plaintiff that it was *ultra vires* of the University to act as trustee during the lifetime of Sir Tarak Nath Palit, and that the surviving trustees on Sir Tarak Nath's death could make no valid assurance or transfer of the properties to the University, inasmuch as they were never vested in them. It was, however, established from the Minutes of the Syndicate that the gift was accepted by both the Syndicate and the Senate and

JITENDRA NATH PALIT v. LOKENDRA NATH.

that the Vice-Chancellor was authorized to take such further steps in the matter on behalf of the University as he might deem necessary:

Held, (1) that under clauses III and XIV of Acts II of 1857 and VIII of 1904, the University had power to accept the grant; [p. 671, col. 1; p. 664, col. 2.]

(2) that there was nothing in the Regulations made under the Act prohibiting the acceptance of the conditions imposed by the donor; [p. 664, col. 2.]

(3) that, assuming that the subsidiary objections, viz., the want of the Governor-General's sanction or the consent of the Senate or the affixture of the seal by the Vice-Chancellors without the Syndicate's sanction, were true, they did not invalidate the grant; [p. 665, col. 1; p. 671, col. 2.]

(4) that it was competent to the surviving trustees, on Sir Tarak Nath's death, to make a valid transfer of the trust property to the University. [p. 665, col. 2; p. 672, col. 2.]

Messrs. *H. D. Basu, L. James and Arabinda Ray*, for the Plaintiff.

The Advocate-General (with him Messrs. *B. Chakravarti and M. R. Mehta*), for the Defendant Calcutta University.

JUDGMENT.

IMAM, J.—This is an action brought to declare that two indentures, dated the 15th June 1912 and the 8th October 1912 respectively, executed by the late Sir Tarak Nath Palit are invalid and inoperative in law and that the properties covered by those indentures are unaffected thereby and form part of the estate of the deceased, and further for an order that the executors under the Will of the late Sir Tarak Nath do, in due course of law, administer the said properties as assets belonging to his estate.

The plaintiff Mr. Jitendra Nath Palit is one of the two sons of the late Sir Tarak Nath, and, under the Hindu Law of the Bengal School by which the family is admittedly governed, is one of the heirs of the deceased.

Sir Tarak Nath died on the 3rd October 1914, leaving a Will dated the 2nd May 1914, whereby he appointed his second son Mr. Lokendra Nath Palit and Mr. Sisir Kumar Mullick executors thereof. At the time of his death his heirs were his two sons above mentioned and his widow Lady Palit.

By the first indenture dated the 15th June 1912, Sir Tarak Nath purported to transfer and convey certain properties to the University of Calcutta on the conditions and upon the trusts mentioned in that deed.

By the second indenture dated the 8th October 1912, he purported to transfer and convey to himself, Sir Asutosh Mookerjee, Mr. Sisir Kumar Mullick, and the University of Calcutta, certain other properties upon trusts and conditions mentioned in that deed.

By his Will dated the 2nd May 1914, after making certain express bequests in favour of some persons he devised the residue of his estate to the University of Calcutta to be held and applied by that body upon trusts specified in the two indentures.

Sir Tarak Nath's object in creating the trusts can best be expressed in his own language, which I quote here from the first indenture:—

"And whereas the Founder (meaning himself) has for sometime past contemplated doing something of a permanent character for the promotion and diffusion of Scientific and Technical Education in Bengal and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen, and in the belief that this object could be best attained by the establishment of University Professorships of Science as a first step towards the foundation of a University College of Science and Technology, he approached the said University of Calcutta, &c. &c."

The conditions in that indenture are the following:—

(a). The University of Calcutta should found two Professorships or Chairs, one of Chemistry and the other of Physics, and apply the entire income of the properties covered by the indenture or so much of it as they deem necessary towards the maintenance of those two Chairs, and should the entire income be found insufficient for the purpose, the University should make such recurring grant or contribution as may be required to supplement the deficiency.

(b). The said Chairs shall always be filled by Indians (that is, persons born of Indian parents as contradistinguished from persons who are called 'Statutory Natives of India') to be nominated by the Governing Body hereafter mentioned, who may in their discretion require a Professor-elect to receive special training abroad before he enters

JITENDRA NATH PALIT V. LOKENDRA NATH.

upon the duties of his office and who may give such Professor elect during such period of his training abroad such allowance, including travelling expenses, as may in each case be determined by the Governing Body—such allowance being considered as part of the maintenance expenses of the Chair or Chairs.

(c). In connection with the said Chairs the University shall from its own funds provide suitable Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research, and it shall out of its own funds earmark and set apart a sum of two lakhs and fifty thousand rupees and apply the same towards the construction of such Lecture Rooms, &c, of permanent and substantial structure with proper and adequate equipment on the site of premises No. 92, Upper Circular Road, one of the properties covered by the indenture.

(d). The Governing Body shall consist of the following persons:—

(1) The Vice-Chancellor of the University as *ex-officio* president. (2) The Director of Public Instruction, Bengal. (3) The Dean of the Faculty of Science of the University. (4) The Dean of the Faculty of Engineering of the University. (5) Four members of the University to be annually elected by the Senate, at least two of whom shall be representatives of Calcutta Colleges under Indian management affiliated in Science to the University. (6) Four members to be nominated every three years by the Founder, and after his death by his representative or representatives in that behalf. The Hon'ble Sir Asutosh Mookerjee shall always be a nominee of the Founder if he has not otherwise a seat on the Board of the said Governing Body. The power of nominating a successor or successors shall be inherent in every original or derivative nominee of the founder. (7) Two representatives of the Professorial Staff to be elected by them annually from amongst themselves.

(e). The University shall from its own funds make such recurring and periodical grants as may be required (a) for the maintenance of the two Chairs, (b) for the maintenance of the Lecture Rooms, Libraries, &c., in such a state of efficiency as may be required and approved of by the Governing

Body, subject to the control of the Senate, (c) for the maintenance and repairs of the buildings to be erected at No. 92, Upper Circular Road, and (d) for the payment of all rates and taxes and other impositions payable in respect of the said premises.

(f). It shall be the duty of the Professors (a) to carry on original research with a view to extend the bounds of knowledge, (b) to stimulate and guide research by advanced students, and as an essential preparation for this purpose, (c) to arrange for the adequate instruction of students for the Degrees of Bachelor of Science with Honours, and Master of Science and Doctor of Science exceptionally and also of other students who may be qualified in any of the subjects of study though they may not be even undergraduates of any University, provided that they be recommended by the said Governing Body.

(g). If the income of the endowed properties exceed the amount required for the maintenance of the two Chairs, such surplus income may at the discretion of the Governing Body be applied to the payment of Scholarships or Stipends to such advanced students for the Degrees of Master of Science or Doctor of Science as may receive training or carry on research under the said Professors—the number and value of such Scholarships to be determined by the said Governing Body.

(h). The income of the endowed properties shall be accumulated by the University until the Chairs are founded, the accumulations to be treated as part of the *corpus* of the endowed properties.

(1) The buildings now standing upon the premises No. 92, Upper Circular Road, shall be dismantled under the direction of the University who shall sell the old materials and hold the sale-proceeds as part of the *corpus* of the endowed properties.

The indenture recites that the University having agreed to accept the Founder's offer of the properties upon the conditions and trusts above stated, he, in pursuance of the agreement and in consideration of the premises granted, transferred and conveyed to the University the properties set out in the schedules to the indenture, and it was agreed and declared between the parties to the indenture that the University should hold the endowed properties on the conditions

JITENDRA NATH PALIT v. LOKENDRA NATH.

and upon the trusts already recited. On behalf of the University the indenture was executed by their Vice-Chancellor, Sir Asutosh Mookerjee, who affixed to the deed the common seal of the University.

By the second indenture dated the 8th October 1912 made between Sir Tarak Nath (therein described as the Settlor) of the first part, Sir Asutosh Mookerjee, Mr. Sisir Kumar Mullick and the University of Calcutta (therein described as the Trustees) of the second part, and the University of Calcutta (therein described as the Trustee University) of the third part, the Settlor granted, conveyed, assigned and transferred the properties mentioned in the schedules to the indenture to the Trustees upon the trusts and to and for the ends, intents and purposes declared in the indenture, *viz.*:—

(a) During the lifetime of the Settlor to permit him to collect, receive and take the rents, issues, profits, dividends and income of all the Trust Estate for his absolute use and benefit.

(b) Upon the death of the Settlor the Trustees or the survivors or survivor of them do and shall transfer and make over the said Trust Estate to the University of Calcutta, who shall thenceforth become the sole Trustee of the said indenture and shall hold and stand possessed of the Trust Estate upon the following trusts:

(1) To collect the income of the Estate and thereout pay all necessary charges.

(2) To set apart Rs. 1,00,000 out of the Trust Estate and to apply the net income thereof in perpetuity in establishing and maintaining Scholarships for advanced students in Science to enable them to carry a research or investigation outside India, the number and value of such Scholarships to be determined by the Governing Body mentioned in the indenture dated the 15th June 1912, the right of nomination to any of the Scholarships resting with the Governing Body.

(3) To pay and to transfer to the authorities of the institution known as the Sakhi Shilpa Samity, Government Securities of the $2\frac{1}{2}$ per cent. loan of the nominal value of Rs. 15,000 whenever the same may be required by that institution, to be applied by it for providing local habitation for Hindu widows, and upon an undertaking by that institution to refund the same to the Trustee University

whenever the said local habitation ceases to be utilized for the promotion of the welfare of Hindu widows, in which event the Trustee University to hold the amount so refunded upon the trusts declared in the indenture of the 15th June 1912.

(4) To pay and transfer to the Albert Victoria Hospital, Calcutta Medical School and College of Surgeons and Physicians, Bengal Government Securities of the $3\frac{1}{2}$ per cent. loan of the nominal value of Rs. 50,000 when the same may be required by that institution, to be utilized by it for the purpose of providing the said institution with a well-equipped Laboratory, upon an undertaking by the said institution, that in the events of the said institution ceasing to exist, or failing to carry out the purpose of the grant, to refund the amount of the securities to the Trustee University, the University to hold and apply the same upon the trusts set out in the indenture of the 15th June 1912.

(5) To pay out of the income of the Trust Estate a sum of Rs. 15 per month to Srimati Rani Palit, the daughter of the Settlor's nephew, for the term of her natural life.

(6) To make such contribution, if any, as in the University's discretion may appear desirable in order to provide for adequate instruction and to give facility to female students who may be desirous of prosecuting their studies for the Degrees of Bachelor of Science with Honours, Master of Science or Doctor of Science, and also to other female students who may be exceptionally qualified in any of the relevant subjects of study though they may not be undergraduates of any University.

(7) To apply the entire balance of the income of the Trust Estate in aid of and for the better carrying out of the trusts in the indenture of the 15th June 1912.

The parties executed this indenture and Sir Asutosh Mookerjee, Vice-Chancellor of the University, affixed the common seal of that body to the deed.

In the plaint the plaintiff has been reticent in enunciating the grounds on which he seeks the indentures to be declared invalid and inoperative, but at the trial his contention has been that in accepting the trusts the University have gone beyond their powers

JITENDRA NATH PALIT v. LOKENDRA NATH.

and it has been '*ultra vires*' of them to undertake to carry out trusts that are in their nature not consonant with the law governing the University. The plaintiff contends that it was *ultra vires* of the University:

(a) To agree that the Chairs shall always be filled by Indians.

(b) To agree that the Professors shall be elected by a Governing Body created by the founder.

(c) To leave to the Governing Body the determination (1) of whether the Professor-elect should receive special training abroad before entering upon his duties, and (2) of the amount payable to such Professor for allowance and travelling expenses.

(d) To agree to make recurring or periodical grants or contributions for the purposes mentioned in the first indenture.

(e) To agree to provide for instruction of persons who may not even be undergraduates of any University.

(f) To agree that the surplus income should at the discretion of the Governing Body be applied to the payment of Scholarships or Stipends, the number and value of which are to be fixed by that body.

(g) To agree to the creation of a Governing Body, some members of which are foreign to the University.

It is further contended that the University by accepting the terms of the trusts have divested themselves of their statutory powers in favour of the Governing Body, which they were not competent to do.

The objections stated above are pressed against the first indenture, and as the educational purpose of the second indenture is subject to the first indenture, the second indenture is also assailed on those grounds. There are, however, some objections that are special to the second indenture, and they are:

(a) That the University could not accept the trust for preserving the life-estate of Sir Tarak Nath.

(b) That the University cannot administer the trusts in favour of (1) Sakhi Shilpa Samity, (2) Albert Victor Hospital, and (3) Srimati Rani Palit.

There are certain other objections, minor in their character, that have been pressed against both the deeds. They are:—

(a) That the previous sanction of the Governor-General in Council has not been obtained for the foundation of the two Chairs in accordance with Chapter IX of the Regulations framed under Act VIII of 1904.

(b) That the Senate of the University have not accepted the trusts.

(c) That the common seal of the University was affixed by the Vice-Chancellor without the express authority of the Senate.

(d) That the Registrar, being the custodian of the common seal, was the person to affix it.

The parties to this suit are (1) Mr. Lokendra Nath Palit in his individual capacity and also as one of the executors of the Will of the late Sir Tarak Nath, (2) Mr. Sisir Kumar Mullick, the executor, and (3) the University of Calcutta.

In their written statements the first two defendants have submitted the contentions of law raised by the plaintiff to the judgment of the Court and have urged no defence. The University of Calcutta, on the other hand, have contended that each of the two indentures is, and all the trusts thereunder are, valid and binding under the law and equity, and that the University have an unimpeachable title thereunder as also under the residuary devise contained in the 10th clause of the Will. The University have further contended that the trusts are being, and ought to be, carried out, regard being had to the clear intention of Sir Tarak Nath manifested in the two indentures and his Will to devote the properties to the advancement of education in Bengal.

The properties comprised in the two indentures are in the possession of the University. The properties comprised in the second indenture have already been assured and transferred to the University by the surviving trustees under that deed.

The issues framed in the case are:—

(1) Does the plaint disclose any cause of action; and is the suit maintainable in its present form in view of section 42, Specific Relief Act?

(2) Are the two indentures of the 15th June 1912 and 8th October 1912, and the deed of transfer of properties assured by the indenture of the 8th October 1912, after Sir Tarak Nath Palit's death valid and opera-

JITENDRA NATH PALIT v. LOKENDRA NATH.

tive in law, and have the University acquired a good and indefeasible title thereunder?

(3) Have the University acquired a good and indefeasible title under the residuary devise and bequest in the Will?

(4) Has not the Settlor by the two indentures of the 15th June 1912 and 8th October 1912 evinced a general intention to give his property to charitable and educational purposes for the use of the University to which the Court will give effect?

(5) Are not the Sakhi Shilpa Samity, the Albert Victor Hospital and Srimati Rani Palit, who are beneficiaries under the indenture of the 8th October 1912, and each of them, necessary and proper parties to this suit, and is not the suit bad for their non-joinder?

After the above issues were framed, it was intimated to the Court that Mr. Lokendra Nath Palit in view of the 4th issue wished to be separately represented by Counsel in his individual capacity as distinguished from his capacity of an executor of his father's Will, and at the trial he was so represented.

The powers of the University of Calcutta are governed by Act II of 1857, whereby that body was established and incorporated, and Act VIII of 1904. The intendment of the establishment of the University, as expressed in the preamble to Act II, was "for the purpose of ascertaining, by means of examination, the persons who have acquired proficiency in different branches of Literature, Science and Art, and of rewarding them by Academical Degrees as evidence of their respective attainments and marks of honour proportioned thereunto." The persons mentioned in section 1 of that Act were constituted and declared to be one body politic and corporate by the name of the University of Calcutta with perpetual succession and a common seal, and by section 2 this body corporate was empowered to take, purchase and hold any property, moveable or immovable, which might become vested in it for the purpose of the University by virtue of any purchase, grant, testamentary disposition or otherwise. Section 8 of that Act provides that the Chancellor, Vice-Chancellor and Fellows, for the time being, shall have the entire management of, and superintendence over, the affairs, concerns and property of the University, and in all cases unprovided

for by the Act it shall be lawful for them to act in such manner as shall appear to them best calculated to promote the purposes intended by the University. In 1904, Act VIII, which was to be deemed to be part of Act II of 1857, passed. Section 3 of Act VIII provides that the University shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments, to erect, equip, and maintain University Libraries, Laboratories, and Museums, to make Regulations relating to the residence and conduct of students, and to do all acts consistent with the Act of Incorporation and Act VIII which tends to the promotion of study and research.

The constitution and powers of the Senate of the University are set out in section 4, clause 3, which states that the body corporate shall be the Senate of the University, and all powers which are by the Act of Incorporation or by this Act conferred upon the Senate, or upon the Chancellor, Rector, Vice-Chancellor and Fellows in their corporate capacity, shall be vested in and exercised by the Senate constituted under this Act, and all duties and liabilities imposed upon the University by the Act of Incorporation shall be deemed to be imposed upon the body corporate as constituted under this Act. This Act vests the executive government of the University in the Syndicate.

To provide for matters relating to the University, section 25 of the Act empowers the Senate with the sanction of the Government, which in the case of the University of Calcutta means the Governor-General in Council, to, from time to time, make Regulations consistent with the Act of Incorporation as amended by this Act, and with this Act; and section 26 provides that where a draft body of Regulations is not submitted within the time allowed, the Government may make the Regulations. In the present instance the University not having submitted the draft body of Regulations within the time allowed, the Government made the Regulations to provide for matters relating to the University. It will be seen from the Act II of 1857 and Act VIII of

JITENDRA NATH PALIT v. LOKENDRA NATH.

1904 that the powers of the University to hold and possess property for their purposes are extensive and no objection to their accepting the trusts in question could validly be urged if the Acts alone had to be considered and construed. The plaintiff's main attack on the indentures is derived from the Regulations, and we are asked to hold, at least on the basis of the Regulations, that it has been *ultra vires* of the University to undertake the trusts in terms of the indentures.

The provisions of the Regulations material to the consideration of the questions raised in this case are contained in Chapter I, section 4; Chapter III, section 4; Chapter IV, sections 12 and 15; Chapter VI, section 3; Chapter VII, section 4; Chapter IX, sections 1, 2, 9 and 10.

Section 4 of Chapter I says that no question shall be brought under the consideration of the Senate which has not first been considered by the Syndicate.

Section 4 of Chapter III provides that each Faculty shall elect its Dean annually from its own number as soon as its members have been appointed.

Chapter IV deals with the Syndicate, and section 12 of that Chapter lays down, amongst other matters, that it shall be the duty of the Syndicate to consider and report upon matters to be submitted to the Senate, to administer the funds and to keep the accounts of the University, to correspond on the business of the University with the Government and all other authorities and persons, and generally to conduct the affairs of the University in accordance with the Act of Incorporation and Act VIII of 1904, the Regulations and the Resolutions of the Senate and the Syndicate, and section 15 places the Syndicate under the Senate for approval, revision or modification of its decisions, or for direction to review the same.

Chapter VI constitutes a Board of Accounts and section B of that Chapter directs that the Board shall, amongst other things, prepare the University Budget, examine and audit the University accounts and the accounts of the Endowment and Trust Funds.

Section 4, clause (a), of Chapter VII directs, amongst other matters, that the Registrar of the University shall be the custodian of the common seal,

Chapter IX of the Regulations is the most important of all in relation to the contentions raised by the plaintiff, and I reproduce here the material sections in their integrity.

Section 1.—"When the funds of the University permit, the Senate with the previous consent of the Governor General in Council shall found such Professorships as it may think fit, prescribe the conditions on which they shall be tenable, and provide, in connection therewith, Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research."

Section 2.—"The Senate shall likewise found and endow Professorships on particular subjects from funds specially given or bequeathed for the endowment of such Professorships, or if it thinks fit, accept endowments of such Professorships made by individual or corporate donors."

Section 9.—"Endowed Professorships already accepted by the Senate shall, subject to the conditions of the endowment, be governed by these Regulations."

Section 10.—"No University Professor shall be appointed without the sanction of the Governor-General in Council."

On behalf of the plaintiff it has been contended that under the terms of the indentures the relation between Sir Tarak Nath and the University was that of two contracting parties and not of donor and donee. The object of such a contention is obvious. If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift discharged from the conditions. In the present case it is clear to my mind that the University have received the properties comprised in the two indentures merely as a charitable gift, and as such it cannot fail, even if the conditions accompanying it are held to be invalid or incapable of fulfilment by the University.

The first question to which attention has to be paid is that of *ultra vires*. Act II of 1857 and Act VIII of 1904, by themselves, confer on the University very comprehensive powers, but it is argued on behalf of the plaintiff that those powers have been curtailed by the Regulations framed under the latter Act. The plaintiff's contention further is that, allowing the Regulations to be eliminated from consideration, it would be *ultra vires* of the University even under the Acts alone to

JITENDRA NATH PALIT v. LOKENDRA NATH.

undertake the trusts in terms of the indentures. This contention leads me to consider the Acts first. From the preamble to Act II of 1857 it may be pointed out that the object of establishing the University of Calcutta was to ascertain by means of examination the persons who had acquired proficiency in different branches of Literature Science and Art and of rewarding them by academical degrees as evidence of their respective attainments. In the scheme of that Act no mention is made of research. In Act VIII of 1904 the usefulness of the University of Calcutta was extended and the University were authorised by section 3 of Act VIII to do all acts consistent with the Act of Incorporation and Act VIII which tend to the promotion of study and research. As Act VIII is to be deemed part of the Act of Incorporation, the power of the University in accordance with the provisions of section 2 of Act II to take and to hold any property, moveable or immovable, for their purposes by virtue of grant or testamentary disposition cannot be questioned. In section 3 of Act VIII it is provided that the University shall be and shall be deemed to have been incorporated for the purpose of making provision for the instruction of students, and for the plaintiff it is contended that the students must be of the University, and as the indenture provides as well for students other than those that belong to any University, the undertaking by the Calcutta University to carry out the trusts is not within their competence. In construing the term "Students," we cannot lose sight of one of the objects of the University being "the promotion of study and research." There is nothing in the Act itself to prohibit the University giving their aid, as indeed they should, to research by students who may not belong to any University, yet by their exceptional gifts may well be requisitioned to, in the language of Sir Tarak Nath, "extend the bounds of knowledge." My reading of Act VIII convinces me that the object of that Legislation was to extend the usefulness of the University, and not to cramp it, and to construe the term "Students" to mean the students of the University alone is to fall into a rigidity of interpretation that is neither justified by the words of the Act, nor its purpose.

It has further been argued for the plaintiff

that by accepting the conditions of the trusts the University have abdicated their statutory powers in favour of a Governing Body, the composition of which is not wholly out of the Senate, but some members of which are nominees, original or derivative, of the founder, foreign to the University. I see nothing in the Acts to prohibit this. If concession were made to the plaintiff's argument, it would imply that it would never be open to the University to accept a grant or testamentary disposition, however beneficial to their purpose, unless the grant be entirely free from the grantor's conditions. I do not think it could ever have been intended that a grantor should either hand over his property to the University free from all conditions, or not make the grant at all. The Acts by themselves do not fetter the discretion of the University to accept such gifts.

So far as the Regulations are concerned, it has been argued that they limit the powers of the University, and in view of those Regulations it was not competent to the University to accept the conditions of the two indentures. In my view of the Regulations the power of the University, derived from the Acts themselves, to accept endowments of Professorships made by donors, has not been curtailed, and the University is competent to accept, if they think fit, endowments subject to conditions. The only provision concerning it in the Regulations is found in section 2, Chapter IX. It has been urged upon me that, in interpreting this section, we have to read section 1 to that Chapter, and the two read together mean that the University can accept such Professorships only as are sanctioned by the Governor-General in Council. I do not think that this contention is sound. It does not appear to me that the qualifying word "likewise" in the first line of section 2 governs the word "accept" in the last but one line of that section. Reading section 9 of the same Chapter, the Regulations do not find it repugnant to allow the University to observe the conditions of endowments already accepted, and I see nothing in the Regulations to prohibit the acceptance of fresh endowments subject to conditions. Section 2 has clearly left it to the University to determine the fitness of an endowment for the purposes of their acceptance. In the view I take of the general com-

JITENDRA NATH PALIT v. LOKENDRA NATH.

petence of the University in this matter, the objection of *ultra vires* must fail.

As regards the special objections to the indenture of 8th October 1912, they are covered by the view I have just expressed. But apart from this, the University now stand possessed of the properties comprised in that indenture by the transfer effected in their favour by the surviving trustees after the death of Sir Tarak Nath in accordance with the terms of that indenture. Even if it were conceded that in the lifetime of Sir Tarak Nath the properties were not vested in the University ■ co-trustee, exclusion of one co-trustee by reason of legal disability, if any, would neither occasion a failure of the trust, nor would such an event affect the status of the other trustees or their competence to carry out the directions in the trust-deed. The objection that the University cannot administer the trusts in favour of Sakhi Shilpa Samity, Albert Victor Hospital and Srimati Rani Palit, is without real substance. No trusts in fact have to be administered in respect of Sakhi Shilpa Samity and Albert Victor Hospital. Under the terms of the indenture those institutions are entitled to receive from the University out of the Trust Estate Rs. 15,000 and Rs. 50,000 respectively in Government Securities; and with the payment of those two items the obligation of the University is discharged. As regards the monthly payment of Rs. 15 to Srimati Rani Palit for the term of her natural life, the undertaking on the part of the University is so small ■ compared with the extent of the estate and the corresponding beneficence of the charity, that such ■ trifle can never be allowed to destroy the trust.

The objection that the Senate have not accepted the trusts seems to have been raised in ignorance of the proceedings of the Senate, bearing dates the 22nd June 1912 and 30th November 1912. By the proceedings of the 22nd June the Senate accepted the trusts contained in the first indenture and by the proceedings of the 30th November 1912 the Senate accepted the trusts contained in the second indenture. The other objection that the common seal of the University should have been affixed by the Registrar and not by the Vice-Chancellor seems to possess no weight, for even if it were allowed it would not suffice to invalidate the trusts. Apart

from this, the objection loses all its force by reason of the Vice-Chancellor being asked and authorized by the Syndicate to sign and take such further steps in the matter on behalf of the University ■ he might deem necessary. The resolutions embodying the authority are recorded at page 1144, Part III, and page 2351, Part VII, of the Minutes of the Calcutta University for the year 1912.

These resolutions were submitted to the Senate in due course, and that body expressed no disapproval of them. The Senate having accepted the trusts, the formal act of affixing the common seal comes within the executive government of the University, which is vested in the Syndicate by section 15 of Act VIII of 1904, and the authority given by the Syndicate fully qualified the Vice-Chancellor to affix the common seal on behalf of the University. My conclusion on the *second* issue, therefore, is that the two indentures dated the 15th June 1912 and 8th October 1912 and the deed of transfer of properties assured by the second indenture after Sir Tarak Nath's death, are valid and operative in law, and the University have acquired ■ good and indefeasible title thereunder.

I do not propose to deal with the other issues as the decision on the second issue disposes of the case.

This suit is dismissed with costs on scale No. 2.

The defendants Messrs. Lokendra Nath Palit and Sisir Kumar Mullick are also allowed their costs on the same scale.

GREAVES, J.—The plaintiff in this action, who is one of the two sons of the late Sir Tarak Nath Palit, claims a declaration that the two indentures dated respectively the 15th June 1912 and the 8th October 1912, whereby Sir Tarak Nath Palit purported to grant certain properties to the Calcutta University upon certain trusts and conditions are invalid and inoperative in law and that the properties are unaffected thereby and form part of his estate. The plaintiff also asks for an order that the executor defendants do administer in due course of law the properties as assets of the estate of the late Sir Tarak Nath Palit.

By the indenture of the 15th June 1912, which was made between Sir Tarak Nath Palit (therein called the Founder) of the one

JITENDRA NATH PALIT v. LOKENDRA NATH.

part and the University of the other part, after reciting, among other things, that the Founder had for some time past contemplated doing something of a permanent character for the foundation and diffusion of Scientific and Technical Education in Bengal and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen and in the belief that this object could be best attained by the establishment of University Professorships of Science as a first step towards the foundation of a University College of Science and Technology, had approached the University and offered to make over to them the properties specified in the schedules thereto on the conditions and upon the trusts following, namely, (a) that the University should found two Professorships or Chairs, one of Chemistry and the other of Physics, and apply the entire income of the scheduled properties or so much as they might deem necessary to the maintenance thereof, and in the event of the said entire income being found insufficient for the purpose, the said University should make such a recurring grant or contribution as would supplement such deficiency, (b) that the Founder's object being the promotion and diffusion of Scientific and Technical Education and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen by and through indigenous agency, such Chairs should always be filled by Indians to be nominated by the Governing Body therein after mentioned, (c) that in connection with the said two Chairs the University should from its own funds provide suitable Lecture Rooms, Libraries, &c., and out of its own funds earmark and set apart a sum of Rs. 2,50,000, and apply the same to or towards the construction, on the site of 92, Upper Circular Road, of permanent and substantial structures and their proper and adequate equipment, (d) that the Government Body should consist of (1) the Vice-Chancellor of the University as *ex-officio* President, (2) the Director of Public Instruction of Bengal (who by the provisions of Clause 5 of the Indian Universities Act, Act VIII of 1904, is *ex-officio* a Fellow of the University), (3) the Dean of the Faculty of Science of the University, (4) the Dean of the Faculty of Engineering of the Univer-

sity, (5) four members of the University to be annually elected by the Senate, (6) four members to be nominated every three years by the Founder and after his death by his representatives as therein provided, (7) two representatives of the Professorial Staff, and that the proceedings of the Governing Body should be laid before the Syndicate and might be revised by it, (e) that the University should from its own funds make such recurring and periodical grants ■ might be required for the maintenance of the said two Professorships, the Libraries, Laboratories, &c., the maintenance and repairs of 92, Upper Circular Road, and for payment of the rates and taxes thereof, (f) that it should be the duty of the Professors to arrange for the adequate instruction of students for scientific degrees and also of other students exceptionally qualified in any of the subjects of study, though not undergraduates of any University, if recommended by the Governing Body, and further reciting that the University had agreed to accept the Founder's offer of the said properties as and by the way of endowment on the conditions and upon the trusts thereinbefore set forth in pursuance of the agreement and in consideration of the premises, the Founder granted, transferred and conveyed the scheduled properties to the University upon the trusts and to and for the ends, intents and purposes thereinbefore as also thereafter declared, expressed and contained of and concerning the same, and it was thereby agreed and declared between and by the parties thereto that the University should hold the endowed properties on the conditions and upon the trusts following, which are the conditions and trusts previously recited. The indenture was executed on behalf of the University by Sir Asutosh Mookerjee, the Vice-Chancellor of the University, the common seal of the University being affixed by him. By the indenture of the 8th October 1912 which was made between Sir Tarak Nath Palit (thereinafter called the Settlor) of the first part, Sir Tarak Nath Palit, Sir Asutosh Mookerjee, Sisir Kumar Mullick and the University (thereinafter called the Trustees) of the second part, and the University (thereinafter called the Trustee University) of the third part, the Settlor granted, assigned and transferred to the Trustees the

JITENDRA NATH PALIT v. LOKENDRA NATH.

premises mentioned and described in the schedules thereto, and it was thereby declared and agreed that the Trustees should hold the scheduled premises (hereinafter called the Trust Estate), (A) upon trust during the Settlor's lifetime to permit him to collect and receive the income of the Trust Estate and apply and dispose of the same for his absolute ■■■ and benefit, (B) upon the death of the Settlor, upon trust to transfer the Trust Estate to the University, who should thenceforth become the sole trustee of the said indenture, and should hold the Trust Estate upon trust (a) to collect the income thereof, (b) to set apart out of the Trust Estate Rs. 1,00,000 upon trust to apply the income in perpetuity in establishing Scholarships, the number and value thereof to be determined by the Governing Body mentioned in the indenture of the 15th June 1912, who should have the right of nomination thereto; (c) and (d) to provide and transfer out of the Trust Estate to certain institutions called respectively the Sakhi Shilpa Samity and the Albert Victoria Hospital, Calcutta, the respective sums of Rs. 15,000 and Rs. 50,000, (e) to pay out of the income of the Trust Estate to Sreemutty Rani Palit Rs. 15 per month during her life, (f) to apply the entire balance of the income of the Trust Estate in aid of and for the better carrying out of the trusts of the indenture of the 15th June 1912.

Clause 9 of the indenture provided that during the Settlor's lifetime the Trustees should never be less than three in number, and by clause 11 it was declared that during the Settlor's lifetime he, in conjunction with any of the Trustees, should be competent to do all the acts required to be done by the Trustees, or to exercise all the powers conferred upon them.

The indenture was executed by the parties thereto, the seal of the University being affixed by Sir Asutosh Mookerjee, the Vice-Chancellor of the University.

The Calcutta University was established and incorporated by Act II of 1857 and the preamble to this Act states that it had been determined to establish a University at Calcutta for the purpose of ascertaining by means of examination the persons who had acquired proficiency in different branches of

Literature, Science and Art, and of rewarding them by Academical Degrees, and the Act goes on to constitute certain named persons and others as one Body Politic and Corporate by the name of the University of Calcutta, and provides that such body shall have perpetual succession and a common seal. By clause II of the said Act it is provided that the Body Corporate shall be able and capable in law to take, purchase and hold any property, moveable or immoveable, which may become vested in it for the purpose of the University by virtue of any purchase, grant, testamentary disposition or otherwise and by Clause VIII, that the Chancellor, Vice-Chancellor, and Fellows for the time being shall have the entire management of and superintendence over the affairs, concerns and property of the University, and that in all cases unprovided for by the Act, it shall be lawful for the Chancellor, Vice-Chancellor and Fellows to act in such manner as shall appear to them best calculated to promote the purposes intended by the University.

By the Indian Universities Act 1904 (VIII of 1904), it is provided (*inter alia*) by clause III, that the University shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments, to erect, equip and maintain University Libraries, Laboratories and Museums, and to do all acts consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research. Clause IV provides for the constitution of the Body Corporate of the University, and that such body shall be the Senate of the University and that all powers which by the Act of Incorporation or this Act are conferred upon the Senate, or upon the Chancellor, Rector, Vice-Chancellor and Fellows in their corporate capacity, shall be vested in and exercised by the Senate, and that all the duties imposed on the University by the Act of Incorporation shall be deemed to be imposed upon the Body Corporate as constituted under this Act. Clause XIV provides that nothing contained in the Act of Incorporation shall be deemed to prohibit the constitution of a new Faculty or the aboli-

JITENDRA NATH PALIT V. LOKENDRA NATH.

tion or reconstitution of any existing Faculty by the Senate under Regulations made in accordance with the provisions of this Act.

Clause XV provides that the Executive Government of the University shall be vested in the Syndicate, and also provides for the constitution of the Syndicate. Clause XXV provides (1) that the Senate with the sanction of the Government (that is to say, the Governor-General in Council) may from time to time make Regulations consistent with the Act of Incorporation as amended by this Act, and with this Act to provide for matters relating to the University, (2) that in particular and without prejudice to the generality of the foregoing power, such regulations might provide for, (3) the appointment and duties of Professors appointed by the University and clause XXVI provides for the preparation of new Regulations. In accordance with the provisions of clause XXVI of Act VIII of 1904, new Regulations were prepared—the appointment of University Professors is dealt with by Chapter IX of such Regulations, which provides (1) that when the funds of the University permit, the Senate with the previous consent of the Governor-General in Council shall found such Professorships as it may think fit, prescribe the conditions on which they shall be tenable, and provide in connection therewith Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research, (2) that the Senate shall likewise found and endow Professorships on particular subjects from funds specially given or bequeathed for the endowment of such Professorships, or, if it thinks fit, accept endowments of such Professorships made by individual or corporate donors.

It appears from the Minutes of the Syndicate (see Calcutta University Minutes, Part III, 1912, Vol. LVI, at pages 1124 and 1144) that Sir Tarak Nath Palit, in a letter dated the 14th June 1912 addressed to the Vice-Chancellor of the University, forwarded a draft of the indenture of the 15th June 1912, and that the Syndicate passed a resolution on that day requesting the Vice-Chancellor to sign the indenture on behalf of the University, and also resolved that the Syndicate recommend to the Senate (i) that the donation of Sir Tarak Nath Palit (then Mr. Palit)

be accepted on the terms mentioned in the Trust-deed, (ii) that the two Professorships be instituted, one to be called the Tarak Nath Palit Professorship of Chemistry, and the other the Tarak Nath Palit Professorship of Physics, (iii) that on the land given to the University by Mr. Palit, a University Laboratory be erected, to be called the Tarak Nath Palit Laboratory. These recommendations of the Syndicate were submitted to the Senate on the 22nd June 1912 and carried by acclamation, see Volume LVI, *supra*, at pages 1148 and 1149.

From Volume LVI, Part VII, of the Calcutta University Minutes for 1912, at pages 2350, 2351 and 2352, it appears that the Vice-Chancellor on the 12th October 1912 reported to the Syndicate the execution by Sir Tarak Nath Palit (then Mr. Palit) of the indenture of the 8th October 1912, informing the meeting that he had accepted the trust on behalf of the University, and that the Syndicate thereupon resolved (i) that the action of the Vice-Chancellor be confirmed, (ii) that he be authorized to take such further steps in the matter on behalf of the University as he might deem necessary and (iii) that the gift be reported to the Senate, and it also appears that the Senate accepted the Syndicate's recommendations unanimously.

It appears from these Minutes that the Vice-Chancellor had reported to Lord Hardinge Sir Tarak Nath Palit's first benefaction under the indenture of the 15th June 1915, and that the Government of India had promised a grant of Rs. 12,000 a year for the maintenance of the College of Science.

Sir Tarak Nath Palit, by his Will dated the 2nd May 1914, appointed the defendants Lokendra Nath Palit and Sisir Kumar Mullick executors thereof, and after giving certain specific and pecuniary legacies devised and bequeathed all properties that might remain undisposed of to the University to be held and applied by the University upon the valid Trusts contained in the indentures of the 15th June 1912 and the 8th October 1912.

Sir Tarak Nath Palit died on the 3rd October 1914, leaving him surviving his widow Dame Kumud Kamini Palit and two sons, the plaintiff and the defendant Lokendra Nath Palit, his heirs under the Bengal

JITENDRA NATH PALIT v. LOKENDRA NATH.

School of Hindu Law, by which it is common ground he was governed.

Lady Palit is not a party to this suit, nor are the two institutions and the annuitant who ■■■ referred to in the indenture of the 8th October 1912. No evidence was called on either side, but it is common ground between the parties to the suit that the University is in possession of the properties purported to be granted and assigned by the two indentures of the 25th June 1912 and the 8th October 1912, and that the University is carrying out the provisions of these two indentures in every particular, the two Chairs having been founded and Professors appointed and Rs. 2,50,000 applied for the purposes referred to in the indenture of the 8th October 1912.

The contentions urged at the Bar on behalf of the plaintiff with regard to the validity of the trust and conditions contained in the two indentures are as follows:—

With regard to the first indenture, that of the 15th June 1912, it is urged that it is *ultra vires* of the University to enter into the conditions therein contained, the main contentions urged being that these conditions involve

(a) The creation of a Governing Body, some members of which are foreign to the University and the others of whom, although members of the University, could not be nominated in such a manner to serve on this body.

(b) An agreement by the University that the new Chairs should always be filled by Indians, which might prevent the best available Professors being selected.

(c) The divesting by the University in favour of the Governing Body of certain of its statutory powers by a delegation to such Governing Body of

(1) The election of Professors.

(2) The determination whether the Professors should receive special training abroad before entering on their duties, and of the amount payable to them for allowances and travelling expenses.

(d) An obligation to make recurring periodical grants and contributions which will fetter the future discretion of the University, and which the University may hereafter refuse or fail to carry out.

(e) An obligation to provide for the instruction of students not members of the University, if recommended by the Governing Body.

(f) Leaving to the discretion of the Governing Body, with regard to the application of any surplus income, the number and value of the Scholarships to be given.

Certain subsidiary objections with regard to the validity of the deed were also raised, namely,

(1) That the previous sanction of the Governor-General in Council to the foundation of the Professorships was not obtained in accordance with Chapter IX of the University Regulations.

(2) That there was no acceptance by the Senate of the terms and conditions of the deed.

(3) That the University seal was affixed by the Vice Chancellor without the express authority of the Senate, the proper person to affix the seal, in the absence of any resolution, being the Registrar ■■■ the custodian of the seal [see Chapter IV (7) of the Regulations].

With regard to the second indenture, that of the 8th October 1912, the same objections that were raised with regard to the first deed were raised with regard to this also, and the following additional special objections were also raised with regard to it, namely:—

(a) That it was *ultra vires* of the University to act as trustee during the lifetime of Sir Tarak Nath Palit and for the purpose of enabling him to receive the life-interest reserved to him under the indenture.

(b) That if this is so, the surviving trustees on Sir Tarak Nath Palit's death could make no valid assurance or transfer of the properties to the University inasmuch as they were never vested in them.

(c) That it is *ultra vires* of the University to act as trustee in respect of the trusts created in favour of—

(1) Sakhi Shilpa Samiti,

JITENDRA NATH PALIT v. LOKENDRA NATH.

- (2) The Albert Victor Hospital,
- (3) Rani Palit.

The following issues were raised for our determination:—

(1) Does the plaint disclose any cause of action, and is the suit maintainable in its present form in view of section 42 of the Specific Relief Act?

(2) Are the two indentures of the 15th June 1912 and the 8th October 1912 and the deed of transfer of the properties assured by the indenture of the 8th October 1912 after Sir Tarak Nath Palit's death valid and operative in law, and has the University acquired a good and indefeasible title thereunder?

(3) Has the University acquired a good and indefeasible title under the residuary devise and bequest in the Will?

(4) Has not the Settlor, by the two indentures of the 15th June 1912 and the 8th October 1912, evinced a general intention to give his property to charitable and educational purposes for the use of the University to which the Court will give effect?

(5) Are not the Sakhi Shilpa Samiti, the Albert Victor Hospital and Sreemutty Rani Palit, who are beneficiaries under the indenture of the 8th October 1912, and each of them, necessary and proper parties, and is not the suit bad for their non-joinder?

The 3rd and 4th issues were admitted subject to the plaintiff's objection that they did not arise and could not be decided in this suit. These issues were also objected to by the executors and by Counsel for the defendant Lokendra Nath Palit, who, after the admission of these issues, severed from his co-executor and was separately represented in his individual capacity. Lady Palit, who in the event of the two indentures being declared invalid, would in certain events be entitled to a Hindu widow's estate, was, as before stated, not a party to the suit.

The Advocate-General on behalf of the University stated that the University did not wish to rely on any technical objection that the plaintiff could not maintain the suit, having regard to the fact that the University were performing the trusts, and that even if their action in so doing was *ultra vires* of the University, the plaintiff, as having no interest

in the University, was not entitled to complain of any *ultra vires* act on its part. The Advocate-General stated on behalf of the University that the University were desirous of having the question of *ultra vires* and the validity of the two indentures determined in this suit.

A considerable body of argument was addressed to us on behalf of the plaintiff with regard to the nature of the two indentures of the 15th June and the 8th October 1912, it being urged that the two indentures were simply contracts between Sir Tarak Nath Palit and the University and nothing more, Sir Tarak Nath conveying certain premises to the University in consideration of the University covenanting to do certain things and to expend certain moneys. We were asked to consider the indentures as contracts and nothing more and to say that the usual results must follow when one party to the contract is acting beyond its statutory powers, and that if this once be established, the indentures are null and void. In my opinion we cannot so regard the indentures—they are indentures which make certain gifts to the University for the purposes of education coupled, it is true, with certain conditions to be performed by the University, and they constitute a charitable trust for the purposes of education.

I now propose to examine what exactly are the powers of the University under the two Acts, namely, Act II of 1857 and the Indian Universities Act, 1904, so far as concerns the purposes of this suit.

Under clause II of the Act of 1857 the University is empowered to hold any property which may become vested in it for the purpose of the University by virtue of any grant. Under the general words of clause VIII (and it is noticeable that whilst other clauses of this Act have been repealed, this clause remains unrepealed) the Chancellor, Vice-Chancellor and Fellows in all cases unprovided for by the Act may act in such manner as shall appear to them best calculated to promote the purposes intended by the University.

Under clause III of the Act of 1904 the University shall be deemed to have been incorporated for the purpose of making provision for the instruction of students with power to appoint University Professors,

JITENDRA NATH PALIT v. LOKENDRA NATH.

hold and manage educational endowments, erect, equip and maintain University Laboratories, &c., and to do all acts consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research. And clause XIV provides for the constitution of new Faculties.

If one turns to the indenture of the 15th June 1912, it provides (a) for the foundation of two Professorships or Chairs with a proviso that in certain events the University should make recurring grants for the upkeep—provisions which, in my opinion, clearly fall within the powers conferred by clauses III and XIV of the Act of 1904, which enable the University to found new Faculties and appoint Professors.

(b) That they shall always be filled by Indians—a provision which, in my opinion, must be read in the light of the general words at the end of clause III of Act VIII of 1904, that is to say, if, in the opinion of the University, the acceptance of the Palit endowment or trust tended as a whole to promote study and research, it was within the powers of the University to accept the endowment with this proviso attached.

(c) For the provision of Lecture Rooms, Laboratories, &c., and for the application by the University of a sum of Rs. 2,50,000 for the construction thereof on a certain site—provisions which, in my opinion, clearly fall within the words of clause 3 of the Act of 1904, “erect, equip, and maintain University Laboratories, &c.”

(d) For the constitution of a Governing Body which, if the constitution thereof is examined, must contain a large preponderance of University representatives, all but the four to be nominated by the Founder or his representatives being office-holders in or members of the University and, moreover, proceedings of the Governing Body are subject to revision by the Syndicate of the University, whose proceedings are in turn subject to revision or modification by the Senate of the University under the provisions of Chapter IV (15) of the Regulations of the University.

(e) For the making of periodical grants by the University for the maintenance and upkeep of the Professorships and of the Laboratories, &c., and repairs, &c., of certain premises—provisions which clearly

fall, either expressly or by implication, within clause III of Act VIII of 1904.

(f) For (*inter alia*) the instruction of exceptionally qualified students at the recommendation of the Governing Body, even if not undergraduates of any University—a provision within clause III of Act VIII of 1904, which does not expressly, nor I think inferentially, limit the word “Students” in the clause to undergraduates of the University.

(g) For the application of surplus income to Scholarships, the number and value and award thereof to be determined by the Governing Body—provisions which, in my opinion, are not *ultra vires*, having regard to the constitution and control of this body as before stated.

With regard to what I have called the subsidiary objections to the first indenture, in my opinion, if one arrives at the conclusion that the trusts and provisions of the indenture are within the powers conferred on the University by Act II of 1857 and Act VIII of 1904, the fact that the internal Regulations of the University may not have been observed, that is, that (a) the previous sanction of Governor-General was not obtained, (b) that the Senate did not accept the trust, (c) that the seal was irregularly affixed, cannot invalidate the indenture, as no question of *ultra vires* arises, and these are merely irregularities which, if necessary, can be cured at any time. But if it is necessary to deal with these matters, it is sufficient to say that there is no evidence that the previous sanction of the Governor-General was not obtained, that it appears that the Senate did in fact accept the gift, and that Sir Asutosh Mookerjee was authorized to sign the indenture, if any execution of the deed by the University was necessary, (and, in my opinion, it was not in the view I take of the indenture as expressed above) in my opinion, under the circumstances of this case, was sufficient authority to him to affix the seal of the University: *In re Barnard's Banking Company, Ex parte Contract Corporation Co.* (1).

Before I come to deal with the second indenture, I want to make one observation with regard to the argument addressed to us that there was no guarantee that the persons who

(1) (1867) 3 Ch. 105 at p. 116; 37 L. J. Ch. 81; 17 L. T. 269; 16 W. R. 193.

GIRDHAR GOPAL v. GAYA PRASAD.

have the control of the affairs of the University in future years will observe the provisions of the indenture, and the observation I wish to make is, that this question does not now arise, and that if and when this happens, will be the proper time to consider the position which then arises.

I now turn to the indenture of the 8th October 1912 and to the special objections urged against it. Even assuming that the University could not act as a trustee of the life-estate thereby reserved to Sir Tarak Nath, and that the appointment of the University as trustee was therefore null and void, and as if it had never been made, the premises thereby transferred then vested during Sir Tarak Nath's lifetime in Sir Tark Nath himself, Sir Asutosh Mookerjee and Sisir Kumar Mullick, who were certainly not incapable of acting ■ trustees, and who, having regard to clauses 9 and 11 of the indenture, constituted a sufficient number of trustees within the provisions of the indenture. And I fail to apprehend how the survivors could not on Sir Tarak Nath's death make ■ valid transfer of the trust property to the University. If and so far as it is contended that after the death of Sir Tarak Nath the University could not act as trustee with regard to the two sums to be transferred to the Shilpa Samiti and the Albert Victor Hospital, the answer is that there are no active trusts to be performed, and all the University has to do is to hand over certain sums of money, which can hardly be seriously argued to be acts *ultra vires* of the University. The only trust that remains is the payment of Rs. 15 a month to Sreemutty Rani Palit, and it is difficult to treat seriously the argument addressed to us that the existence of this provision can invalidate the indenture. Accordingly, in my opinion, the trusts or conditions attached by Sir Tarak Nath to his benefactions are within the express powers of the University.

Having regard to the view which I have expressed with regard to the validity of the two indentures, it is not necessary to deal with the questions raised by the 3rd and 4th issues or to decide if these questions can properly be raised in this suit as at present constituted.

In view of the desire of the University to have a decision of this Court upon the

question of the validity of the two indentures having regard to the powers of the University, it is not necessary for me to express any opinion upon the *first* issue that was raised.

With regard to the *second* issue, I hold that the two deeds of trust and the deed of transfer are, each of them, valid and operative in law, and that the University has acquired ■ good and indefeasible title thereunder.

Having regard to the view expressed upon the 2nd issue, the 3rd and 4th issues do not arise.

With regard to the 5th issue, in my opinion, the two institutions and Srimati Rani Palit were necessary parties to the suit ■ being interested in maintaining the validity to the second indenture.

The result is that this action must be dismissed with costs.

Suit dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 58 OF 1915-16 OF
LUCKNOW DISTRICT.

April 18, 1916.

Present:—Mr. Campbell, J. M.

GIRDHAR GOPAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

GAYA PRASAD AND ANOTHER—PLAINTIFFS,
SAJJAD HUSAIN DEFENDANT—
RESPONDENTS.

Grant—Rent-free service grant—Grant, non-transferable—Purchaser of rent-free grant, title of, as against grantor.

A rent-free grant made in lieu of service is non-transferable, and the purchaser of such grant from the original grantee cannot acquire any valid title ■ against the grantor. [p. 673, col. 1.]

Ghulam Sarrar v. Muhammad Ambar Ali Khan, 25 Ind. Cas. 594; 1 O. L. J. 325, dissented from.

Appeal from the decree of the Commissioner, Lucknow, dated the 27th August 1915, upholding the order of the Deputy Commissioner, Lucknow, dated the 31st March 1915, reversing that of the Assistant Collector, Lucknow, dated the 1st February 1915.

Mirza Mohammad Fasih, for the Appellants.

Babu Rudra Datta Sinha, for Respondents
Nos. 1 and 2.

NAGESHAR PRASAD PANDE v. PATESHRI PARTAB NARAIN SINGH.

JUDGMENT.—It has been found, as a matter of fact, that the grant was made rent-free in lieu of service. This cannot be disputed in third appeal. There can then be no doubt that the grant was non-transferable and appellant could not, by purchase from the original grantee, acquire any valid title against the grantor. I entirely disagree with the views expressed in *Ghulam Sarvar v. Muhammad Ambar Ali Khan* (1).

I uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

(1) 25 Ind. Cas. 594; 1 O. L. J. 325.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 16, 1915.

Present:—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

NAGESHAR PRASAD PANDE—

APPELLANT

versus

Raja PATESHRI PARTAB NARAIN SINGH AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit for possession by defendant against plaintiff—Plea of mortgage to plaintiff—Possession decreed—Subsequent suit on foot of mortgage—Maintainability—Transfer of Property Act (IV of 1882), s. 41—Transfer by person whose name was registered in Revenue Records against will of real owner—Absence of enquiry by transferee, effect of—Real owner, how far bound by the transfer—Hindu Law—Reversioner—Loan raised by mortgage utilised in payment of widow's debts—Reversioner not found entitled to property mortgaged—Real owner, if bound by mortgage.

The Raja of Basti brought a suit against N and others for possession of certain immoveable properties. N set up the suit mortgage as a defence. The suit was, however, decreed in favour of the Raja and possession of the properties was also delivered to him. Subsequently N instituted the present suit against the Raja on the foot of the same mortgage.

Held, that the decision in the prior suit operated as *res judicata* and that the suit was barred. [p. 674, col. 1.]

Where a person advanced money upon mortgage to another person, without making any enquiry whatever to ascertain the latter's title to the property mortgaged, and where it appeared that adequate enquiries would have disclosed the fact that the mortgagor was only the ostensible owner and that his name was registered in the revenue papers

without the consent of the real owner and in spite of his objections, and where it further appeared that the mortgagee resided in the same locality and was acquainted with all the circumstances of the family with which he had had money dealings for a long time:

Held, that the mortgagee could not claim the benefit of section 41 of the Transfer of Property Act, 1882, as he was not a *bona fide* transferee without notice. [p. 674, col. 2.]

On the death of a Hindu widow, a person claiming to be the reversioner entered into possession of the property and created a mortgage over it for paying off the debts of the widow. Subsequently it was decided that the reversioner had no right to enter upon the estate and that the real owner was the Rajah of Basti. In a suit by the alienee from the reversioner to enforce his mortgage:

Held, that the mortgage was not binding upon the real owner, even though the money was applied for paying the widow's debts. [p. 674, col. 2.]

Appeal against the decree and judgment of the High Court of Judicature for the North-Western Provinces, Allahabad, reported as 10 Ind. Cas. 961.

FACTS.—The property in suit, *viz.*, a share in the village of Saondih, was originally owned by one Chet Singh who sold it to his wife, Rup Kunwari, in 1847. On her death in 1887, it was taken possession of by one Rudra Narain Singh, nephew of Chet Singh. The property, however, having been attached during her lifetime at the instance of a creditor of hers, Rudra Narain Singh executed the suit mortgage on 21st January 1895 for repayment of the decree-debt. Subsequently, the present defendant, the Raja of Basti, claiming to be entitled to the suit property, among others, by virtue of a *sapurdnama*, dated 21st March 1848, executed by Chet Singh, and a Will executed by Rup Kunwari in 1858, sued the present plaintiff, Rudra Narain and others, for possession of the suit property. The present plaintiff set up the suit mortgage and contended that the plaintiff had no right whatever to question the validity of the alienations, and on the assumption that the suit was to set aside his alienation also joined issue as to the sufficiency of the Court-fee. The Trial Court decided the issue against the defendants and the decision, not having been objected to in appeal, became final. That suit eventually went against the defendants therein and the plaintiff in that suit (the present defendant), having succeeded in the High Court as well in the Privy Council, obtained possession of the property from the

NAGESHAR PRASAD PANDE v. PATESHRI PARTAB NARAIN SINGH.

defendants. The present suit was instituted on the foot of the mortgage of 1895 for a sale of the mortgaged property. Plaintiff contended that the property in defendant's possession was subject to a charge in his favour and that the defendant was estopped from denying his mortgage. The Subordinate Judge decreed the plaintiff's suit, but on appeal the High Court reversed the decree on the ground that the previous decision in defendant's favour operated as *res judicata* and that the plaintiff was not a *bona fide* transferee without notice so as to have the benefit of section 41 of the Transfer of Property Act. The Subordinate Judge also held that as the money raised by the mortgage was applied to discharge Rup Kunwari's debts, the Raja of Basti was liable to the plaintiff.

The judgment of the High Court on the first point was as follows:—

"The question of the title of the plaintiff to that suit was one of the material questions in the case and it was determined in favour of the plaintiff against the present plaintiff, who was a party to that suit. It is true that no specific mention of the mortgage now in question was made in the judgment in that suit, but we think the present plaintiff, as defendant, did raise the question of the validity of the mortgage in his favour and was entitled to do so with a view to resist the plaintiff's claim for establishment of his title. He could assert, as he does now, that by reason of the operation of the rule of estoppel, the then plaintiff, the Raja of Basti, was precluded from setting up his right to the property mortgaged to him; but he did not do so. We think that it is too late for him now to assert that the decision in the former suit to which he was a party and which has become conclusive as between all persons who were parties to it, should be ignored in the present suit and the question of the title of the appellant. . . . should be considered and determined independently of that judgment. It having been held between the parties to the present suit that Rajah Pateshri Partap Narain Singh and not Rudra Narain Singh is entitled to the property in question, it was not, in our opinion, open to the Court in this case to hold otherwise."

On the second point the High Court held as follows:—

"The Court below was of opinion that the mortgage is binding on the appellant inasmuch as Rudra Narain Singh's name was entered in the Revenue papers after the death of Rup Kunwari, and he was the ostensible owner of the property. The learned Subordinate Judge apparently relies on the provisions of section 41 of the Transfer of Property Act, but he overlooks the proviso to that section, which is to the effect that the transferee from an ostensible owner can defeat the real owner only if, after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith. There is nothing in this case to show that the plaintiff made any enquiry whatever to ascertain the title of the mortgagor, Rudra Narain Singh. It is true the name of Rudra Narain Singh was entered in the Revenue papers, but if enquiry had been made, it would have appeared that at the time when mutation of names was applied for, objections were preferred on behalf of the Raja of Basti and that the name of Rudra Narain Singh was entered because he was in possession. Further enquiry as to Rudra Narain's title would have led to the discovery of the fact that there was a Will, by virtue of which the Raja of Basti was the owner of the property after the death of Rup Kunwari. It cannot be said that the name of Rudra Narain Singh was entered as ostensible owner with the consent of the real owner, the Raja of Basti. On the contrary, his name was entered in spite of opposition put forward by the Raja. The present plaintiff is a person who has been lending money to the family for a long time. He resides in the same locality and was apparently acquainted with all the circumstances of the families concerned. He cannot, therefore, claim to be a *bona fide* transferee without notice so as to be in a position to defeat the title of the real owner."

The High Court further held that the mere application of the money raised by the mortgage to pay off Rup Kunwari's debts, did not make it binding on the appellant.

The High Court, therefore, reversed the decree of the Subordinate Judge. The plaintiff thereupon appealed to His Majesty in Council.

Mr. Dube, for the Appellant.

GOVIND v. CHANDRABHAGA.

Mr. De Gruyther, K. O., and Sir William Garth, for the Respondents.

JUDGMENT.

VISCOUNT HALDANE.—Their Lordships think that they may depart from the practice of making a more elaborate report, and they desire only to say that the judgment of the High Court seems to them so satisfactory and sufficient that they do not wish to hear anything further about the case.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. Barrow, Rogers and Neville.

Solicitors for the Respondents: Mr. Douglas Grant.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 74 OF 1914.

November 13, 1915.

Present:—Sir Henry Drake-Brockman, Kt., J. C., and Mr. Prideaux, Offg. A. J. C.

GOVIND—DEFENDANT—APPELLANT
versus

Musammat CHANDRABHAGA—
PLAINTIFF—RESPONDENT.

Evidence Act (1 of 1872), s. 115—Estoppel, statement, when amounts to—Admission on point of law, effect of—Hindu Law—Co-widows' right to partition property—One co-widow, whether can alienate her share.

A representation in order to work an estoppel must generally be a material statement of fact. An admission on a point of law cannot operate as an estoppel under section 115 of the Evidence Act. [p. 677, col. 1; p. 680, col. 1.]

Rajnarin Bose v. Universal Life Assurance Company, 7 C. 594, 10 C. L. R. 561, *Jagwant Singh v. Silan Singh*, 21 A. 285; A. W. N. (1899) 66; *Jethabhai Parbhudas v. Nathabhai Baraji*, 28 B. 399 at p. 407; 6 Bom. L. R. 428, followed.

Where, therefore, a Hindu widow adopted the defendant, who was an orphan, as a son to her deceased husband and subsequently sued for a declaration that the adoption was invalid:

Held, that, in so far as the plaintiff's conduct in adopting the defendant and subsequently supporting the adoption could be regarded as equivalent to a representation that an orphan can be validly adopted, it did not give rise to an estoppel and did not preclude her from maintaining the suit. [p. 680, col. 1.]

Dharam Kunwar v. Balwant Singh, 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675 (P. C.); 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142, distinguished.

According to Hindu Law, two co-widows are entitled to partition the estate inherited from their husband; and one co-widow can alienate for her life her share whether before or after partition, though the alienation will only be binding on the other, so as to defeat her right of survivorship, if that other consented to it. [p. 682, col. 1.]

Musammat Chander v. Murat Singh, 7 C. P. L. R. 153, dissented from.

Sundar v. Parbati, 12 A. 51 at p. 57; 16 I. A. 186; 5 Sar. P. C. J. 448; *Musammat Dal Koer v. Musammat Panbas Koer*, C. W. N. 658; *Gajapathi Nilamani v. Gajapathi Radhamani*, 1 M. 290; 1 Ind. Jur. 589; 4 I. A. 212; 1 C. L. R. 97; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 365, followed.

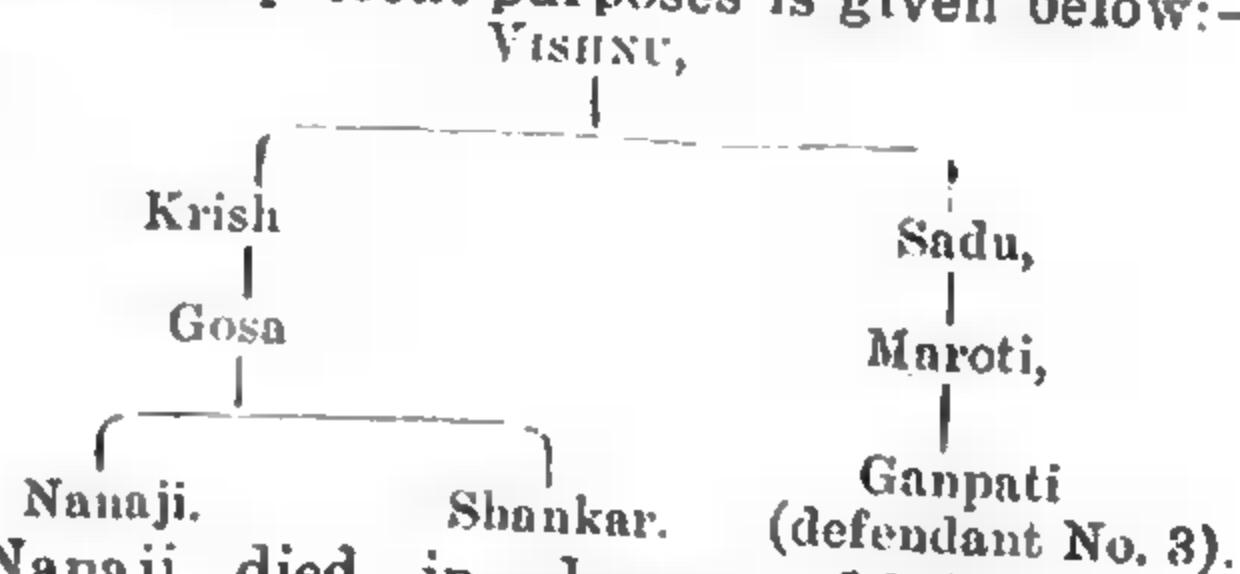
First appeal against the decree of the District Judge, Nagpur, dated the 16th June 1914.

Mr. F. W. Dillon, for the Appellant.

Messrs. J. Mittra and M. B. Kinkhede, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the District Court, Nagpur, passed in a suit brought by one Chandrabhaga Bai for a declaration that her adoption of the defendant Narain was invalid and for possession of her deceased husband Nanaji's estate in the hands of the said defendant and the defendant Ganpati. There was a third defendant Bhagirathi Bai, the plaintiff's co-widow.

So much of the pedigree of Nanaji as suffices for present purposes is given below:—



Nanaji died in January 1907, all the other persons named in the above table except Ganpati having predeceased him. On the 22nd February 1907, Chandrabhaga Bai adopted the defendant Narain, whose name was thereupon changed to Govind. In 1908 Govind attained the age of 18 years and as a major assumed possession of Nanaji's estate. On the 11th November 1907, the defendant Ganpati filed a suit (No. 114 of 1907) for a declaration that Govind's adoption was invalid, because Chandrabhaga Bai had no authority from Nanaji to adopt and also

GOVIND V. CHANDRABHAGA.

because Govind was an orphan when adopted. In that suit Chandrabhaga Bai and Bhagirathi Bai as well as Govind were defendants. In the course of the trial a compromise was arranged between Ganpati and Govind by virtue of which Ganpati obtained possession of Nanaji's cloth shop at Ramtek. Eventually, however, the compromise fell through, Govind failing to do all it required of him within the time allowed for the purpose, and on the 13th February 1912 Ganpati obtained a decree declaring that "so far as his (Ganpati's) rights as a reversioner of Nanaji are concerned, Govind is not the adopted son of Nanaji and, therefore, is not the owner of the property left by Nanaji."

On the 11th November 1911, Bhagirathi Bai sued for a declaration that Govind's adoption was invalid and for possession of the property held by him as Nanaji's adopted son, joining as defendants Govind, Chandrabhaga Bai, Amba Bai, Saraswati Bai and Ganpati. Amba Bai is the junior widow of Nanaji's father Gosai, while Saraswati is widow of Sham Rao, grandson of Gosai, the mother of the grandson's father Daji being Gosai's senior widow. This litigation ended on the 15th May 1912 in a decree based on a compromise between Bhagirathi Bai and Govind, by virtue of which the former received approximately the equivalent of one quarter out of Nanaji's estate. The suit bears No. 34 of 1911.

The suit (No. 1 of 1913) out of which the present appeal arises was filed on the 1st February 1913 and was followed up 16 days later by one (No. 4 of 1913) in which Amba Bai, the junior widow of Gosai, figured as plaintiff, the defendants being Govind, Chandrabhaga Bai, Bhagirathi Bai and Ganpati. On the 17th June 1914, Amba Bai obtained a decree declaring Govind's adoption null and void, from which Govind has preferred to this Court First Appeal No. 76 of 1914.

To both the suits of 1913 Govind set up a number of defences: 14 issues common to both were framed and nearly all were decided adversely to him. The District Judge found, however, that Chandrabhaga Bai must, on the strength of numerous admissions, be taken to have had Nanaji's

authority to adopt. The adoption was pronounced invalid on the ground that Govind was an orphan when it took place. The decree in Chandrabhaga Bai's suit directed Govind and Bhagirathi Bai to deliver to her joint possession to the extent of an 8-annas share of Nanaji's immovable property, and Ganpati to give her similar possession over the shop at Ramtek besides paying her Rs. 700 in cash as representing her share of the cloth and outstandings belonging to the said shop. Other directions and declarations were given which do not at this stage call for specific mention.

For the appellant the only finding impeached in this Court is that the 10th issue which runs thus:

"Did the plaintiff recognise the defendant Govind as Nanaji's adopted son both during Nanaji's lifetime and after his death and is she estopped from challenging the validity of Govind's adoption for the reasons alleged in paragraph 10 of his written statement?"

[After dealing with the facts, the judgment proceeds as follows:—]

The learned District Judge named three things necessary to bring a case within the scope of section 115, Indian Evidence Act, namely, (a) representation which amounts to an intentional causing or permitting belief in another, (b) belief on the part of that other, and (c) action arising out of that belief. He then went on to hold that the record contains nothing to indicate that Govind changed his family and status on the faith of any representation made to him either before or at the time of his adoption, and that even if Chandrabhaga can be supposed to have represented to Govind in February 1907 that he was not an orphan, Govind could not possibly have been misled as to his real position. Adverting next to the position that an act or omission, no less than a statement, may give rise to an estoppel, the lower Court dealt as follows with an argument that Chandrabhaga's offer to take Govind in adoption should be regarded tantamount to a representation that an orphan could be validly adopted and as accounting for

GOVIND V. CHANDRABHAGA.

Govind's willingness to leave his natural family:—

"This is not Govind's case. He has denied that he was ■ orphan when adopted. His case, on the other hand, is that his mother Muli gave him in adoption to Chandrabhaga. In short, he does not allege that he ■ led by Chandrabhaga's conduct to believe that ■ orphan could be validly adopted and that he, therefore, went in adoption. Secondly, Chandrabhaga's alleged representation by conduct might at the most be regarded as an admission on a point of law, and it has been held that an admission on ■ point of law is not an admission of ■ 'thing' within the meaning of section 115 of the Evidence Act."

Jhunka Prasad v. Nathu (1) was next referred to ■ authority for the proposition that there can be no estoppel against an adoptive mother who impeaches her adoption on the ground that ■ married man cannot be legally adopted. And finally, *Tek Chand v. Musammatt Gopal Devi* (2) and *Aiyanna Chariar v. Lakshmi Ammal* (3) were relied on as showing that where opposing parties have equal means of knowing the law, no estoppel can arise from conduct based on ■ mistake of law.

In this Court the appellant's learned Counsel cited the following cases as authorities for applying the doctrine of estoppel in respect of an adoption of ■ person whose adoption is strictly prohibited:—

(i) *Gopalayyan v. Raghupatiayyan* (4),

(ii) *Sadashiv Moreshwar Ghate v. Hari Moreshwar Ghate* (5),

(iii) *Dharam Kunwar v. Balwant Singh* (6), affirmed by the Judicial Committee of the Privy Council *sub iisdem nominibus* [*Dharam Kunwar v. Balwant Singh* (7)].

(1) 18 Ind. Cas. 960; 35 A. 263; 11 A. L. J. 293.

(2) 13 Ind. Cas. 482; 46 P. R. 1912; 127 P. L. R. 1912; 180 P. W. R. 1912.

(3) 10 Ind. Cas. 194; 21 M. L. J. 500; 10 M. L. T. 19; (1911) 2 M. W. N. 62.

(4) 7 M. H. C. R. 250.

(5) 11 B. H. C. R. 190.

(6) 30 A. 549; 5 A. L. J. 568; A. W. N. (1908) 231; 4 M. L. T. 385.

(7) 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675 (P. C.); 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142.

In the first of these it was undoubtedly held that, though a sister's son cannot be legally adopted, yet a member of the adoptive family who sought to impeach the adoption of such a person was precluded by ■ long course of acquiescence coupled with considerable changes in the situation of the adoptee. The judgment of the Court (Holloway and Innes, JJ.) was delivered on the 16th December 1872 but contains no reference to section 115, Indian Evidence Act. In the Bombay case, decided on the 21st September 1874, the question whether the adoptee's adoption was legally invalid because his *upanayana* and marriage ceremonies had already been performed in his natural family was not determined: here too there was no reference to the Indian Evidence Act, nor does the report show whether any attempt was made in argument to distinguish between conduct resolvable into ■ statement of fact on one hand and a statement of opinion or law on the other. The plaintiff in the Allahabad case was the adoptive mother who sought to avoid the adoption on the ground that the authority given by her husband did not extend beyond the adoption of a second boy should the first adopted son die: their Lordships of the Privy Council, though confirming the decision of the lower Courts that the plaintiff was estopped, were of opinion that the suit must fail because the widow's husband was shown to have given the more extended authority necessary to support the adoption.

Kannammal v. Virasami (8) furnishes another instance of estoppel against ■ widow who, after representing to the adoptee's parents that she had authority to adopt, sought years later to impeach her act for want of authority. This was cited by the appellant's learned Counsel ■ negating any necessity for showing that the adoptee had lost all his rights in his natural family or would have difficulty in recovering them. The report, however, is a brief one and we are not prepared to deduce from it the conclusion pressed upon us. On the other hand, the following passage in the judgment serves rather to indicate that the learned

(8) 15 M. 496, 2 M. L. J. 114.

GOVIND V. CHANDRABHAGA.

Judges (Collins, C. J., and Wilkinson, J.) did regard the adoptee as cut off from his natural family:—

"The plaintiff then brought up the 2nd defendant as her adopted son, and as such married him to the girl of her choice, and her adopted son he for years performed funeral ceremony of her husband."

That the belief induced in the person who sets up an estoppel must be one in fact, not in a proposition of law, was held by Broughton, J., in *Rajnarain Bose v. Universal Life Assurance Company* (9). This view seems to us to find distinct support in *Gopee Loll v. Chundraolee Buhoojee* (10), where the plaintiff Girdhareejee claimed as heir of one Luchmunjee whose widow was the defendant. The original owner of the property in dispute was one Damoodurjee who died leaving two widows, to whom he gave power to adopt sons. One widow adopted the plaintiff's father and the other adopted Luchmunjee. If Luchmunjee was not adopted, the plaintiff's claim failed, and the defendant in her pleadings denied the validity of the adoption. Before the Judicial Committee of the Privy Council it was argued for Girdhareejee that the defendant was estopped from pleading the invalidity alleged by her, inasmuch as she had represented in former suits, by letters and by other actions, that Luchmunjee was the adopted son of Damoodurjee. But their Lordships said:

"There is no estoppel in this case. There has been no misrepresentation on the part of Luchmunjee, or the defendant, on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties."

A similar pronouncement by the highest judicial authority is to be found in *Surendro Keshub Roy v. Doorgascondery Dossee* (11),

where the younger of the two widows, who in obedience to their husband's Will had simultaneously adopted a son each, sought as against the adoptee of the elder widow to plead the invalidity of such a double adoption. Their Lordships said:—

"They observe that the word 'estop' is often used in Indian cases very loosely to denote obligations which do not rest on estoppel at all. Such uses of the word are not countenanced by the definition of estoppel in section 115 of the Indian Evidence Act. It would indeed be difficult to see how the younger Ranees (widows), who represents the whole inheritance in an administration suit, could be prevented from pleading anything but the true state of the case. However that may be, it is not the fact that she has caused anybody to believe something to be true which she now alleges not to be true. She is entitled to raise any defence which the facts of the case will support."

Further authority for the proposition that an admission on a point of law cannot work an estoppel under section 115, Indian Evidence Act, will be found in *Jagwant Singh v. Silan Singh* (12) and *Jethabhai Purbhudas v. Nathabhai Baraji* (13). It was doubtless on this ground that in *Jhunka Prasad v. Nathu* (1) Griffin and Chamier, JJ., held that no question of estoppel could arise where the adoption of a married Sudra by his paternal uncle was impeached by that uncle more than 6 years after the adoption: unfortunately the judgment contains no reason or reference to authority in support of this conclusion.

On the other hand, there are not wanting authorities which support the appellant's contention though not mentioned by his learned Counsel. Thus in *Sarat Chunder Dey v. Gopal Chunder Laha* (14) their Lordships of the Privy Council, in the course of considering the Full Bench decision in *Vishnu v. Krishnan* (15), said:—

"Their Lordships would also have great difficulty in holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recog-

(9) 7 C. 594; 10 C. L. R. 561.

(10) 11 B. L. R. 391; 19 W. R. 12; 1. A. Sup. 131.

(11) 10 C. 513; 19 I. A. 108.

(12) 21 A. 285; A. W. N. (1899) 66.

(13) 28 B. 399 at p. 407; 6 Bom. L. R. 428.

(14) 20 C. 296 at p. 313; 19 I. A. 203.

(15) 7 M. 3.

GOVIND V. CHANDRABHAGA.

nised, constitute a representation in law only and not of fact."

The Madras High Court had held that the adoptive father's conduct in making and acting upon the adoption had created no false impression in the adoptee's mind as to any question of fact, but had at most contributed to instil in him an error on the question of law as to the validity of the adoption. In *Gurulingaswami v. Ramalakshamma* (16) while Shephard, J., thought that no estoppel arose from the mere fact that the plaintiff (a reversioner) concurred in an adoption supposed by all parties concerned to be legal and valid, Muttusami Ayyar, J., went further and said:—

"No estoppel can arise from ignorance of law which both parties must be presumed to know. The adoption took place in 1888, whilst this suit was brought in 1892. There are not in this case equitable considerations consequent on the growth of a new family or rights of property under an invalid adoption concurred in for a considerable interval of time."

Evidently the learned Hindu Judge considered that even the power to impeach an adoption as invalid on a pure point of law might be lost if the considerations he mentioned obtained. And the same view was apparently taken in *Vaithilinga Mudali v. Munigan* (17), where too an orphan's adoption was impugned.

The authorities so far examined seem to us to leave room for considerable doubt as to whether section 115, Indian Evidence Act, does or does not apply to a case where conduct relied on as giving rise to an estoppel amounts in effect to no more than an assurance that an adoption is valid. We are, therefore, inclined to attach special weight to the view expressed by Johnstone and Rattigan, JJ., in *Tek Chand v. Musammatt Gopal Devi* (2), one of the cases relied on by the lower Court. There the observations of the Judicial Committee above quoted from *Sarat Chunder Dey v. Gopal Chunder Laha* (14) were explained as follows:—

"The matters dealt with in the Madras

judgment [*Vishnu v. Krishnan* (15)] were in reality largely, if not entirely, matters of fact, and denial of those matters was what section 115 of the Indian Evidence Act, rightly interpreted, prohibited the party from making. The Privy Council did not in any way hold that section 115 covered estoppel in connection with representation not only of 'things', that is, facts, but also representations in law: their Lordships merely expressed the opinion that 'a series of acts by which an adoption is professedly made and subsequently recognised' cannot be taken ■ constituting ■ representation in law only and not of fact."

The opinion of Mr. Bigelow in his learned "Treatise on the Law of Estoppel" (6th edition, pages 634—636) is expressly that a representation in order to work an estoppel must generally be a material statement of fact. He says also:—

"It can seldom happen that a statement of opinion or of a proposition of law will conclude the party making it from denying its correctness; except where it is understood to mean nothing but a simple statement of fact..... The rule we apprehend to be this; that where the statement or conduct is not resolvable into ■ statement of fact as distinguished from ■ statement of opinion or of law, and does not amount to ■ contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards him to whom it was made..... The rule in regard to statements of opinion and statements of law is, it seems, based upon the ground that the truth is uncertain, or that the person to whom the statement is made knows as much about the matter ■ the other. When this is not the case, when the person making the statement in the form of an opinion, or perhaps of ■ rule of law, knows of facts which make the 'opinion' a sham, or knows that his rule of law is false, he has really made a misrepresentation of fact in the one case, and of something in the nature of fact in the other (in that his statement amounts to an assertion that the law has been so laid down); and then if the rest of the elements required in ordinary cases of misrepresentation are present, the estoppel is made out."

(16) 18 M. 53 at p. 58; 4 M. L. J. 237.

(17) 15 Ind. Cas. 299; 37 M. 529; 23 M. L. J. 189; 1912) M. W. N. 1127.

GOVIND V. CHANDRABHAGA.

On the whole the balance of authority in our opinion favours the view adopted by the District Judge. We hold then that, in so far as the plaintiff Chandrabhaga Bai's conduct in adopting the appellant and subsequently supporting the adoption can be regarded, as equivalent to a representation that an orphan can be validly adopted, it does not give rise to an estoppel. That Chandrabhaga Bai ever made to the appellant an express oral or written representation asserting the adoption of an orphan to be legal either under the general Hindu law or by virtue of a custom in the caste (Barai), has not been suggested at any stage of this litigation.

We are further of opinion that the appellant has failed to establish clearly the connection of cause and effect between Chandrabhaga Bai's conduct and his acceptance of the adoption. There is no doubt considerable resemblance between the facts of this case and those of *Dharam Kunwar v. Balwant Singh* (7). But there are important differences, apart from the point that in the Allahabad case the representation out of which estoppel was said to arise related to a matter of pure fact, namely, whether the plaintiff's husband had given her authority to adopt only one boy or to take several, one after the other, if deaths rendered that course necessary. There the adoptee was only 14 and was made over by his natural father, so that he had no choice in the transaction; he was evidently married while still a minor and to the girl of his adoptive mother's choice; and not a few changes of position had taken place in consequence of the adoptive mother's behaviour. In the words of their Lordships:—

"She (plaintiff) could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani (plaintiff) purported to endow him. He married on the faith of his adoptive mother's word, and

no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith."

The adoptee's position and that of the adoptive mother are widely different in the present case. Chandrabhaga Bai is an illiterate woman only 4 or 5 years older than the appellant and with several elderly ladies, including Nanaji's mother Amba Bai, in the household would have little real authority: her own evidence as P. W. No. 12 to this effect is borne out by the fact that the adoption-deed (exhibit D-1) was executed by 4 senior ladies besides the two co-widows. The appellant, on the other hand, has had a fairly good education which includes a fair knowledge of English. He is still in possession of his natural father Balaji's estate, Balaji having left no other children or brothers. Balaji's old friend Krishna Rao (D. W. No. 5) could not say if any more distant heirs than brothers exist, nor does the record contain any indication that the appellant's retention of Balaji's property, which has already lasted some 10 years, is likely to be threatened. The appellant, moreover, married as a major a girl of his own choice and being in possession of Nanaji's estate must have used its resources in opposing the suits brought against him. Similarly, the position of social importance, described by the Tahsildar (D. W. No. 15), Munsif (D. W. No. 16) and Circle Inspector (D. W. No. 17) of Ramtek, to which he has attained, is the outcome of his volition exercised after reaching majority. The Counsel (D. W. No. 3) who drafted the joint written statement which was filed on behalf of Chandrabhaga Bai and the appellant in Ganpati's suit (No. 114 of 1907) on the 5th February 1908, deposed that the appellant was already sufficiently grown up to understand his position and to give instructions independently. On the 15th February 1908, when Ganpati's written reply to the defence was put in, the appellant became aware that his adoption was impeached on the ground that it took place when both his parents were dead, and on the 12th August following—a month or so after he attained majority—he expressly endorsed all the defences already advanced, including a denial that an orphan cannot be validly adopted. Lastly he did not even offer to enter the witness-

GOVIND V. CHANDRABHAGA.

box and testify to the considerations which determined his conduct until the 4th May 1914, a week after he had closed his case and $3\frac{1}{2}$ months after the examination of his own latest witness (Buddhu Singh, No. 14). In this state of the facts there seems to be good reason to doubt whether—to use the language of Lord Escher, M. R., in *Seton v. Lafone* (18)—Chandrabhaga Bai's conduct was the "proximate" or "real" cause of the appellant's assent to being adopted in the first instance or of his acceptance of the position only 17 months later and onwards.

The appeal in Chandrabhaga Bai's suit, therefore, fails and is dismissed with costs. As against Amba Bai the appellant's case is admittedly no stronger: accordingly the appeal (No. 76 of 1914) to which that lady is respondent is, like the present one, dismissed with costs.

It remains to consider two objections to the lower Court's decree which have been advanced on behalf of Chandrabhaga Bai. The first impeaches the view expressed in the District Judge's 59th paragraph that Bhagirathi Bai (defendant No. 2) could alienate her life-interest in her husband's estate. The contention here is that Chandrabhaga Bai is not bound by any alienation effected by her co-widow and that consequently she is entitled to a decree for possession of the entire estate in the appellant's hands. This is rested on *Musammatt Chander v. Murat Singh* (19) and *Balu Bai v. Tanu Bai* (20). In the former one of two sisters who had succeeded to their father's property sold her share and the vendees sued the other for possession. Stevens, J. C., held that the estate of two sisters is one like that of two widows; that neither could alienate without the consent of the other; and that the vendees' suit must for want of such consent be wholly dismissed. The conclusion reached was based on the ruling of their Lordships of the Privy Council in *Bhugwandeem Doobey v. Myna Bae* (21), the facts and reasoning in which were considered in *Balu Bai v. Tanu Bai* (20) where also the rights

of sisters *inter se* were in dispute. The last mentioned case contains an *obiter dictum* that the *ratio decidendi* in *Musammatt Chunder v. Murat Singh* (19) is beyond dispute, but actually decided that it is open to two sisters who have inherited their father's property to make by agreement a partition which will extinguish the right of survivorship *inter se*. In several other High Courts recent authority favours the view that one of two co-widows is at liberty to alienate her life-interest in her husband's estate. Of the cases cited by the District Judge in this connection *Janoki Nath v. Mothuranath* (22) is not really in point, the parties being governed by the Dayabhaga. *Kanni Ammal v. Ammakannu Ammal* (23) and *Vadali Mamidigadu v. Kotipalli Ramayya* (24) deal respectively with the rights of two daughters and two widows and in neither did partition between the co-heirs precede the disputed alienation. In *Hari Narayan Jog v. Vitai* (25) Chandavarkar and Heaton, JJ., laid stress on the point, mentioned also by the late learned Shastri Golapchandra Sarkar at page 430 of his "Treatise on Hindu Law" (4th edition), that the Mitakshara in a passage accidentally omitted by Colebrooke expressly lays down that two or more co-widows jointly inheriting their husband's estate shall take the same by dividing it. And in *Durga Dutt v. Gita* (26) Stanley, C.J., and Griffin, J., explained in a manner which we accept as correct that their Lordships of the Privy Council did not in *Bhugwandeem v. Myna Bae* (21) lay down that one co-widow could not alienate her life-interest without the other's consent. We concur, moreover, with Shastri Golapchandra Sarkar in thinking that a female co-heir should in equity be held to have the same rights over her share as if she had been the sole heir.

In view of the more recent authorities which we have cited, we are unable to agree with the decision in *Musammatt Chunder v. Murat Singh* (19). The right of two co-widows to partition the estate inherited from their

(18) (1887) 19 Q. B. D. 68 at pp. 70, 71; 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749.

(19) 7 C. P. L. R. 153.

(20) 24 Ind. Cas. 808; 10 N. L. R. 51.

(21) 11 M. I. A. 487; 9 W. R. (P. C.) 23; 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184.

(22) 9 C. 580; 12 C. L. R. 215.

(23) 23 M. 504; 10 M. L. J. 253.

(24) 26 M. 334.

(25) 31 B. 560; 9 Bom. L. R. 1049.

(26) 9 Ind. Cas. 498; 33 A. 443; 8 A. L. J. 220.

GAJODHAR v. UDIT NARAIN SINGH.

husband is now well settled, though the division is not to be made with the objects properly kept in view where male co-parceners are concerned: see *Sundar v. Parbati* (27) and *Musammatt Dal Koer v. Musammatt Panbas Koer* (28). Partition will not affect the right of survivorship which results from the position that the co-widows are joint tenants holding one estate: see *Gajapathi Nilamani v. Gajapathi Radhamani* (29). Similarly, one co-widow can alienate for her life her share, whether before or after partition, though the alienation will only be binding on the other, so as to defeat her right of survivorship, if that other consented to it.

We do not feel at all pressed by the consideration that Bhagirathi Bai took no conveyance from the appellant, though he was in possession of the entire estate. The registered *farkhatnama* (Exhibit D-3) executed by her begins by setting out that the appellant's adoption is invalid and goes on to relinquish all further claim to certain property in consideration of being placed in possession of a quarter of the same property. The arrangement thus evidenced was embodied in the decree deciding the suit, and we are unable to distinguish the effect of all this from that of an alienation by Bhagirathi Bai to the appellant of her interest in all but one quarter of her husband's estate. The appellant had no estate which he could himself convey. This view seems to us to find support in *Sheo Singh v. Jeoni* (30), *Ram Sarup v. Ram Dei* (31), *Khunni Lal v. Gobind Krishna Narain* (32) and *Kambinayani Javvaji Timmaji Amma Garu v. Kambinayani Javvaji Subbaraju Nayanivaru* (33).

(27) 12 A. 51 at p. 57; 16 I. A. 186; 5 Sar. P. C. J. 449.

(28) 8 C. W. N. 658.

(29) 1 M. 290; 1 Ind. Jur. 589; 4 I. A. 212; 1 C. L. R. 97; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 365.

(30) 19 A. 524; A. W. N. (1897) 141.

(31) 29 A. 239; 4 A. L. J. 168; A. W. N. (1907) 33; 3 M. L. T. 59.

(32) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 675; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 38 I. A. 87.

(33) 5 Ind. Cas. 640; (1910) M. W. N. 60; 22 M. L. J. 204; 7 M. L. T. 340; 33 M. 473.

The first objection thus fails.

Appeal dismissed.

[Note: The rest of the judgment is immaterial for the purpose of report.—Ed.]

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 6 OF 1914.

April 27, 1915.

Present:—Mr. Stuart, A. J. C., and

Pandit Kanhaiya Lal, A. J. C.

GAJODHAR—DEFENDANT—

APPELLANT

versus

Raja UDIT NARAIN SINGH—PLAINTIFF

—RESPONDENT.

Oudh Laws Act (XVIII of 1876), s. 9 (c)—Under-proprietor in mahal of village—Proprietor of another mahal of village—Village community, members of—Pre-emption, right of—Lots, determination by.

An under-proprietor of certain specified plots in a mahal of a village and the proprietor of another mahal in the same village, are both members of the village community within the meaning of the third clause of section 9 of the Oudh Laws Act, and neither has a right of pre-emption superior to that of the other. Lots ought to be drawn to determine who as between them is entitled to pre-empt. [p. 685, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 23rd December 1913.

Pandit Gokaran Nath Misra, for the Appellant.

Babu Bisheshwar Nath Srivastava, for the Respondent.

JUDGMENT.—Certain specified plots in Mahal Maheshwar Bakhsh Singh in the village of Chand Sahali in the Bara Banki district, the property of Thakur Sheopal Singh, Talukdar of Rampur Mathra, were sold by the Court of Wards on behalf of the said Talukdar, whose property was under the management of the Court of Wards, by a deed dated 3rd October 1912 to Gajodhar Kurmi, a resident of Bhikhari-pur. Raja Udit Narain Singh, Talukdar of Ram Nagar, asserting a right of pre-emption under the provisions of Chapter II, Act XVIII of 1876, instituted a suit for possession of the plots in question on payment of consideration stated in the

GAJODHAR v. UDIT NARAIN SINGH.

deed. The Raja alleged in the plaint that the village of Chand Sahali was divided into two *mahals* known as Mahal Maheshar Bakhsh Singh and Mahal Raja Sarabjit Singh, that he was the sole owner of Mahal Raja Sarabjit Singh and that Mahal Maheshar Bakhsh Singh contained two *khata*s, the first of which, comprising the major portion of the area included in the *mahals*, was owned in entirety by Thakur Sheopal Singh, and the second of which was a *shamilat mahal* divided into 16 shares, 5 belonging to the owner of Mahal Maheshar Bakhsh Singh and eleven belonging to himself as owner of Mahal Raja Sarabjit Singh. He thereby asserted that he was a co-sharer in a *khata* which formed part of Mahal Maheshar Bakhsh Singh, and was thus a co-sharer in that *mahal* within the meaning of the second clause of section 9, Act XVIII of 1876. He denied that Gajodhar, the vendee, was a co-sharer in the *mahal* in question.

Gajodhar asserted in reply that the Raja of Ram Nagar had no interest in Mahal Maheshar Bakhsh Singh and that he himself was a co-sharer in that *mahal*. He further asserted that he had intimated to the Raja his intention of purchasing the specified plots in question before his purchase was completed, and that the Raja had agreed to the completion of the transaction, and was thus estopped from setting up a right of pre-emption with respect to those plots.

The learned Subordinate Judge found that the Raja of Ram Nagar owns a share in a *khata* which forms an integral portion of Mahal Maheshar Bakhsh Singh, and is thus a co-sharer in Mahal Maheshar Bakhsh Singh. He found that Gajodhar is not a co-sharer in Mahal Maheshar Bakhsh Singh. He did not decide clearly whether Gajodhar is an under-proprietor or a tenant in the said *mahal*. He finally found that the Raja had not agreed to the purchase made by Gajodhar, and that he was not estopped from asserting a right of pre-emption. He, therefore, decreed the claim of the Raja for possession. The present appeal is preferred.

The first point for decision is, whether the Raja of Ram Nagar is a co-sharer in Mahal Maheshar Bakhsh Singh. At the

time of the first Regular Settlement the village of Chand Sahali was divided into two *mahals* and one *chak*. The first *mahal* consisted of a two-annas share in the village and was owned by Thakur Sarabjit Singh, Talukdar of Ram Nagar. The second *mahal* consisted of a fourteen-annas share in the village and was owned by the Talukdar of Mohammadpur. The *chak*, which was known as Chak Andi, consisted of *shamilat*, half of which was owned by the Talukdar of Ram Nagar and half by the Talukdar of Mohammadpur. The shares were recorded in the Revenue Court in the first Regular Settlement in the following manner:—

Name of Owner.	Detailed shares.	Amount of land revenue payable.
(a) Thakur Sarabjit Singh of Ram Nagar.	Two-annas share in Chand Sahali. Eight-annas share in Chak Andi.	Rs. a. p. 179 6 0
(b) Thakur Ganga Singh of Mohammadpur.	Fourteen-annas share in Chand Sahali. Eight-annas share in Chak Andi.	
		1,076 4 0

The tenure is recorded as *pattidari* and each *patti* is separately assessed.

In the *kabuliat* executed by the Talukdar of Ram Nagar in favour of Government as an incident of his receipt of a *sanad*, the shares mentioned under (a) are included as a portion of his *talukdari* property being described as No. 35 in *Parganah* Mohammadpur, it being noted in the remarks column that *Patti* Ganga Singh is excepted. In the *kabuliat* similarly executed by the Talukdar of Mohammadpur at the same time, the shares included under (b) are similarly recorded as a portion of his *talukdari* property being described as No. 2 in *Parganah* Mohammadpur. In the recent Settlement the record is made as follows:—

Mahal Dan Bahadur Singh (which is now known as Mahal Maheshar Bakhsh Singh) is divided into two *khata*s. In *khata* No. 1 the name of the *lambardar* and sole sharer is given as Thakur Maheshar Bakhsh Singh.

GAJODHAR V. UDIT NARAIN SINGH.

His share is recorded ■ sixteen annas. The area of the *mahal* is recorded ■ 1343—7—0. The land revenue is recorded as Rs. 1,335 for the first five years of Settlement, the amount being varied after the first five years. There is no other entry in *khata* No. 1. In *khata* No. 2 the name of the *lambardar* is given ■ Maheshar Bakhsh Singh. The share again amounts to sixteen annas. The area is 611—5—0. The land revenue is stated to be Rs. 15-5-0. The names of the sharers are recorded in a peculiar manner. The shares are given as *shamilat-deh* and it is noted that *Mahal* Dan Bahadur Singh owns five annas and *Mahal* Sarabjit Singh owns eleven annas. There is an attempt made to add up the ■ and the land revenue. But the totals do not correspond to the real totals of the area and land revenue as given. The fact that the totals are given incorrectly shows that the *khewat* was prepared carelessly and loosely. The remaining *khewat* in the village is of *Mahal* Sarabjit Singh in which the *lambardar* and sole sharer is described as *Raja* Sarabjit Singh of Ram Nagar. The shares ■ given ■ 16 annas. The area is given as 323—4—3, and the land revenue is Rs. 220 for the first five years. Comparing the old Settlement and the new Settlement we find that there is no reason to suppose that the *mahals* constituted by the recent Settlement differed in any way from the *mahals* constituted by the old Settlement. The fourteen-annas share which formerly belonged to the *Talukdar* of Mohammadpur now appears as *khata* No. 1 in *Mahal* Dan Bahadur Singh, which is now known ■ *Mahal* Maheshar Bakhsh Singh. The two-annas share formerly owned by *Thakur* Sarabjit Singh appears as *Mahal* Sarabjit Singh owned by *Raja* Sarabjit Singh, and the old Chak Andi appears ■ *khata* No. 2 known as *shamilat-deh*. The shares were formerly half and half. They have now become ■ five-annas share owned by *Thakur* Maheshar Bakhsh Singh and an eleven annas share owned by *Raja* Sarabjit Singh. It is to be noted that the *Talukdar* of Mohammadpur has transferred all his rights in the village. We have to consider whether this *shamilat-deh*, which is now described as *khata* No. 2 in *Mahal* Dan Bahadur Singh, is really ■ portion of that *mahal*. The *shamilat-deh* is clearly the old Chak Andi, and the old Settlement shows that this was a *chak* distinct from the two *mahals*. The

owners of the two *mahals* were co-sharers in the *chak*, but the owner in each *mahal* was not a co-sharer in the other *mahal*. In spite of the fact that the *shamilat-deh* has now been given a *khata* number in *Mahal* Dan Bahadur Singh, we consider that it still forms an entity separate from either *mahal*. The owners of the *mahals* ■ co-sharers in the *shamilat-deh*. But it is clear from the entry in *khata* No. 1 of *Mahal* Dan Bahadur Singh that the *Raja* of Ram Nagar is not a co-sharer in *Mahal* Dan Bahadur Singh. He is not described anywhere as ■ co-sharer, and if he had been a co-sharer the entries, had the respondent's contention been correct, would have been of this nature:—

Mahal DAN BAHADUR SINGH.

Name of <i>lambardar</i>	... Maheshar Bakhsh Singh.
Name of sharers	... Maheshar Bakhsh Singh and <i>Raja</i> Sarabjit Singh.
<i>Khata</i> No. 1 Total	... Sixteen annas.
Detail of shares	... Maheshar Bakhsh Singh sixteen annas; <i>Raja</i> Sarabjit Singh, nil.
<i>Khata</i> No. 2 Total	... Sixteen annas.
Name of <i>lambardar</i>	... Maheshar Bakhsh Singh.
Name of sharers	... Maheshar Bakhsh Singh and <i>Raja</i> Sarabjit Singh.
Detail of shares	... <i>Raja</i> Sarabjit Singh, eleven annas; Maheshar Bakhsh Singh, five annas.

The fact that the entries are not made in this way goes to show that Chak Andi was not made ■ portion of *Mahal* Dan Bahadur Singh in the recent Settlement. By a careless entry it was given a *khata* number in that *mahal*. But that circumstance does not show that it becomes a portion of that *mahal*. Thus the *Raja* of Ram Nagar is not a co-sharer in *Mahal* Maheshar Bakhsh Singh, though he is the owner of *Mahal* *Raja* Sarabjit Singh in the same village of Chand Sahali. The circumstance that he is not a co-sharer in the *mahal* prevents his having title to claim pre-emption under the provisions of the second clause of section 9. But he is, of course, a member of the village community, and, as such, has ■

GAJODHAR V. Udit Narain Singh.

right to claim pre-emption under the provisions of the third clause of the section.

We have now to consider what is the title of Gajodhar in the village. In 1867 the present *Mahal* Maheshwar Bakhsh Singh belonged to *Thakur* Ganga Singh, *Talukdar* of Mohammadpur. The latter transferred on the 9th June 1867 certain specified lands in that *mahal* to Janki Pershad Tewari, who subsequently transferred those lands to Suraj Bali, father of Gajodhar, by a deed of sale, dated 31st July 1874. The deed of transfer in favour of Janki Pershad is of a peculiar nature. It was for a consideration of Rs. 500, but nevertheless it is called a deed of gift. The *talukdar* agrees therein to put Janki Pershad in possession of certain plots and charge no rent on the same in perpetuity. The *talukdar* further agrees to pay land revenue on the plots. He says that he releases in perpetuity the transferee from the liability to pay rent and that he will pay the Government revenue of this land together with the Government revenue of the remaining land that he owned in the *mahal*. He does not give Janki Pershad a right of transfer explicitly. But he does not deny that the right he gives is transferable, and on reading the deed as a whole we find that Janki Pershad was given a right of transfer over the land in question. Thus Janki Pershad obtained a heritable and transferable right in the land which formed the subject of the deed of transfer. He subsequently transferred that right to the father of the present appellant. He was liable to pay rent under the terms of that deed, for the liability to pay rent is noted in the deed although the *talukdar* exempted him from liability. We do not find that full proprietary title passed under this deed. The Revenue Authorities appear to have arrived at the same conclusion, for nowhere has Janki Pershad or his successor-in-interest ever been recorded as a proprietor in this village. But on these facts we find that the appellant is an under-proprietor in the *mahal*. He is thus also a member of the village community within the meaning of the third clause of section 9.

It remains to consider whether the respondent has been estopped by his own conduct in

asserting the right of pre-emption. We have examined the evidence adduced by the appellant upon this point. The learned Subordinate Judge who heard the evidence did not consider it reliable, and after examining it we arrive at the same conclusion. We, therefore, find that the respondent is not estopped from asserting a right of pre-emption, but that he has not a right of pre-emption superior to that possessed by the vendee. Both of them are members of the village community within the meaning of the third clause of section 9, Act XVIII of 1876, and neither has a right superior to that of the other.

We have not so far touched on the question of assessment of costs in the lower Court which was also raised in the appeal, and we need not go into that question in view of the fact that we consider that, each party has an equal right to pre-emption in the property in dispute, the costs of the proceedings in both Courts should be borne by them.

We, therefore, decide that the parties shall draw lots according to the provisions of section 9 of Act XVIII of 1876 to determine who is entitled to the property in question. The amount fixed for payment into Court has, we understand, already been paid. If the appellant succeeds in the drawing of lots, the amount paid by the respondent into Court will be returned to the respondent and possession of the plots will be given to appellant. If the respondent succeeds, the possession of the property will remain with the respondent and the amount paid into Court will be given to the appellant.

—Lots were drawn in our presence and Counsel for the parties.

P. Gokaran Nath, for Appellant, }
Mr. Bisheshwar Nath, for Respondent. }

The respondent failed and the appellant succeeded in the drawing of lots. The amount paid by the respondent into Court will be returned to respondent, and possession of the plots will be given to the vendee Gajodhar, appellant. The suit for pre-emption will stand dismissed. Costs will be borne out by parties throughout.

Appeal allowed.

SYED HUSAIN V. SAJJADI BEGAM

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION No. 521 OF 1915.

February 1, 1916.

Present:—Mr. Lindsay, J. C.

SYED HUSAIN—DEFENDANT—
APPLICANT

versus

Musammât SAJJADI BEGAM—PLAINTIFF—
OPPOSITE PARTY.

Civil Procedure Code (Act I of 1908), ss. 22, 23—Plaintiff, right of—Suit, forum of, selection of—Transfer of case, grounds for.

The plaintiff has a right to bring a suit in any Court which the law allows, and a strong case based either on some ground of expense or convenience must be made out in order to overrule the right of the plaintiff to select the forum of his suit.

Syed Zahur Ahmad, for the Applicant.

Mirza Sami Ullah Beg and Pandit Brijnath Sharga, for the Opposite Party.

JUDGMENT.—This is an application under sections 22 and 23 of the Code of Civil Procedure for the transfer of a suit now pending in the Court of the Additional Munsif of Lucknow to a Court having jurisdiction in Cawnpore. The plaintiff in the suit is Musammât Sajjadi Begam, who claims to be one of the heirs of one Mohammad Murtaza, deceased. The lady's claim is to recover a one-twelfth share of the property left by Mohammad Murtaza, some of that property being immoveable. It is stated in the petition that out of the four items of immoveable property in suit, two of them valued at Rs. 2,000 are situated in Lucknow City, while the other two items the total value of which comes to Rs. 6,000 are situated in the Cawnpore district. The case for the plaintiff, it is said, is that this property came wrongfully into the hands of the defendant Syed Husain after the death of Mohammad Murtaza and the allegation for the plaintiff is that Syed Husain was the general agent of Mohammad Murtaza and that he has managed to get hold of the property in this way. On the other hand, Syed Husain's defence is that he bought the property from Mohammad Murtaza, and it is represented on his behalf that it would be more convenient to have the trial at Cawnpore because the sale-deed upon which the defendant relies was settled, executed, and registered at Cawnpore.

BRAHMADAT TEWARI V. CHAUDAN BIBI.

All the attesting witnesses are said to reside there and there is, of course, the fact that the greater portion of the property is situated in the Cawnpore district. On the other hand, it has been represented on behalf of the plaintiff Musammât Sajjadi Begam that it will be necessary for her to examine witnesses in Lucknow to prove certain dealings between the defendant and Mohammad Murtaza, dealings which would show that the defendant, who is the applicant here, was in fact the general agent of Mohammad Murtaza. The law is that the plaintiff has a right to bring a suit in any Court which the law allows, and a strong case based either on some ground of expense or convenience must be made out in order to overrule the right of the plaintiff to select the forum of his suit. In the present instance I am satisfied that there is no question of the balance of convenience of the parties. After all Cawnpore is only 40 or 50 miles from Lucknow and I do not think that the summoning of witnesses from Cawnpore to Lucknow will cause either inconvenience or enormous expense. I, therefore, think that this application must be refused. I dismiss it accordingly with costs.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 429 OF 1912.

June 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

BRAHMADAT TEWARI—CAVETOR—
APPELLANT

versus

CHAUDAN BIBI—PETITIONER—
RESPONDENT.

Will—Probate, grant of, where attesting witnesses did not prove due execution—Probate Court, duty of, to grant Probate when due execution proved otherwise than by evidence of attesting witnesses—Presumption in favour of due execution and attestation of Will—Evidence, necessary, to prove due execution of Will.

Where there is ample reliable evidence in the record to show that a Will was duly executed and

BRAHMADAT TEWARI v. CHAUDAN BIBI.

attested, Probate should not be refused on the ground that the testimony of the attesting witnesses who have been examined does not establish full compliance with the statutory requirements. [p. 687, col. 2.]

Nubo Kishore Doss v. Joy Doorga Dossee, ■ W. R. 189; *Cooper v. Bockett*, (1846) 4 Moore P. C. 419; 10 Jur. 931; 13 E. R. 365, followed.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court of Probate may, on consideration of the circumstances of the case or of other evidence, pronounce in favour of the Will. [p. 688, col. 1.]

For proving due execution and attestation of a Will, it is enough to establish from the circumstances that the relative position of the testator and the attesting witnesses was such that they might have seen the execution and the attestation respectively, and it is not necessary that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. [p. 688, col. 2.]

In re Trimnell, (1865) 11 Jur. (N. S.) 248; *Newton v. Clarke*, (1839) 2 Curt. 320, followed.

Every presumption will be made in favour of due execution and attestation, when a Will is regular on the face of it and is apparently duly executed. [p. 688, col. 2.]

Sibo Sundari Debi v. Hemangini Debi, 4 C. W. N. 204; *Wright v. Sanderson*, *In re Sanderson*, (1884) 9 P. D. 149; 53 L. J. P. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180; *Lloyd v. Roberts*, (1858) 12 Moore P. C. 158; 14 E. R. 871; *Harris v. Knight*, (1890) 15 P. D. 170 at p. 179; 62 L. T. 507; *In the goods of Peverett*, (1902) P. D. 205; 71 L. J. P. 114; 87 L. T. 143, followed.

Appeal from a decision of the District Judge, Saran, dated the 1st October 1912.

Babu Harihar Prosad Singh, for the Appellant.

Babu Nores Chandra Singh, for the Respondent.

JUDGMENT.—This appeal is directed against the grant of Probate of a Will alleged to have been executed by one Ram Charan Tewari on the 19th March 1893. The Will was registered six days later. The testator died on the 10th August 1911. On the 3rd May 1912 the application for Probate was made by his grand-daughter, the sole surviving beneficiary under the Will. The caveator is a brother of the testator. There is no room for doubt on the evidence that the Will was executed by Ram Charan Tewari. The only substantial question in controversy is, whether it was duly attested. The document on the face of it purports to have been attested by thirteen witnesses inclusive of the scribe, of whom five signed their names as witnesses, and eight affixed to their signa-

tures the words "on the admission of the executant." Six of the thirteen witnesses are proved to be dead; two have been examined and have proved hostile to the petitioner; three others have not been examined on the allegation that they too were hostile; the whereabouts of the remaining two witnesses have not been traced. The two attesting witnesses who have been examined are constrained to admit that they signed the Will as witnesses. One of them, however, could not recollect whether he had seen the testator sign. The other stated that he had signed as an attesting witness at the request of a third person, who assured him that the testator had left the Will in his custody and desired the witness to attest. This statement is remarkable, as the witness did not affix to his signature, as seven other witnesses did, a note that he had signed on receiving an acknowledgment of execution by the testator.

In this state of the evidence, it has been argued by the caveator that as the testimony of the attesting witnesses who have been examined, does not establish full compliance with the statutory requirements, Probate should not be granted. In our opinion, this contention cannot prevail, as there is ample reliable evidence on the record to show that the Will was duly executed and attested. Brij Behary Tewari who was present at the time of the execution of the Will, though he did not sign as an attesting witness, states in his examination-in-chief that when the Will was signed by the testator, Mahabir Tewari, Balmukund Tewari, Sheo Shankar Upadhyaya and Ramlal Upadhyaya were present there, that the witnesses and the testator signed, that the witnesses signed in the presence of the testator and in the presence of each other, and that the testator's signature was made in his presence. Two of these attesting witnesses, namely, Balmukund Tewari and Ramlal Upadhyaya are proved to be dead; the other two, namely, Mahabir Tewari and Sheo Shankar Upadhyaya have been examined, and, as already stated, have deposed practically in favour of the objector. This, however, does not compel the Court to pronounce against the Will. It was ruled by this Court in the case of *Nubo Kishore Doss v. Joy Doorga Dossee* (1) that the mere fact that

(1) 22 W. R. 189.

BRAHMADAT TEWARI v. CHAUDAN BIBI.

attesting witnesses to a Will have repudiated their signatures does not invalidate the Will, if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper v. Bockett* (2). The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will. [*Young v. Richard* (3) and *Burgoyne v. Showler* (4).] In the case before us, there is no reason why the testimony of Brij Behary Tewari should not be accepted in its entirety. That evidence shows that Balmukund and Ram Lal were present when the Will was signed by the testator and that they signed in his presence and in the presence of each other. This is confirmed by the fact that against the signatures of Balmukund and Ramlal, there is no note that they had signed on receiving an acknowledgment of execution from the testator; and the same remark applies to Mahabir and Sheo Shankar, both of whom are stated by Brij Behary to have been present when the Will was executed, which is consistent with the fact that their signatures appear as those of attesting witnesses, without any note or qualification as in the case of the other witnesses. This is sufficient to show that the requirements of section 50 of the Indian Succession Act, which has been made applicable to the Wills of Hindus by section 2 of the Hindu Wills Act, were substantially complied with. Under that section—we refer to so much of it only as is necessary for our present purpose—the first requirement is that the tes-

tator shall sign the document; the second is that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will; the third is that the Will shall be attested by two or more persons, each of whom must have seen the testator sign, and each of the witnesses shall sign the Will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time. In the present case, there is no question as to the first two requirements; the signature of the testator, which has been proved by Brij Behary, appears eight times on the document which is composed of sheets pasted in succession and made into a roll. But as regards the third requirements, it is urged that Brij Behary does not say that the witnesses saw the testator sign and that the testator saw the witnesses sign. It is not necessary, however, that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Walde, J., said in *re Trimnell* (5), the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names [*Newton v. Clarke* (6)]. In cases of this description, as was pointed out by this Court in *Sibo Sundari Debi v. Hemangini Debi* (7) on the authority of *Wright v. Sanderson, Sanderson, In re* (8), every presumption will be made in favour of due execution and attestation in the case of a Will regular on the face of it and apparently duly executed [*Lloyd v. Roberts* (9), *Harris v. Knight* (10) and *In the goods of Peveret* (11)]. As Foy, L. J., observed in *Wright v.*

(2) (1846) 4 Moore P. C. 419; 10 Jur. 931; 13 E. R. 365.

(3) (1839) 2 Curt. 371

(4) (1844) 1 Rob. 5.

(5) (1865) 11 Jur. (N. S.) 248.

(6) (1839) 2 Curt. 320.

(7) 4 C. W. N. 204.

(8) (1884) 9 P. D. 149; 53 L. J. P. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180.

(9) (1858) 12 Moore P. C. 158; 14 E. R. 871.

(10) (1880) 15 P. D. 170 at p. 179; 62 L. T. 507.

(11) (1902) P. D. 205; 71 L. J. P. 114; 87 L. T. 143.

AMIRUL RAHMAN v. DHAN KUMAR DAS.

Sanderson, In re Sanderson (8), the Court of Probate has long been accustomed, rightly and wisely, to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred.

In our opinion, the evidence in this case establishes beyond reasonable doubt that the Will was duly attested, and as we have already said, we feel no doubt whatsoever that it is a genuine instrument.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. We assess the hearing-fee at five gold mohurs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 4 OF 1915-16 OF
BARABANKI DISTRICT.

February 24, 1916.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

Chaudhri AMIRUL RAHMAN AND
OTHERS—DEFENDANTS—APPELLANTS
versus

DHAN KUMAR DAS—PLAINTIFF,
Chaudhri ATAUR RAHMAN—
DEFENDANT—RESPONDENTS.

Partition case—Minors parties to case—Certificated guardian of minors ultimately made party—Objection by guardian as to proprietary title dismissed as time-barred—Order of dismissal, whether justifiable—Appeal to Deputy Commissioner—Revision, third appeal treated as—U. P. Land Revenue Act (III of 1901), ss. 110, 111—Board's Circulars, 21-II, r. 9.

In a partition case certain minors were parties. On the last day of the time allowed by the proclamation issued under section 110, U. P. Land Revenue Act, their certificated guardian applied stating that she, as guardian, should have been made a party to the case and raising some objections to the partition which did not concern the shares of the minors. After several adjournments the Court ultimately agreed to her standing as guardian, and within a week after this she filed an objection under section 110 raising a question of proprietary title concerning the shares of the minors. The Assistant Collector dismissed the objection as time-barred. This order was appealed from to the Deputy Commissioner, who ordered that the appeal was to be returned for presentation to the District Judge and that meanwhile partition proceedings were to be stayed. A further

appeal was preferred to the Commissioner who rejected it and, finally, the matter was laid before the Board in appeal.

Held, that no third appeal lay to the Board under the partition chapter, but that the appeal could be treated as revision under the special circumstances of the case. [p. 689, col. 2.]

Held, further, that the Assistant Collector's order was not passed under section 111, U. P. Land Revenue Act, at all, and was thus appealable to the Deputy Commissioner. [p. 690, col. 1.]

Held, lastly, that the Assistant Collector ought not, in view of rule 9, 21-II, B. C., to have dismissed the objection as time-barred but to have decided it on the merits. [p. 690, col. 1.]

Appeal against the order of the Commissioner, Fyzabad, dated the 25th August 1915, upholding that of the Deputy Commissioner, Bara Banki, dated the 18th July 1915, directing the appeal from that of the Assistant Collector, Bara Banki, dated the 24th April 1915, to be presented to the Court of the District Judge.

Mr. Mohammad Wasim, for the Appellants.
Babu Har Dayal, for Respondent No. 1.
Mr. Akbar Shaw, for Respondent No. 2.

JUDGMENT.

HOLMS, S. M.—(February 17th, 1916.)—No third appeal lies under the partition chapter, but the circumstances of the case are such that it is necessary to take the matter up in revision. The facts of the case appear to be these.

The appellants are two minor brothers, to whom their aunt appears to have been appointed as guardian under the Guardians and Wards Act by the Civil Court. When a proclamation was issued under section 110, their aunt applied on the 15th February 1915 stating that she, as guardian, should have been made a party to the case and raising some objections to the partition which did not concern the shares of the minors. This day was the last day of the time allowed by the proclamation. The case was adjourned several times and, on the 17th of April, the Court agreed to her standing as guardian. On the 24th of April she filed an objection under section 110 raising a question of proprietary title concerning the shares of her minor wards. The Assistant Collector dismissed the objection as time-barred. This order was appealed to the Deputy Commissioner, who passed an altogether unjustifiable order to the effect that

GAURI SHANKAR v. ABU JAFAR KHAN.

the appeal was to be returned for presentation to the District Judge, and that meanwhile partition proceedings were to be stayed. The Deputy Commissioner seems to have treated the order of the Assistant Collector as passed under section 111 (3). The order of the Assistant Collector was not passed under section 111 at all, as he held the objection was not made within time, and it was appealable to the Deputy Commissioner who should have passed orders accordingly.

The Commissioner very properly rejected the appeal to him as it did not lie, though it would have been as well had he recognised the irregularity of the Deputy Commissioner's order and referred the case for revision to the Board.

I now proceed to deal with the matter on the merits and to see whether the order of the Assistant Collector rejecting the objection as time-barred was justified. It is admitted that no copy of the proclamation originally issued under section 110 was served on the guardian of the minors, and it was practically not till the 17th April that she became a party to the case, and within a week of this date she filed her amended objection raising a question of proprietary title. The appellants further point out that under rule 9, B C. 21-II, such an objection may, for special reasons, be entertained at a period subsequent to the date fixed for lodging objections.

I would, therefore, set aside the order of the Assistant Collector dismissing the objection as time-barred and the order of the Deputy Commissioner of the 18th July 1915, and direct that the Assistant Collector pass orders on the objection of the 24th April 1915 under section 111. The Deputy Commissioner had no jurisdiction to pass the order he did, and there is ample reason for interference on revision.

Parties will bear their own costs in all the Courts.

CAMPBELL, J. M.—I agree.

Order set aside ; Cause remanded.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 480 OF 1913.

June 24, 1915.

Present:—Mr. Lindsay, J. C.

GAURI SHANKAR—DEFENDANT—
APPELLANT

versus

THE HON'BLE Raja Syed ABU JAFAR
KHAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 83—Tender, full or inadequate, effect of—Costs, mortgagee's right as to.

A tender made under section 83 of the Transfer of Property Act may be either full or inadequate. If it is full the interest stops altogether from the date of the tender. If it is inadequate the mortgagee is at liberty to ignore it and is entitled to recover interest at the contract rate up till the date of the redemption suit. The mortgagee is not bound to accept anything less than the full amount that is owing to him and he cannot be damaged by any mistake made by the mortgagor in making the tender. There is no *via media* in the matter. [p. 692, col. 1.]

A mortgagee is entitled to costs in suits for redemption or foreclosure unless he has been guilty of any misconduct; and the fact that he claims more than is found owing to him is not *per se* any sufficient ground for depriving him of his costs. [p. 692, col. 1.]

Appeal from the decree of the District Judge, Fyzabad, dated the 28th July 1913, modifying the order of the Subordinate Judge, Fyzabad, dated the 23rd January 1913.

Babu Bisheshwar Nath Srivastava, holding brief of Babu Ram Chandra, for the Appellant.

Syed Ali Mohammad, for the Respondent.

JUDGMENT.—This second appeal has arisen out of a suit for redemption. The defendant Gauri Shankar is the appellant. The plaintiff Raja Syed Abu Jafar Khan is the assignee of the equity of redemption. The dispute in second appeal is with regard to three items in account between the parties. The mortgage in suit was a mortgage with possession, which was executed on the 10th of June 1903. There was a deed of further charge executed on the 29th of June 1903 carrying interest. The original mortgage provided that the mortgagee should receive the profits of the property in lieu of interest, with the exception of Rs. 12-15-3 which was to be paid to the mortgagor under the name of "*paramsana*." This mortgagee Gauri Shankar became the as-

GAURI SHANKAR V. ABU JAFAR KHAN.

signee of another mortgage executed by the same mortgagor. This mortgage was assigned to Gauri Shankar in the year 1902. It was a mortgage similar in terms to the one already mentioned and under this document the mortgagee was liable to pay Rs. 5-13-3 by way of *paramsana* to the mortgagor. In taking the account it was alleged on behalf of the plaintiff that the *paramsana* Rs. 12-15-3, which was payable to the mortgagor under the deed of the 10th of June 1903, had not been paid. The mortgagor, therefore, claimed to be entitled to deduct this sum from the amount payable for redemption. The answer to this plea given by Gauri Shankar was to the effect that after the year 1902 there had been an oral agreement between him and the original mortgagor by which this sum of Rs. 12-15-3 *paramsana* together with the other sum of Rs. 5-13-3 *paramsana* above referred to were to be set off against the rent of an area of 7 *bighas* odd of the mortgaged land which had been made over to the mortgagor as a tenant. It was said that the arrangement was that the mortgagor was to pay Rs. 20-8-0 rent for the 7 *bighas* odd of land and against this rent was to be set off Rs. 18-12-6 per annum, being the total amount of the two sums above mentioned. The learned District Judge held with reference to the provisions of section 92 of the Indian Evidence Act that no evidence of this alleged oral agreement could be given. He, therefore, allowed the claim of the plaintiff and deducted Rs. 106-11-9 on account of *paramsana*, which he found was owing from the mortgagee to the mortgagor. It is contended here in appeal that the view of the law taken by the lower Appellate Court with regard to the admissibility of proof of this oral agreement is erroneous. I may mention here that speaking of the evidence which was put forward in this connection the learned Judge described it as flimsy and although he came to no definite finding on the point, there is some reason for thinking that he was of opinion that the agreement had not been proved.

I do not propose to discuss the legal question as to the admissibility of this agreement, for after an examination of the evidence which was led to prove it I am of

opinion that no agreement was proved. The defendant-appellant relied upon the oral evidence of a witness named Swami Dayal. This man was called to prove the receipts, Exhibits A6 and A7, purporting to have been executed on the 29th of June 1904. These receipts show payments of Rs. 12-15-3 and Rs. 5-13-3 respectively on account of *paramsana*. Standing by themselves they obviously do not constitute any evidence whatever of the agreement set up by the defendant. On the contrary, they rather tend to show that no such agreement had been come to and that the *paramsana* was being paid to the mortgagor in the ordinary way. This witness also deposed that an agreement had been come to between Gauri Shankar and the mortgagor, by which the latter was to allow a set-off for the *paramsana* as against the rent of 7 *bighas* odd which had been let to him as a tenant. The only other evidence in this connection is the evidence of the *Patwari* Asharfi Lal. His evidence only amounts to this, namely, that the mortgagor was recorded as a tenant of 7 *bighas* odd for which he was liable to pay a sum of Rs. 20-8-0 rent per annum while Gauri Shankar was described as being the mortgagee. I hold that this is not sufficient evidence of any agreement by which the *paramsana* payable by the mortgagee was to be set off against the rent payable by the mortgagor. On this point the appeal must fail.

The next point raised is with reference to interest. It is admitted that before the suit was brought the plaintiff tendered under section 83 of the Transfer of Property Act a sum of money which, he alleged, constituted a full satisfaction of the mortgagee's claim. It has been found by the Court below that the amount tendered by the plaintiff was not the full amount which was then owing to the mortgagee, but fell short of it by a sum of Rs. 36. This represents the interest for one year and it appears that in making the calculation of interest one year's interest was left out of account. The plaintiff seems to have claimed that interest ought to stop from the date on which the tender was made. The mortgagee, on the other hand, contended that he was entitled

SONAI CHUTIA v. SONARAM CHUTIA.

to get compound interest up to the date of the suit. The learned Judge solved the difficulty by allowing the mortgagee only simple interest. He said that there obviously had been a *bona fide* mistake which the plaintiff would certainly have put right, had the mortgagee appeared and called his attention to the fact. Instead of this the mortgagee offered no help. The answer to this is that the mortgagee is not bound to accept anything less than the full amount that is owing to him, and that he cannot be damnified by the mistake made by the mortgagor in making the tender. There is no *via media* in the matter; either a full tender is made in which case interest stops altogether, or an inadequate tender is made which the mortgagee is at liberty to ignore and which does not affect his right to recover interest at the contract rate up till the date of the suit.

The only other matter in dispute is with regard to costs. The order of the lower Appellate Court was that the defendant was to pay one-third of the plaintiff's costs in both Courts while the plaintiff was to pay two-thirds of the defendant's costs in both Courts, this being approximately the proportion in which the appeal had succeeded and failed. It is argued here that the defendant was in any case entitled to all his costs, the general rule being that the mortgagee is entitled to costs in suits for redemption or foreclosure unless it is made to appear that he has been guilty of any misconduct. It is settled law that the fact that the mortgagee claims more than is found owing to him is not *per se* any sufficient ground for depriving him of his costs. In the present case I think this general rule ought to be applied, and the mortgagee ought to be awarded his costs in both Courts.

The result is, therefore, that the finding of the lower Appellate Court with regard to the payment of *paramsana* is to stand. As regards interest I find that the defendant is entitled to compound interest up to the date of the suit and is also entitled to his full costs both in the Court of first instance and in the lower Appellate Court. The plaintiff is not entitled to any costs. I allow the appeal to this extent and direct the decree of the lower Appellate Court be modified

accordingly. In this Court the parties will bear their own costs.

Appeal partly allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1914.

May 3, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

SONAI CHUTIA—DEFENDANT—

APPELLANT

versus

SONARAM CHUTIA—PLAINTIFF—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale, oral, of immoveable property under Rs. 100 in value, to mortgagee in possession—Delivery of possession, necessity of.

Where, on the occasion of the oral sale of an immoveable property of less than Rs. 100 in value by the owner to the mortgagee in possession, formal possession was delivered, boundaries were pointed out and the mortgage document was handed over to the mortgagee after endorsing on it, "as I have not been able to pay you the money, I make over the *jamai patta* to you. You have your name registered"; in fact everything was done that could be done to deliver possession:

Held, that such delivery was sufficient for the purpose of section 54 of the Transfer of Property Act and the sale was valid in law. [p. 693, col. 1.]

Sibendrapada Banerjee v. Secretary of State for India in Council, 34 C 207; 5 C. L. J. 390, referred to.

Appeal, under clause 15 of the Letters Patent, against the decree of Mr. Justice Mullick, dated the 21st January 1914, in Appeal from Appellate Decree No. 2820 of 1911.

Mr. N. C. Burdoloi, for the Appellant.

Mr. G. Sircar and Babu Probodh Chandra Ray, for the Respondent.

JUDGMENT.—This is an appeal from a judgment of Mr. Justice Mullick. He has reversed the decree of the lower Appellate Court, which had confirmed the decree of the Munsif. It appears to us that the determination of the lower Courts did substantial justice between the parties. And although there may be some difficulty in supporting the reasons by which they arrive at that conclusion, the record furnishes sufficient foundation for a decision in favour of the defendant. It is true that the

BITTO v. RAM NIDH.

defendant was a mortgagee and in possession. And, no doubt, in view of that fact we must have regard to what was decided in the case of *Sibendrapada Banerjee v. Secretary of State for India in Council* (1). But we have the additional fact in this case that it is in evidence that on the occasion of the subsequent oral sale there was a delivery of possession, the boundaries were pointed out, formal possession was delivered and a mortgage document was endorsed and handed over to the defendant. Everything, therefore, was done that could be done to deliver possession. Under the circumstances we ought to hold that there was a delivery of possession. It is said that there is no finding of the lower Appellate Court of this delivery of possession. It is because in the view that it took it did not consider it necessary. Now, we in second appeal have powers to consider evidence and to determine any issue that might have been left undetermined by the lower Appellate Court. We consider that the evidence on the record justifies a finding of delivery of possession sufficient for the purpose of section 54 of the Transfer of Property Act. We, therefore, restore the decree of the lower Appellate Court. Each party will bear his own costs in this Court.

Appeal accepted.

(1) 34 C. 207; 5 C. L. J. 390.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 73 OF 1915-16 OF
RAE BARELI DISTRICT.

April 19, 1916.

Present:—Mr. Campbell, J. M.
Musammāt BITTO—APPLICANT—
APPELLANT

versus

RAM NIDH—OPPOSITE PARTY—
RESPONDENT.*Ejectment, assistance to—Co-sharer, right of only one, to eject—Oudh Rent Act (XXII of 1886), s. 60.*

Where two co-sharers joined in issuing a notice of ejectment against their tenant, but after this one of them was not willing to eject him:

Held, that the other co-sharer alone could not apply for assistance to ejectment under section 60 of the Oudh Rent Act.

HOBIBULLAH v. ABTIKALLAH.

Appeal against the order of the Commissioner, Lucknow, dated the 13th October 1915, upholding that of the Assistant Collector, Rae Bareli, dated the 5th June 1915.

FACTS.—Two co-sharers, Musammāt Bitto and Musammāt Ramkali, joined in issuing a notice of ejectment against their tenant Ram Nidh. The notice was not contested but he did not vacate the land. Thereupon Musammāt Bitto alone applied to Court under section 60 of the Oudh Rent Act for assistance to eject him. He objected to this application, on the ground that previous to it and subsequent to the issue of the notice Musammāt Ramkali had granted him a fresh lease. She was summoned to verify it but did not appear. It was, however, found to be clear that she had granted the lease. The point for decision, therefore, was whether or not one co-sharer being unwilling to eject the tenant, irrespective of the fact that the lease granted by her alone could not stand, the other co-sharer was alone entitled to ask for assistance to eject the tenant.

Chaudhri Ram Bharose Lal and Babu Chitragopal Prasad, for the Appellant.

Babu Ambika Bakhsh, for the Respondent.

JUDGMENT.—I entirely agree with the Commissioner. Two co-sharers issued a notice for ejectment: but only one of them now wishes to carry it out. The other has compromised with the tenant. It is quite clear that the tenant cannot be ejected under such circumstances. I uphold the Commissioner's order and dismiss this appeal with costs.

*Appeal dismissed.*CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 371 OF 1915.
August 20, 1915.Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice N. R. Chatterjee.
Nawab Khajah HOBIBULLAH—
DEFENDANT—APPELLANT

versus

Khajah ABTIKALLAH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1

HOBIBULLAH v. ABTIKALLAH.

(1)—“Just and convenient,” meaning of—Receiver, discretion of Court to appoint.

The words “just and convenient” in Order XL, rule 1 (1), Civil Procedure Code, do not mean that the Court can appoint a Receiver simply because it thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property, or the prevention of injury, according to legal principles. They confer no arbitrary and non-regulated discretion on the Court. [p. 694, col. 2.]

Where in a suit relating to title to the office of *mutwalli*, it was established that the defendant, since he took possession as *mutwalli* had not paid allowances to the beneficiaries, but there was no allegation of waste or mismanagement against him, the High Court held that, at that stage of the suit, no ground was established to justify an order for appointment of a Receiver. [p. 694, col. 2.]

Appeal against the decision of the Subordinate Judge, Dacca, dated the 28th July 1915.

Mr. B. Ghakravarty and Babu Surendra Nath Guha, for the Appellant.

Babus Dwarka Nath Chuckerbutty and Kali Kinkar Chuckerbutty, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—We are invited in this appeal to consider the propriety of an order for the appointment of a Receiver in respect of the subject-matter of the litigation in the Court below. The suit relates to the title to the office of *mutwali* of an endowment created on the 10th March 1847 and the contesting parties are the rival claimants to that office, which was held by Nawab Sir Sulimulla up to the time of his death on the 16th January 1915. The Subordinate Judge has granted the application for the appointment of a Receiver, on the ground that it is just and convenient that a Receiver should be appointed under clause (1), rule 1, of Order XL of the Code of 1908. On behalf of the defendant it was contended before him that the grounds which justify the appointment of a Receiver had not been established. The Subordinate Judge was, however, of opinion that he had a wide discretion under rule 1 of Order XL of the Code, and could appoint a Receiver if he thought it just and convenient to do so. The only ground established up to the present stage is that allowances payable to beneficiaries under the deed of the 10th March 1847 have not been paid since the defendant took possession of the properties as *mutwalli*; but there is no allegation of waste or mis-

management. In fact, the plaintiffs intimated to the Court that they were prepared to accept the defendant or his present manager, Mr. Hudding, as Receiver. The defendant, on the other hand, has intimated to this Court, ■ he did in the Court below, that he was ready and willing to pay into Court regularly the sum payable as allowances under the *wakfnama*. We are clearly of opinion that no ground has been established for the appointment of a Receiver at the present stage.

In view of the observations made by the Subordinate Judge, it is desirable to point out that the words ‘just and convenient’ in Order XL, rule 1 (1), do not mean that the Court can appoint a Receiver simply because the Court thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property or the prevention of injury, according to legal principles; ■ was explained in *Jagat Tarini Dasi v. Naba Gopal Chaki* (1), the object and purpose of the appointment of a Receiver is generally the preservation of the subject-matter of the litigation, pending a judicial determination of the rights of the parties thereto. They confer no arbitrary and non-regulated discretion on the Court. In support of this view, reference may be made to the cases of *Beddow v. Beddow* (2) and *Aslatt v. Corporation of Southampton* (3). It is conceivable that in the present case the appointment of a Receiver may hereafter prove necessary, if circumstances alter; for instance, if it is found that the estate is in danger, because no longer properly managed, or that difficulties have arisen in connection with litigation about the properties comprised in the estate, or that there is good ground to apprehend that the defendant may misapply trust funds, the Court may properly appoint a Receiver. But we are clearly of opinion that at the present stage no ground has been established to justify the order for appointment of a Receiver.

The appeal is allowed and the order of the Subordinate Judge discharged. This order is made on the basis of the under-

(1) 5 C. L. J. 270; 34 C. 305 at p. 315.

(2) (1878) 9 Ch. D. 89 at p. 93; 47 L. J. Ch. 588 26; W. R. 570.

(3) (1880) 16 Ch. D. 143 at p. 148; 50 L. J. Ch. 33; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

NANHU v. NARBADA PRASAD.

taking given by the defendant to pay into Court regularly the sums payable as allowances under the *wakfnama* of 1847 and to bring into Court the arrears of allowances due, the amount payable in each case to be determined by the Subordinate Judge. The term "allowances" includes all sums payable to the beneficiaries under the *wakfnama*. When the deposits are made, the beneficiaries will be at liberty to withdraw the sums.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 323
OF 1915.

February 14, 1916.

Present:—Mr. Stanyon, A. J. C.

NANHU—DEFENDANT—APPELLANT

versus

NARBADA PRASAD—PLAINTIFF—
RESPONDENT.

Pasturage—Right to graze cattle on village waste, how defined—"Agricultural cattle," meaning of—Suit for recovery of grazing dues, nature of—Appeal, second.

The right of a cultivator to graze cattle free on the village waste is limited to a reasonable number of animals kept by the cultivator for the purposes of his holding in the village, and not exceeding the number which would ordinarily be kept for the purposes of good husbandry for, and in connection with, a similar holding. [p. 696, col. 2.]

Ramkrishna Seetaram v. Balasahib, 1 C. P. L. R. 158, followed.

The term 'agricultural cattle' means and includes animals employed in agriculture and in purposes subservient to agriculture, including the domestic requirements of the tenant, but cannot be extended so as to cover animals kept as the stock of a trading dairy farm, or bred for sale to cultivators or butchers or for the plying of carts or other conveyances for hire. [p. 696, col. 1.]

Where, therefore, a tenant who kept animals to supply milk for commercial purposes grazed them on the village pasturage and the landlord claimed grazing dues in respect of such animals:

Held, that the tenant could not graze such cattle free and the landlord was entitled to grazing dues in respect of them. [p. 695, col. 2.]

A claim to grazing rights under a village custom is a claim to an interest in immoveable property, and a suit for recovery thereof is not of a Small Cause nature and admits of a second appeal. [p. 695, col. 2.]

Appeal against the decree of the District Judge, Seoni, dated the 23rd February 1915, confirming that of the Munsif, Seoni, dated the 25th November 1914.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *P. S. Kotwal*, for the Respondent.

JUDGMENT.—The plaintiff is the landlord of a village in the Seoni District of which the defendant is a resident. The defendant owns 20 cows (including calves) and 13 she-buffaloes (including calves) and carries on the business of a dairyman, chiefly as a seller of *ghee* (clarified butter). The plaintiff has claimed grazing dues from the defendant in respect of 13 cows and 8 she-buffaloes, and the Courts below have concurred in giving a decree against him for Rs. 65-4 0. The defendant has appealed on the ground that under the village *wajib-ul-arz* he is entitled to graze all his cattle free upon the pasture lands of the village. The lower Appellate Court has defined the extent of that right, and has held that it has been satisfied by the exclusion of seven cows and five buffaloes. It was urged as a preliminary objection that no second appeal lies in this case, but I am of opinion that a claim to grazing rights under a village custom is a claim to an interest in immoveable property, and that the case is not one of a Small Cause Court nature. I have therefore overruled the objection.

Under the village *wajib-ul-arz* a right is recognized in every tenant to graze on the village waste his agricultural cattle, and this is defined as including cattle required for domestic use. The language employed in the *wajib-ul-arz* is vague and general, and it is not easy to apply it in cases where such questions arise as the following:—

(a) What is the village waste? Does it include the *malguzari* forest of all kinds?

(b) Is the right of free grazing limited to tenants who carry on cultivation in the village or will it also apply to the milch cattle of a village servant, e. g., a *kotwar*, who has no cultivation, or an agricultural labourer; or to the cart bullocks of any resident of the village?

(c) What is the number per acre of bullocks required for cultivation?

It is obvious that each case must be decided

NACHIAPPA CHETTY v. THANGAVELU CHETTY.

according to its own facts, subject to such general rules as can be based upon the *wajib-ul-arz*. In that paper the word 'waste' is used in some places in a way which suggests that it is something different from 'forest.' But the defendant's cattle appear to have been grazed in the plaintiff's forest lands generally. If any part of such lands are outside the category of the village waste, then the *wajib-ul-arz* affords no defence to the grazing dues. This did not attract attention in the Courts below, and I must presume in this case that the areas in which the defendant grazed his cattle are such as are covered by the clause in the *wajib-ul-arz*.

Then as regards the cattle which may be grazed free on such lands, I have received much assistance from a well-considered judgment of the learned District Judge in another case from the same village. I agree with him that the term 'agricultural cattle' in the *wajib-ul-arz* means and includes animals employed in agriculture and in purposes subservient to agriculture, including the domestic requirements of the tenant. This will cover bullocks and buffaloes used for ploughing or threshing, for the cartage of produce, for the private dairy purposes of the tenant, and for the conveyance of himself and his household. It will also include a reasonable number of animals for breeding for the purpose of keeping his agricultural stock constant, so that animals which die or become too old or ill to work can be replaced from his reserve without having recourse to fresh purchases. But the *wajib-ul-arz* cannot be extended to allow free grazing of animals kept as the stock of a trading dairy farm, or bred for sale to cultivators or to butchers, or for the plying of carts or other conveyances for hire. I agree with the following passage in the judgment of Mr. Bourne in the connected case:—

"The only cattle which would not be classed as agricultural cattle within the meaning of the *wajib-ul-arz* would be such cattle as are bred for sale, or hire, or are used for breeding calves for sale or for producing milk, *ghee*, etc., for sale. In fact if the tenant engages in any trade besides that of agriculture and uses cattle for that

trade.....the cattle so used would be non-agricultural cattle and would be liable for grazing fees."

In *Ramkrishna Sestaram v. Balasahib* (1) it was laid down, in a case from Nagpur, that the provision in the *wajib-ul-arz* regarding the right to graze cattle free on the village waste must be construed as limited to a reasonable number of animals kept by the cultivator for the purposes of his holding in the village, and not exceeding the number which would ordinarily be kept for the purposes of good husbandry for, and in connection with, a similar holding. I concur in the view thus expressed as sound and just.

It follows that the appellant, whose animals are kept to supply milk for commercial purposes, chiefly to make *ghee* for sale to the public, cannot claim the protection of the *wajib-ul-arz* beyond that which has accidentally left him with free grazing for seven cows and five buffaloes. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 1 C. P. L. R. 158.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 120 OF 1915.

March 16, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

NACHIAPPA CHETTY—PETITIONER—
APPELLANT

versus

THANGAVELU CHETTY AND OTHERS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 12 (2)—
Notice to creditors—Private notice, if sufficient.

An order of adjudication passed without a general notice to creditors is wholly irregular and should be set aside. A private notice is of no avail. [p. 697, col. 1.]

Muthukaruppan Chettiar v. Muthuraman Chettiar,
26 Ind. Cas. 282; (1914) M. W. N. 899; 1 L. W. 1012,
followed.

Appeal against the order of the District Court of Trichinopoly, dated the 16th February 1915, in Civil Miscellaneous Petition No. 676 of 1914 (Insolvency Petition No. 20 of 1914).

Mr. K. S. Ganesa Aiyar, for the Appellant.

Messrs. V. C. Seshachariar and O. Venkata-subbaramayya, for the Respondents.

JAMADAR SINGH v. JAGAT KISHORE ACHARYA.

JUDGMENT.—Following the decision in *Muthukaruppan Chettiar v. Muthuraman Chettiar* (1), we hold that an order of adjudication on a creditor's application, without the issue of the general notice to creditors, prescribed by section 12 (2) of the Provincial Insolvency Act, of the date fixed under section (12) (1) for hearing the petition, is wholly irregular and ought to be set aside.

Even if the appellant (petitioner) had somehow got private notice of the presentation of the petition to adjudicate, he is not bound to appear unless the general notice in the local Official Gazette calls upon him and the other creditors to so appear, and the order passed without the issue of such general notice will not be validated by proof that the creditors had private notice, assuming, of course, that the creditors, who had such private notice, could, if they choose, inform the Court that they dispensed with the issue of the general notice in the local Official Gazette.

We set aside the order of adjudication and direct the Petition No. 20 of 1914 to be heard and disposed of after complying with all the provisions of section 12 which have already not been complied with. As the appellant did not take the objection as to want of publication under section 12 of the Provincial Insolvency Act in the lower Court, there will be no order as to costs hitherto.

Order set aside.

(1) 26 Ind. Cas. 282; (1914) M. W. N. 899; 1 L. W. 1012.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 733
OF 1914.

RULE NO. 656 OF 1915.

July 20, 1915.

Present:—Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

JAMADAR SINGH—DEFENDANT—
APPELLANT—APPLICANT

versus

Raja JAGAT KISHORE ACHARYA
CHOWDHURY—PLAINTIFF—

RESPONDENT—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—

"Amount claimed", meaning of—Appeal, bar to, under s. 153, whether can be evaded by joining claim for money with claim for rent—Civil Procedure Code (Act V of 1908), s. 102—Error of law—Revision.

The expression "amount claimed in the suit", which occurs in clause (a) of section 153, Bengal Tenancy Act, must be read with the words "in any suit instituted by a landlord for the recovery of rent" and has plainly reference to rent for the recovery whereof the suit has been instituted. [p. 698, col. 1.]

The bar to an appeal provided in section 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent. [p. 698, col. 1.]

Where there would have been no second appeal, if two different suits had been instituted for the recovery of rent and the recovery of damages for breach of a contract, by reason of section 153, Bengal Tenancy Act, and section 102, Civil Procedure Code, the bar provided by these two sections could not be evaded by amalgamating the two claims in one suit for rent. [p. 698, col. 2.]

An error of law committed by a Subordinate Court in deciding a case is not a ground for interference by the High Court in the exercise of its revisional jurisdiction. [p. 698, col. 2.]

Appeal and Rule against the decision of the Subordinate Judge, Dacca, dated the 27th November 1913, confirming that of the Munsif, Naraingunj, dated the 8th February 1913.

Babu Sasankajiban Roy, for the Appellant.

Babu Satish Chunder Ghose, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—The objection taken by the respondent to the competency of this appeal raises a question of first impression. The plaintiff instituted this suit against the defendant for recovery of a sum of Rs. 132 8-0. He claimed Rs. 82-8-0 arrears of rent and damages; and he added thereto a claim for Rs. 50 damages for breach of contract. His allegation was that the defendant had failed to prepare and deliver certain papers he had undertaken to do, and had made himself liable under the terms of the agreement between them to pay to the plaintiff the sum of Rs. 50. The defendant protested against the joinder of these claims in one suit; but his objection was overruled. The case was tried on the merits, and a decree was ultimately made against him. That decree has been confirmed on appeal by the Subordinate Judge. On the present appeal, the defendant seeks to contest the propriety of the decision of the Court of Appeal below.

NAKULSAO v. RAMADHINSAO.

A preliminary objection is taken on behalf of the respondent that the appeal is incompetent under section 153 of the Bengal Tenancy Act. That section provides that an appeal shall not lie from any decree passed on appeal in any suit instituted by a landlord for recovery of rent, where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless the decree has decided one or more of several special questions. The appellant contends that ■ this is a suit instituted by ■ landlord for recovery of rent and the amount claimed in the suit exceeds Rs. 100, the appeal is competent. In our opinion, this argument is based upon a superficial reading of section 153. No doubt, the suit has been instituted by ■ landlord for recovery of rent, although he has joined to the claim for rent ■ claim for damages for breach of contract; but the amount claimed on account of rent does not exceed Rs. 100. It is plain that the expression "the amount claimed in the suit", which occurs in clause (a) of section 153, must be read with the words "in any suit instituted by a landlord for the recovery of rent"—which find a place in the introductory paragraph of the section. The "amount claimed" has plainly reference to the rent for the recovery whereof the suit has been instituted. The term 'rent' may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or, statutory damages for non-payment of rent. But the Legislature could never have intended that the bar provided in section 153 should be evaded by the joinder of ■ claim for money with a claim for rent. The contention of the defendant in substance is that although there would have been no second appeal, if two different suits had been instituted for the recovery of the arrears of rent and the recovery of damages for breach of contract, by reason of section 153, Bengal Tenancy Act, and section 102, Code of Civil Procedure, he is entitled to evade the provisions of both these sections because the two claims have been

amalgamated in one suit. We ■ clearly of opinion that this argument should not prevail. The result follows that the appeal is barred under section 153, Bengal Tenancy Act, in so far ■ the claim for rent is concerned. In respect of the claim for damages for breach of contract, there can be no question that the appeal is equally barred, under section 102, Civil Procedure Code.

We have finally been invited to interfere with the decision of the Subordinate Judge in the exercise of our revisional jurisdiction. We ■ of opinion that this is clearly ■ case where the Court cannot interfere under section 115, Civil Procedure Code. If the contention of the appellant be conceded to be well founded, the utmost that can be said is that the Subordinate Judge has committed an error of law: but that is undoubtedly not ■ ground for interference in the exercise of our revisional jurisdiction. In fact, if we were to accede to the prayer of the appellant, we should allow him ■ appeal in the disguise of revision, where an appeal is expressly barred by statutory provisions.

The result is that the appeal is dismissed with costs and the Rule is discharged.

Appeal dismissed; Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 265 OF 1914.

November 30, 1915.

Present:—Mr. Batten, A. J. C.

NAKULSAO—DEFENDANT NO. 1—APPELLANT
versus

RAMADHINSAO—PLAINTIFF—
RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 41, sub-section (8), scope of—Transfer by occupancy tenant without landlord's consent—Right of landlord to evict transferee.

Sub-section (8) of section 41 of the Central Provinces Tenancy Act pre-supposes the right of ■ landlord to bring a suit for ejectment against the transferee and makes a special provision for the protection of a tenant against both the landlord and the transferee. [p. 700, col. 2.]

NAKULSAO v. RAMADHINSAO.

Where, therefore, an occupancy tenant of certain fields mortgaged them to the defendant, and the proprietor of the *patti* in which the fields lay, sued to recover possession on the ground that the mortgage was without the landlord's consent:

Held, that the question of abandonment by the tenant did not arise, whether or not he was joined as a party, and that the landlord was entitled to evict the transferee in possession. [p. 700, col. 2.]

Bhola v. Fathu, 15 C. P. L. R. 17, distinguished.

Appeal against the decree of the District Judge, Raipur, dated the 6th January 1914, reversing that of the Munsif, Raipur, dated the 23rd September 1913.

Mr. M. Chuckerbutty, for the Appellant.

Mr. J. Mittra, for the Respondent.

JUDGMENT.—The first defendant appeals against the judgment and decree of the District Judge, in which he reversed the decree of the Munsif who dismissed the plaintiff's suit. Sobharam was the absolute occupancy tenant of the five fields in suit. He mortgaged the fields in 1902, and the mortgagees foreclosed and took possession of the fields in May 1909; the first defendant-appellant is the sole representative of the mortgagees, and the 2nd and 3rd defendants are the sons of the deceased mortgagor Sobharam. The plaintiff is the landlord, being the proprietor of the *patti* in which the fields lie. He sues for possession of the fields on the ground that the mortgage was without the landlord's consent. Two of the fields were given by the mortgagees for cultivation to the 2nd and 3rd defendants for the year 1910-11, and they were still in possession of these two fields when the suit was instituted. There is a concurrent finding by both Courts that the mortgage was in contravention of the provisions of section 41 of the Central Provinces Tenancy Act, and was, therefore, voidable at the instance of the landlord. The learned Munsif, however, dismissed the suit on the ground that the plaintiff had failed to show that the tenants had abandoned their holding. The 2nd and 3rd defendants are described in the plaint as sub-tenants of two of the fields and are described in the *jamabandis* as occupancy tenants of the same two fields. The grounds on which the Munsif dismissed the suit and the District Judge reversed the Munsif's decree appear in the following portion of the judgment of the learned District Judge:—

"The Court has dismissed the plaintiff's claim on the ground that because Sobharam's

sons are in possessions of two of the fields in suit (area 2'97 acres) there has been no such abandonment of Sobharam's fields (area 8'58 acres) in suit as to justify the plaintiff-appellant to claim possession of these fields. The ruling [*Bhola v. Fathu* (1)] quoted in support of the view has, I think, no application to this case. In paragraph 6 of the plaint the plaintiff has stated that in 1910-11 (i. e., a year after the mortgagees took possession of the fields in suit in 1909) the defendant No. 1 Nakulsao let two of the fields (area 2'97 acres) to Sobharam's sons, the defendants Nos. 2 and 3, that he (Nakulsao) retained 4'49 acres out of the fields under his cultivation and let the remaining area to defendant No. 4 Bhola. All these allegations in the 6th paragraph of the plaint have been admitted by the defendant No. 1 Nakulsao (paragraph 4 of his written statement). The allegations in the 6th paragraph of the plaint are not tantamount to an admission of the plaintiff that there has been no complete abandonment by Sobharam or his son of the fields in suit. The contending parties are agreed that the mortgagees took possession of the fields in suit in 1909 and they are also agreed that only two fields (area 2'97 acres) out of the five mortgaged fields (area 8'58 acres) were let to Sobharam's sons, the 2nd and 3rd defendants, in 1910-11. It is clear that the letting of only two fields constituted splitting or disruption of the mortgaged holding of Sobharam. It cannot be any evidence of the non-abandonment of the holding. ■ ■ ■ ■ ■ Indeed the defendant No. 1 did not raise the plea of non-abandonment of the holding as a bar to the plaintiff's suit. Sobharam's sons did not raise this plea. Nor have they made statements that there has been no complete abandonment of the holding. I find that there has been a complete abandonment of the fields in suit by their tenant or tenants in 1909, and that the fact that two of the fields were let to Sobharam's sons, the defendants Nos. 2 and 3, in 1910-11, could not constitute non-abandonment of the fields in suit. The lower Court's decree is set aside and the plaintiff's claim is decreed."

It would appear that the learned District Judge has applied the principles of *Bhola v. Fathu* (1) to the case, but has held as a fact

(1) 15 C. P. L. R. 17.

NAKULSAO V. RAMADHINSAO.

that the sub-tenants have abandoned the holding, and that their continued entry as occupancy tenants in the *jamabandis* in respect of two fields is an error. The learned Counsel for the appellant, the 1st defendant, the mortgagee, relies on the above cited case, and on *Aladad Khan v. Daula Rajput* (2), and argues that the mere fact that the original tenants, who are parties to the suit, are in possession of part of the holding, indicate that they have not abandoned the holding. The learned Counsel for the respondent plaintiff points out that the above cited rulings related to occupancy holdings, and that the law as to absolute occupancy holdings is now contained in sub-section (8) of section 41 of the Central Provinces Tenancy Act, XI of 1898, which runs as follows:—

“If a person to whom an absolute occupancy tenant has transferred possession of his holding in contravention of the provisions of this section be ejected by the landlord, the tenant may apply to a Revenue Officer within one year of the ejectment of such person to be reinstated in possession of the holding, and the Revenue Officer may order him to be reinstated in possession on his depositing within a stated period, for payment to the landlord, the costs incurred by the landlord in procuring the ejectment. If the tenant fails to make such application within one year of the ejectment, or if he fails to deposit such costs within the period stated, his tenancy shall be deemed to have lapsed.”

The Central Provinces Tenancy Act, XI of 1898, came into force on the 21st October 1898, while *Bhola v. Fathu* (1) was a ruling of 1901, but it referred to a case governed by the previous tenancy law, for it was based on a suit in a Civil Court in which a landlord sought to obtain possession of an occupancy field by avoiding a mortgage which had been foreclosed. No such suit in respect of occupancy land lies under the present law.

It appears to me that the principles embodied in *Bhola v. Fathu* (1) and the cases cited therein, none of which were cases of absolute occupancy holdings, relate

to a condition of affairs which is now obsolete, and do not apply to the conditions existing under the present law. Under the previous tenancy law there was no statutory protection for a tenant, whether absolute occupancy, occupancy or ordinary, when his transferee was evicted by the landlord through the Civil Courts; and protection was extended to them by the Courts in the manner laid down in *Bhola v. Fathu* (1), though such action would seem really to have protected the transferees rather than the tenants. Under the present law the Civil Courts have nothing to do with the avoidance by the landlord of transfers by occupancy and ordinary tenants, while the rights of an absolute occupancy tenant whose transferee is ousted by the landlord are expressly protected, by sub-section (8) of section 41 quoted above, in a manner which protects him against both the landlord and the transferee. The sub-section pre-supposes the right of a landlord to bring a suit for ejectment against the transferee, and makes a special provision for the protection of the tenant whose interests, therefore, need not be considered by the Court. If the view of the first Court were correct in this case, then the object of the legislation would have failed, for the tenant, being only a sub-tenant as against the mortgagee who has foreclosed, would be liable to eviction. The legislation was clearly intended to protect both landlord and tenant, for the result of the transferee's ejectment is the possibility of the tenant's reinstatement. If the landlord's suit could not be maintained, the tenant could not be reinstated as such.

For these reasons I consider that the question of abandonment by the tenant does not arise, and the appeal is dismissed with costs.

Appeal dismissed.

VEPA KAMESAM v. VARIGONDA NARASIMHAM.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 16 of 1899.

January 2, 1900.

Present:—Mr. Justice Shephard and
Justice Sir S. Subramania Aiyar, Kt.
VEPA KAMESAM—DEFENDANT No. 7—
APPELLANT

versus

VARIGONDA NARASIMHAM, MINOR,
BY HIS MOTHER RAMUDU, AND OTHERS—
PLAINTIFF AND DEFENDANTS NOS. 1 TO 6
—RESPONDENTS.

*Mortgage, usufructuary—Lease to mortgagor—
Stipulation for rent—Sale to third party—Possession
with vendor-mortgagor—Suit for account against
mortgagor and purchaser, whether maintainable.*

A usufructuary mortgagee who leases the property back to the mortgagor for a specified rent is entitled to file a suit for accounts on his mortgage notwithstanding the lease, as the relation of mortgagor and mortgagee co-exists with that of landlord and tenant and the right to rent is supplementary to, and not in substitution of, the right to interest.

The claim is alike enforceable against a purchaser of the property subsequent to the mortgage, and accounts will be taken at his instance also as if the mortgagor alone were interested.

Mainland v. Upjohn, (1889) 41 Ch. D. 126; 58 L. J. Ch. 361; 60 L. T. 614; 37 W. R. 411, referred to.

Second appeal against the decree of the Subordinate Judge's Court, Vizagapatam, in Appeal Suit No. 230 of 1897, presented against that of the Court of the District Munsif, Vizagapatam, in Original Suit No. 61 of 1896.

FACTS.—Defendants Nos. 5 and 6 were the original owners of certain properties. They sold them to defendants Nos. 1 to 4. The latter executed in respect of those properties a usufructuary mortgage in favour of plaintiff; but the latter allowed the mortgagors to remain in possession and obtained from them a lease-deed stipulating for payment of rent. No rent, however, was ever paid. Defendants Nos. 1 to 4, then sold back the lands to defendants Nos. 5 and 6, the original owners, but the property remained in the possession of defendants Nos. 1 to 4. Plaintiff thereupon brought a suit on his mortgage for an account. During the pendency of the suit defendants Nos. 5 and 6 sold the lands to the 7th defendant. Defendant No. 7 was added as a party and he pleaded that the right of the plaintiff was only on his lease-deed for recovery of rent and not a suit for an account. The District Munsif dismissed the suit, on the ground that his claim was only for rent on the lease-deed and not for

an account. On appeal the Subordinate Judge reversed the decree and held that the right of the plaintiff under the mortgage was not lost by the execution of a lease-deed. The present appeal was by 7th defendant against that decree.

Mr. T. V. Seshagiri Aiyar for Mr. P. R. Sundara Aiyar (with him Mr. V. Ramesam), for the Appellant.

JUDGMENT.

SHEPHARD, J.—The facts are not clearly stated in either of the judgments. They seem to be as follows. The property, the subject of the mortgage, was in 1879 sold by the 5th and 6th defendants to the mortgagor (1st defendant). The mortgage was executed in 1883. In October 1884, the property was sold by the mortgagor to the 5th and 6th defendants. Notwithstanding this sale the property remained in the possession of the mortgagor and *kadapas* given by him to the plaintiff are produced for the years 1885, 1887, 1890 and 1891. After the commencement of the suit, the appellant purchased the property. It is not stated that the plaintiff had any notice of the sale to the 5th and 6th defendants. Nor is it explained why they, as purchasers, did not take possession from the mortgagor. Had they been in possession they could not have disputed the plaintiff's right to interest. Alike as between the mortgagor and the plaintiff and between them and the plaintiff there was or might have been the relation of mortgagor and mortgagee in addition to that of landlord and tenant. The right to rent was supplementary to, and not in substitution of the right to interest on the mortgage-money. As the mortgagor could not have claimed credit for rent or interest which he never paid, neither can the appellants do so—he is in no better position. The account to be taken at the instance of a purchaser of the equity of redemption is taken as it would be if the mortgagor only were interested. [*Mainland v. Upjohn* (1)].

The case is totally different from that to which the observations of the Judicial Committee refer.

I would dismiss the appeal with costs.

SUBRAMANIA AIYAR, J.—I entirely agree.

Appeal dismissed.

(1) (1889) 41 Ch. D. 126; 58 L. J. Ch. 361; 60 L. T. 614; 37 W. R. 411.

MUHAMMAD ALI MUHAMMAD v. SHAUKAT ALI.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 29 OF 1915-16 OF
BARABANKI DISTRICT.

April 3, 1916.

{Present:—Mr. Holms, S. M.

THE HON'BLE SIR Raja MUHAMMAD
ALI MUHAMMAD KHAN BAHADUR—
PLAINTIFF—APPELLANT

versus

Munshi Shaikh SHAUKAT ALI—

DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLIII,
r. 1—Oudh Rent Act (XXII of 1886), s. 107K—Decree,
ex parte, setting aside of—Resumption suit—Appeal.*

An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under Order XLIII, rule 1, Civil Procedure Code, is nevertheless appealable in view of the provisions of section 107K of the Oudh Rent Act.

Appeal against the order of the Commissioner, Fyzabad, dated the 26th July 1915, upholding that of the Deputy Commissioner, Bara Banki, dated the 8th May 1915, upholding that of the Assistant Collector, Bara Banki, dated the 12th April 1915.

FACTS.—An *ex parte* decree was passed in a resumption suit, but the Assistant Collector set the decree aside on the application of the defendant. An appeal against this order of the Assistant Collector was preferred to the Deputy Commissioner, who rejected the appeal on the ground that the order was not appealable in view of the provisions of Order XLIII, rule 1, Civil Procedure Code. A further appeal was taken to the Commissioner, who passed the following order:—"The only argument adduced before me is that section 107K applies. The reply to this is that the order of the first Court is not an order under the resumption chapter but under the Civil Procedure Code. The rules of the Civil Procedure Code hold good and under them the order is not appealable. Section 107K has no application. Appeal dismissed."

Syed Zahur Ahmad, for the Appellant.

ORDER.—The order of the Assistant Collector of the 12th April 1915 accepting an application to set aside the decree passed *ex parte* was not appealable under rule 1, Order XLIII, of the Code of Civil Procedure. It is contended, however, by

DINA NATH DAS v. RAM NATH DAS

the appellant that section 107K makes it appealable, all orders are appealable under the Land Revenue Act. The other side contends that this order is not an order under the resumption chapter but under the Code of Civil Procedure. It is urged that the words "orders under this chapter" in section 107K should be interpreted to mean "orders in suits under this chapter," and for this contention there is a good deal to be said. If the respondent's contention is accepted, then certain intermediate orders under the resumption chapter would be appealable to the Commissioner whereas final orders are appealable to the Collector, which is certainly anomalous. Moreover, if the appellant's contention is not correct, I do not understand what the words "orders under this chapter" mean, for there can only be decrees under the chapter if intermediate orders passed in suits under it are not taken into account. On the whole I think that the appellant's contention is correct and that an appeal lay to the Collector against the order in question. I have looked into the merits of the appeal and on the whole consider the Assistant Collector was right. For this reason, I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2098
OF 1912.

August 25, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice N. R. Chatterjee.

DINA NATH DAS—PLAINTIFF—
APPELLANT

versus

RAMA NATH DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120, non-applicability of, where consequential relief is asked for—Limitation, running of, against person in possession affected by adverse entry in Record of Rights.

Article 120 of the Limitation Act is applicable to suits for declaratory reliefs but not to suits for

DINA NATH DAS v. RAM NATH DAS.

declaration of title in which consequential reliefs ■ also prayed for. [p. 703, col. 2.]

In ■ suit for declaration of title to land ■ prayer for injunction upon the defendant is ■ prayer for consequential relief quite ■ much as ■ prayer for confirmation of possession. [p. 703, col. 2.]

In regard to a suit for declaration of title to land in the possession of the plaintiff against whom an adverse entry has been made in the Record of Rights, time does not begin to run against him under Article 120 of the Limitation Act unless an actual claim is made by the defendant upon the strength of the entry. [p. 703, col. 2.]

Appeal against the decision of the Subordinate Judge, Cuttack, dated the 19th April 1912, reversing that of the Munsif, Balasore, dated the 25th February 1911.

Babu Mohini Mohan Chatterjee, for the Appellant.

Babu Satis Chandra Mukerjee (for Babu Suresh Chunder Chuckerbutty), for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in ■ suit for declaration of title to land, for confirmation of possession, and for the issue of ■ permanent injunction upon the defendants to restrain them from acts of interference with the plaintiff in the enjoyment of the disputed property. The case for the plaintiff is that he purchased the land on the 6th May 1882 from the widow of one Golak Prosad, and that notwithstanding his possession on the basis of this purchase, his name was not registered by the Settlement Authorities at the time of the periodical Settlements. The order in the first of these Settlements was made adversely to the plaintiff in 1898, and this was repeated in 1908. The plaintiff states that the defendants, encouraged by these entries, have raised obstacles to his peaceful possession of the disputed property since the 28th November 1907; he was consequently driven to institute this suit on the 4th April 1910. The defendants pleaded, *first*, that the vendor of the plaintiff had no interest in the property, as her husband had predeceased her father-in-law, and, *secondly*, that the claim was barred by limitation. The Courts below have concurrently found in favour of the plaintiff upon the question of title. But whereas the Trial Court held that the claim was not barred by limitation, the Subordinate Judge has held that the suit

is barred under Article 120 of the Schedule to the Indian Limitation Act, as explained in *Francis Legge v. Rambaran Singh* (1) and *Akbar Khan v. Turaban* (2). On the present appeal, the plaintiff has contended that the view taken by the Subordinate Judge upon the question of limitation is obviously erroneous. The argument in substance is that the suit is in no sense a suit for ■ pure declaratory decree, as he seeks ■ two-fold consequential relief, *first*, by way of confirmation of possession and, *secondly*, by way of ■ permanent injunction to restrain the defendants from unlawfully interfering with his possession. In our opinion, the decree of the Subordinate Judge cannot possibly be supported.

It need not be disputed, as ruled in the two cases mentioned by the Subordinate Judge and also in the decisions of this Court in the cases of *Mohabharat Shaha v. Abdul Hamid Khan* (3) and *Shyamanand Das v. Raj Narain Das* (4), that Article 120 of the Schedule to the Indian Limitation Act is applicable to suits for declaratory reliefs. But the present suit is not of that character, as ■ prayer for injunction is a prayer for consequential relief quite ■ much as a prayer for confirmation of possession: *Umatul Batul v. Nauji Kuar* (5), *Jhuman Karti v. Debu Lal Singh* (6). Assume, however, that this is ■ suit for declaratory relief. The entries in the Record of Rights did not affect the possession of the plaintiff, though they might have been used in evidence against him in a possible suit for declaration of title. But the plaintiff was entitled to wait till the defendants had, on the strength of the entry in the Record of Rights, attempted to disturb his possession. This is clear from the decision in the case of *Sheopher Singh v. Deo Narain Singh* (7), where it was pointed out that unless an actual claim was made upon the strength of the entry in the Record of Rights, time did not begin to run against the plaintiff: *Rahmatullah*

(1) 20 A. 35; A. W. N. (1897) 193.

(2) 1 Ind. Cas. 557; 31 A. 9; 5 A. L. J. 537; A. W. N. (1908) 252; 4 M. L. T. 444.

(3) 1 C. L. J. 73.

(4) 4 C. L. J. 568.

(5) 6 C. L. J. 427; 11 C. W. N. 705.

(6) 16 Ind. Cas. 898; 22 C. L. J. 415.

(7) 17 Ind. Cas. 675; 10 A. L. J. 413.

VISHWANATH v. SHANKERLAL.

v. Shamsuddin (8). In our opinion, even if Article 120 be made applicable to this case, the suit has been instituted within six years after the cause of action arose. In this view the decree of the Subordinate Judge cannot be supported. It is needless to remand the case for a finding upon the question of possession, as the Trial Court expressly held that the plaintiff was not out of possession and this finding does not appear to have been assailed before the Subordinate Judge.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

Appeal allowed.

(8) 21 Ind. Cas. 609; 11 A. L. J. 877.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 55
OF 1915.

January 19, 1916.

Present:—Sir Henry Drake-Brockman, Kt.,
J. C.

VISHWANATH—PLAINTIFF—APPELLANT
versus
SHANKERLAL—DEFENDANT—
RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), s. 41 (6)—Malguzar purchasing property from subsequent mortgagee in possession—Suit by prior mortgagee to recover mortgage-money, nature of—Charge on purchase-money—Limitation Act (IX of 1908), Sch. I, Art. 132—Pleadings—Omission in plaint to refer to technical point not misleading defendant—Defendant, whether can object to frame of plaint on appeal.

Plaintiff, first mortgagee of an absolute occupancy holding, sued defendants, the legal representatives of a subsequent mortgagee, for the recovery of Rs. 2,000 due to him by the tenant mortgagor. The holding was purchased by the *malguzar*, under the provisions of section 38, Central Provinces Tenancy Act, from the second mortgagee, who had foreclosed the mortgage and remained in possession. Plaintiff claimed a charge on the purchase-money.

Held, (1) that the mortgage-debt was a charge on the purchase-money in exoneration of the land within the meaning of section 41 (6) of the Tenancy Act, 1898, and no new cause of action having arisen, the suit was governed by Article 132 of the Limitation Act; [p. 705, col. 2.]

Kamala Kant Sen v. Abul Barkat, 27 C. 180; *Upendra Chandra Singh v. Mohri Lal Marwari*, 31 C. 745; *Gopi Krishna Maudal v. Ram Lal Mandal*, 5 Ind. Cas. 524; 14 C. W. N. 484; 12 C. L. J. 468. *Berhamdeo Pershad v. Tara Chand*, 33 C. 92; 9 C. W. N. 989, referred to.

Ram Din v. Kalka Prasad, 7 A. 502; 12 I. A. 12; 4 Sar. P. C. J. 619, distinguished.

(2) that the omission of the plaintiff to refer to the existence of such a charge in the plaint did not mislead the defendant as it stated all the facts fully, and he could not object to the frame of the plaint in appeal. [p. 706, col. 1.]

It is not the practice to construe *moffusil* pleadings strictly. [p. 706, col. 1.]

Kunj Bihari Prasadji v. Keshavalal Hirralal, 28 B. 567 at p. 572, 6 Bom. L. R. 475, referred to.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 22nd October 1914, confirming that of the Junior Subordinate Judge, Wardha, dated the 25th November 1913.

Mr. J. Mitra, for the Appellant.

Mr. P. S. Kotwal, for the Respondent.

JUDGMENT.—The plaintiff in the suit out of which this second appeal arises sued to recover Rs. 2,000, as due on a mortgage of two absolute occupancy fields mortgaged to him by the tenant Ganaji on the 5th April 1885. The defendants are the legal representatives of one Liladhar to whom Ganaji's entire holding, consisting of five fields in all, was mortgaged in 1824. Liladhar foreclosed and obtained possession on the 14th March 1895. The *malguzar* then, after some litigation, purchased the holding under the provisions of section 38 (5), Central Provinces Tenancy Act, 1883, the price of the land having been fixed by a Revenue Officer at Rs. 1,600 and paid to Liladhar in Court on the 16th June 1902.

The plaint sets out all the facts and claims Rs. 2,000 as due under the mortgage of 1885. The cause of action is described as having arisen on the 16th June 1902. The only defence with which we are now concerned is one of limitation. The original cause of action under the plaintiff's mortgage admittedly arose on the 5th April 1887 and the Trial Judge held that Article 132 of the Limitation Schedule applied and that the suit was not saved by section 31, Indian Limitation Act, 1908, inasmuch as the claim is not for foreclosure or for sale. The suit was dismissed on this and also on other grounds.

VISHWANATH V. SHANKERLAL.

In appeal the Divisional Judge decided only the question of limitation. His view was that Article 62 or Article 120 of the Limitation Schedule governed the case. He followed the dissenting opinion of Geidt, J., in *Berhamdeo Pershad v. Tara Chand* (1) and dismissed the appeal, holding that the plaintiff attained majority more than 3 years before suit.

In second appeal it is urged that the suit is really one to enforce the charge on the purchase-money paid by the landlord which is created by section 38 (6), Tenancy Act of 1883, which corresponds to section 41 (6) of the 1898 Act, and that the effect of the said provision is merely to substitute the money for the land as security, the original cause of action remaining. This contention finds support in several cases decided by the Calcutta High Court with reference to section 73, Transfer of Property Act, e. g., *Kamala Kant Sen v. Abul Barkat* (2); *Upendra Chandra Singh v. Mohri Lal Marwari* (3) and *Gopi Krishna Mandal v. Ram Lal Mandal* (4). In the case [*Berhamdeo Pershad v. Tara Chand* (1)] cited by the lower Appellate Court, the view taken by Geidt, J., was dissented from by Henderson and Sale, JJ., who concurred in applying Article 132 of the Limitation Schedule to the facts before them. Those facts were that a first mortgagee brought the mortgaged property to sale in a suit to which the second mortgagee, whose mortgage had already matured, was a party. Subsequently, the first mortgagee obtained a decree under a third mortgage without joining the second mortgagee as a party and withdrew the surplus sale-proceeds realised under the earlier decree in part satisfaction of the later decree. The second mortgagee then sued on his mortgage claiming to recover the surplus proceeds so withdrawn. The view of the majority is clearly expressed in the following passage in the judgment of Sale, J.:—

"When property is sold under a decree obtained by the first mortgagee the right of the puisne incumbrancers to follow the surplus sale-proceeds after the decree-holder's claim has been satisfied is an equitable right.

(1) 33 C. 92; 9 C. W. N. 989.

(2) 27 C. 180.

(3) 31 C. 745.

(4) 5 Ind. Cas. 524; 14 C. W. N. 484; 12 C. L. J. 468.

The property so sold doubtless passes into the hands of the purchaser discharged from all encumbrances, but equity regards the rights of the puisne incumbrancers, not ■ extinguished or discharged by the sale, but transferred thereby to the surplus sale-proceeds."

Both Henderson and Sale, JJ., regarded the decisions under section 73, Transfer of Property Act, as supporting this view.*

There is, so far ■ I am aware, no authority for holding that ■ new cause of action arises when section 73 of the Transfer of Property Act comes into operation, though the result of taking such ■ view was considered in *Kamala Kant Sen v. Abul Barkat* (2). The wording of the section seems to lend no aid to that view, and the same may be said of section 41 (6) of the Central Provinces Tenancy Act, 1898. In the latter provision the mortgage-debt is declared to be "a charge on the purchase-money in exoneration of the land," this expression distinctly favouring the appellant's contention that the burden of the mortgage is merely transferred from one item of property to another.

The theory of substitution suffices, in my opinion, to dispose of the respondent's objections that Article 132 of the Limitation Schedule applies in terms solely to a suit to enforce payment of money charged upon immoveable property, and that section 31 of the Act deals only with a suit for foreclosure or a suit for sale. The decision of the Privy Council in *Ram Din v. Kalka Prasad* (5), on which also the respondent relies, decides merely that where the suit of a mortgagee is based on a personal covenant to pay the mortgage-debt, Article 132 has no application: their Lordships had no occasion to consider the position of a charge actually transferred by operation of law from land to money. Nor is it easy to understand on what principle it can be justifiable to modify a mortgagee's rights by reason of action taken by a third party which he has no means of preventing or even objecting to. If the principle followed in the Calcutta cases is applied to circumstances such as those now

(5) 7 A. 502 (P. C.); 12 I. A. 12; 4 Sar. P. C. J. 619.

* Vide Privy Council decision in *Barhamdeo Prasad v. Tarachand*, 21 Ind. Cas. 961; 15 M. L. T. 62; (1914) M. W. N. 38; 19 C. L. J. 132; 18 C. W. N. 345; 12 A. L. J. 82; 16 Bom. L. ■ 89; 26 M. L. J. 243; 41 C. 654 at p. 660.—Ed.

MUHAMMAD ABUL HASAN KHAN v. RAJ KUMARI.

under consideration, the result is a position where, but for the protection and advantage designedly afforded to the pre-empting landlord, the tenant and his mortgagee are left unaffected, and this seems to me entirely proper and reasonable. By applying either Article 62 or Article 120 to such circumstances on the assumption that a new cause of action arises, we improve or worsen the mortgagee's position according as he would, in the absence of pre-emption, have had less or more time to enforce his mortgage in the ordinary course.

I do not feel at all pressed by the respondent's objection to the frame of the plaint where no reference to the existence of a charge under section 41 of the Tenancy Act is made. All the facts are fully stated and, had this objection been raised at the trial, the Court of first instance would doubtless have permitted any amendment it considered desirable. It is not, and could not, be suggested that the defendant has been misled by the way in which the claim was put and it is not the practice to construe *mufassil* pleadings strictly see *Kunj Bihari Prasadji v. Keshavalal Hirallal* (6).

I hold that the claim is not time-barred and, setting aside the decree of the lower Appellate Court as based upon a wrong decision of a preliminary point, remand the case to that Court for a determination of the questions which it has left undecided. The Court-fee paid on the memorandum of second appeal will be refunded: other costs will be costs in the cause.

Appeal accepted; Case remanded.

(6) 28 B. 567 at p. 572; 6 Bom. L. R. 475.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 138 OF 1915-16 OF
GONDA DISTRICT.

March 1, 1916.

Present:—Mr. Holms, S. M.

Raja MUHAMMAD ABUL HASAN
KHAN—DEFENDANT—APPELLANT—
APPLICANT

versus

Musammât RAJ KUMARI—PLAINTIFF—
RESPONDENT—OPPOSITE PARTY.

Appeal, second—Revenue Court—Copy of first Court's judgment not filed, effect of—Dismissal of appeal, illegal—Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII, r. 1—Oudh Rent Act (XXII of 1886), s. 135.

Where a second appeal is preferred to a Revenue Court under the provisions of the Oudh Rent Act, and the memorandum of appeal is not accompanied by a copy of the first Court's judgment, or, if so accompanied, the copy is incomplete as only containing reference to the main judgment, the appeal ought not, in view of Order XLI, rule 1, and Order XLII, rule 1, Civil Procedure Code, and section 135 of the Rent Act, to be dismissed on the ground that the appellant has failed to file the copy of the first Court's judgment or main judgment, as the case may be, within the time allowed to him for that purpose, inasmuch as he is not required by law to file such a copy. [p. 707, col. 1.]

Maharaja Kesho Prashad Singh v. Baijnath Saran Pande, Selected Decision No. 14 of 1913, referred to.

Application for review of the order passed by the Senior Member, Board of Revenue, United Provinces, dated the 15th September 1915.

Babu Aditya Prasad, for the Applicant.

Babu Basdeo Lal, for the Opposite Party.

JUDGMENT.—*Maharaja Kesho Prashad Singh v. Baijnath Saran Pande* (1) applies to the Land Revenue Act only, but its principle applies also to the Oudh Rent Act, for rule 1, Order XLI and Order XLII, are both applicable under section 135. There is sufficient reason then for reviewing my order of the 15th September 1915* and hearing the appeal on the merits.

The plaint was drafted in a somewhat vague manner, but so far it is definite that the plaintiff claimed under-proprietary rights by reason of *birt* in the land in suit, and nothing was said about occupancy rights under section 5. I have had some difficulty in finding what

(1) Selected Decision No. 14 of 1913.

*The order referred to was passed as follows on second appeal in suits to contest notices of ejectment:—

"The leading appeal is No. 463. When it was filed on 7th August last appellant was allowed 3 weeks to file a copy of the Assistant Collector's judgment. This he did not do in time, and so far as the Naini Tal Office is aware, has not done so up to the present time. The same is the case with Appeal No. 475. In the remaining 11 appeals the copies of the Assistant Collector's judgments filed are incomplete without a copy of the main judgment, as they only contain references to it.

"All the 13 appeals are, therefore, dismissed."

JOHUR LALL DEY v. DHIRENDRA NATH DEY.

the reasons were for which the present appellant contested the claim to under-proprietary rights: but it would seem from the Assistant Collector's judgment that by reason of the judgment of the Assistant Commissioner dated 30th April 1872 and the Commissioner's judgment on appeal dated 6th July 1872, it was urged that the respondent had ~~an~~ under-proprietary rights and, therefore, could not claim them now. I have again asked the appellant to say why he denies the rights and he says that the *sanklap-deed* only covers 120 *bighas* and no more. He urges before me that the word '*pukhtadari*' in the claim decided in 1872 really means an under-proprietary right and not sub-settlement, and that, therefore, this judgment is conclusive. It seems to ~~me~~ that the claim of 1872 was merely for sub-settlement and is not conclusive against under-proprietary rights of any other nature, and the Commissioner's judgment really takes much the same view that there has been no real adjudication as to under-proprietary rights. It seems to me that, on the evidence, there is clearly a *prima facie* claim established for under-proprietary rights and that the lower Courts should have taken this view, and not gone into the question of occupancy rights which were not definitely claimed, though of course they can be claimed and possibly established should it be found in the Civil Court that respondent has no under-proprietary rights.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 20 OF 1915.

November 24, 1915.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe,
Kt., and Justice Sir Asutosh
Mookerjee, Kt.

JOHUR LALL DEY—PLAINTIFF—

APPELLANT

versus

DHIRENDRA NATH DEY—DEFENDANT—

RESPONDENT.

Succession Act (X of 1865), s. 57—Will, revocation

of, by tearing—Partial tearing, effect of—Question of fact—Trial Judge, opinion of—Appellate Court, interference by.

A testator sent for his Will from his solicitor and wrote the word "cancelled" on it and signed his name and dated it and thereafter, according to the instructions of the solicitor, intentionally tore the Will only partially, without ever intending to tear it up altogether:

Held (per Curiam), that the tearing, under the circumstances was effectual under section 57 of the Indian Succession Act for the purpose of revocation. [p. 710, col. 2; p. 711, col. 2.]

Per Sanderson, C. J.—A tearing (though partial) of a Will, which is such a tearing as to evidence the testator's intention to revoke the Will and is all the tearing that he intends to do, added to the fact that he writes the word "cancelled" on the Will and signs his name, constitutes in law an effective revocation of the Will. [p. 710, col. 2.]

The opinion of a Trial Judge on questions of fact, formed after seeing the witnesses and hearing their evidence, ought not to be differed from by a Court of Appeal, except upon very clear grounds. [p. 708, col. 2.]

Per Mookerjee, J.—Section 57 of the Indian Succession Act lays down that revocation consists of two elements; intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling, or obliterating are sufficient to constitute a total or partial revocation of a Will must depend to a considerable extent upon the circumstances of each case. [p. 711, col. 1.]

The slightest act of tearing with intent to revoke the whole Will thereby is sufficient to constitute valid revocation. [p. 711, col. 2.]

Appeal against the judgment of Mr. Justice Chaudhuri, passed in the exercise of Testamentary and Intestate Jurisdiction, dated the 4th December 1914.

Messrs. S. P. Ghosh and C. C. Ghosh, for the Appellant.

Messrs. Jackson, Langford James and P. N. Dutt, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case the question arises in connection with the Will of a man called Fakir Chand Dey. The appellant is the sister's daughter's husband, and the respondent is the ~~son~~ of the testator.

The Will was made on the 7th of April 1903 and under it the appellant took a substantial interest. The Will is alleged to have been revoked on the 29th of August 1913. The testator, apparently, ~~was~~

JOHUR LALL DEY v. DHIRENDRA NATH DEY.

taken ill in August 1913; he went to a place called Karmatar and returned from there some time in August, and, according to the endorsement in the Will, he cancelled his Will on the 29th of August 1913.

The appellant puts his case in two ways. He says *first* of all that the whole of the cancellation was not genuine. He alleges that the handwriting on the Will which purports to be the cancellation is not in the handwriting of the testator, that the signature which purports to be the signature of the testator in respect of the cancellation is not the signature of the testator, and he goes on to say that the date was originally the 5th of August but was altered, at some time or other, to the 29th of August. He also says, though his learned Counsel did not seem to lay so much stress on this part of his case, that although the words of the cancellation may have been written upon the Will by the testator himself and although the signature may have been his, still there was no tearing at the time the word "cancelled" was written, and that the tearing was done by somebody after the testator's death.

There is an alternative point which the appellant takes. He *further* says that even if the cancellation in every sense of the word was a genuine cancellation, it is not effective in law, because the cancellation was not attested by two witnesses in accordance with the provisions of the Act, and secondly, that the tearing is not a sufficient tearing in compliance with the provisions of the Act.

On the other hand, on behalf of the respondent it was contended in the Court of first instance that the cancellation was absolutely genuine, that the testator consulted his solicitors Messrs. Bonnerjee and Bonnerjee of whom Jotindra Bonnerjee was the surviving partner, that Mr. Bonnerjee was summoned to the house of the testator, that he took the Will with him to the testator's room, that after requesting the testator's partner to leave the room, and in the presence of the testator's son, the testator wrote the word which appears on the Will, "cancelled," and signed his name and dated it the 29th of August.

I think it would be quite unnecessary and would be uselessly taking up the time of

the Court if I were to go into the facts of the case in great detail. The main facts have been very carefully set out by the learned Judge of the Court of first instance who tried the case: they have been very clearly stated by the learned Counsel who appeared before us, and in addition to that we have a statement of the facts relied upon by him handed up to the Bench this morning. I have stated the contention on the one side and on the other. In my opinion this was a case in which the main question—which was, of course, a very serious question—as to whether this cancellation was a genuine cancellation or not, is a question of fact and which to a very large extent depended upon the evidence of witnesses and the way in which they gave their evidence.

It is quite unnecessary for me to emphasize the point that the learned Judge who has to decide a question of fact has the opportunity and advantage of seeing the witnesses in the witness-box, of hearing them give their evidence and of observing their demeanour when they are giving their evidence and has thus enormous advantage over Judges who are sitting in the Court of Appeal, and for whose guidance there are only the written memoranda of the evidence and the arguments of the learned Counsel, who no doubt place their case before the Court, as in this case, to the best of their ability: and, where the point is really a question of fact, speaking for myself only, I should be very reluctant to interfere with the judgment of the learned Judge of the Court of first instance who has had that opportunity of seeing the witnesses on both sides and has evidently tried the case with very great care and has given the matter his earnest consideration. In my judgment, the opinion of the learned Judge, so formed after seeing the witnesses and hearing their evidence upon a question of fact, ought not to be differed from by this Court except upon very clear ground indeed.

Now, in spite of the very able arguments of the two learned Counsel for the appellant to which I have listened with great attention, they have not satisfied me that Mr. Justice Chaudhuri upon this question of fact has gone wrong: and, that being so, it is

JOHUR LALL DEY V. DHIRENDRA NATH DEY.

really not necessary for me to say more. I quite agree with them that there are matters which might legitimately give rise to suspicion; I may mention, ■■■ instance, the fact that inspection was not given as was asked for; that the reasons for refusing that inspection might not appear to be good reasons; that an unjustifiable charge of Rs. 200 was asked for ■■ preliminary to giving such inspection—I am only mentioning these facts to show that I have not forgotten but have considered them. Then there is the fact that the day-book was not at first produced and was not actually seen until April 1914. There is also the fact that there is a blot upon the Will which, it is urged by the learned Counsel for the appellant, is ■ blot of the figure 2 only and, therefore, goes to show that the figure 2 was added afterwards and was not put upon the paper at the same time as the figure 9. I have considered that. Judging through my own eyes, I am not at all certain that the blot is not only of the figure 2 but of part of the figure 9 as well; and, I am not at all certain that there may not have been some more ink used upon the first part of the writing which deals with the date and that part may not have dried so soon as the other. And, while I am referring to this, I may mention that it seems to be quite possible that anybody looking at the figures hurriedly might say this is 9th August, but looking at it more closely, it is not 9th but 29th. The two figures are put so closely together that on casual or short inspection they may appear to be one. I am only mentioning these matters to show that I have not forgotten them, but I do not intend to go into any detail. I may justify my judgment upon this ground that the question is ■ question of fact, and Mr. Justice Chaudhuri had the evidence which, in my opinion, if believed, justified him in coming to the conclusion to which he did. I have considered the whole of the evidence, and the learned Counsel for the appellant has not satisfied me that the opinion of the learned Judge is wrong. This is quite sufficient to say with regard to the first point.

With regard to the second point, it raises ■ very interesting question of law

and it is this: Assuming that the cancellation upon the Will was ■ genuine cancellation, still it is not such as complies with the provisions of section 57 of the Indian Succession Act.

Now, that section, no doubt, requires two things, first of all, an intention to revoke, and secondly, the cancellation to be executed in the same way ■ ■ Will ought to be executed, or there must be ■ burning, tearing or otherwise destroying the Will. The section says, "No unprivileged Will or codicil nor any part thereof *shall be revoked otherwise than by marriage or by another Will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed.*" I may pause here for one moment to say that it is admitted in this case that the alleged revocation or cancellation was not executed in the manner in which a Will ought to be executed. Then the section goes on to say, "or by the burning, tearing or otherwise destroying the same by the testator . . . with the intention of revoking the same." Therefore, we have got to consider whether there was first of all the burning, tearing or otherwise destroying, and secondly, if there was such burning, tearing or otherwise destroying, whether that was done with the intention of revoking the Will. Now, the only thing that is alleged here is tearing. Therefore, all we have got to consider is whether such tearing comes within this section, and secondly, whether this was done with the intention of revoking the Will.

Now, it seems to me that if Mr. Justice Chaudhuri's judgment be upheld upon the first point—as in my opinion it must be—namely, that the cancellation was genuine, then it is obvious that the testator had the intention of revoking his Will. Therefore, the only question which is left to be considered is whether there was a tearing of the Will in such ■ way as to comply with the provisions of the section. In my opinion there was. It is to be noted in this case that according to the evidence which Mr. Justice Chaudhuri has accepted, the testator did all that he was told to do. The learned Judge says, "He never intended to tear it up altogether. His

JOHUR LALL DEY v. DHIRENDRA NATH DEY.

intention was only to tear it partially as suggested by his attorney. He completely carried out the instructions of his attorney. He was not told to do anything more." I draw attention to that, because that ■■■■ to me to entirely distinguish this case from the case of *Elms v. Elms* (1) to which the learned Judge of the Court of first instance drew attention, and the report of which Mr. Justice Mookerjee has handed to ■■■ this morning. In that case there was a tearing of the Will, a tearing across all the pages of the Will, but no one of them was completely torn through, and it came about in this way: The testator when he began to tear them intended to revoke the Will. Before he completely tore them he was prevented by the exclamations of those who were in the room from completing the tearing by tearing it right through, and, therefore, he never actually completed that which he set out to do. In this case, if we accept the finding of fact—which I have said we ought to do—that what the testator was told by his attorney to do was to tear the Will partially, and Mr. Justice Chaudhuri has found on the evidence that he carried out those instructions, the testator did complete that which he set out to do. It is pretty clear to my mind upon the authority of the learned Judge who gave judgment in that case, and I adopted what he says, that the Legislature does not mean that the testator must rend the Will into more pieces than it originally consisted of. The learned Judge adds "and, therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke if done with that intention. But in order to make it effectual he must have intended to revoke by so tearing it: by which I mean that he must have intended that which he actually did of itself to have that effect without more." Mr. Justice Chaudhuri has found quite clearly on the evidence—and I do not intend to interfere with that finding—that when the testator did tear the Will in the way he did, he did intend to revoke it by so tearing and he did not intend to do any more tearing. That being so, I think the

tearing comes sufficiently within the meaning of the section. I have to refer to one other case which the learned Counsel has cited this morning in the course of his argument, *Bibb d. Mole v. Thomas* (2). In that case the testator being in bed one day near the fire ordered a person to fetch his Will, the Will was fetched, and then he opened it and gave it a rip with his hands and then rumpled it together and threw it on the fire, but it fell off and was not burnt. The person who ■■■ in the room picked it up and kept it without his notice. It was left to the jury to consider whether that was sufficient revocation and the jury found that it was and that the testator intended to revoke it: and when it went to the Court, Chief Justice Grey observed that this case fell within two of the specific acts described by the statute: it was both ■ burning and tearing, although as ■ matter of fact in that case the Will had got only ■ rip with the hands and had fallen off the fire being slightly burnt without being seriously injured. I think upon the authority of those two cases, it is clear that a tearing which is such a tearing ■ to evidence ■ man's intention to revoke ■ Will, and is all the tearing that he intends to do and then stops ■ he has done in this case, a tearing which he was directed to do on the evidence of his attorney, and this added to the fact that he writes the word "cancelled," and signs his name, would, in my opinion, be ■ sufficient compliance with the provisions of the section; and on those grounds I think Mr. Justice Chaudhuri's judgment was right upon the second point.

For these reasons I think Mr. Justice Chaudhuri's judgment and decree must be upheld and this appeal must be dismissed with costs.

WOODROFFE, J.—I ■ of opinion that the facts of this case establish that what was alleged to be done constituted an effective revocation in law. The rest of the question is one of simple fact. The appellant has shown no ground for disturbing the judgment of the Court of first instance, the accuracy of which in the

(1) (1858) 1 Sw. & Tr. 155; 27 L. J. P. 96; 4 Jur. (N. S.) 765; 6 W. R. 864.

(2) (1749) 2 W. Bl. 1043; 96 E. R. 613.

JHUMAK LAL v. SARJU PRASAD.

main depends on the value, which the learned Judge attached to the witnesses whom he had an opportunity, which we have not, of seeing. I agree, therefore, that the appeal should be dismissed.

MOOKERJEE, J.—I agree that Mr. Justice Chaudhuri arrived at the correct conclusion upon each of the two fundamental points in the case, namely, *first*, was there a genuine act of cancellation by the testator? and *secondly*, was the act operative as a valid cancellation in law?

The answer to the *first* of these questions depends upon the evidence. Notwithstanding the careful criticisms of the Counsel for the appellant, I can see no good ground to differ from Mr. Justice Chaudhuri in his estimate of the evidence on the record, which conclusively establishes that the endorsement of cancellation was made by the testator. There is also satisfactory evidence to show that the Will was torn by the testator. There is an entry to this effect in the day book of the attorney, and I see no reason to doubt the genuineness of that entry. We have consequently the two facts that the Will was torn by the testator and that he made an endorsement to show that he intended to cancel the Will thereby.

The *second* question is, whether the act of tearing was operative as a valid cancellation in law. The answer depends upon the true construction of section 57 of the Indian Succession Act. That section, as I read it, lays down that revocation consists of two elements; intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case. Reference may, in this connection, be made to a passage in the judgment in the case of *Price v. Powell* (3): "If the document should be entirely burnt up, entirely obliterated or torn into

scraps or covered with cross-lines, there would be no doubt as to the intent of the testator. But it is not necessary to go to that extent in any of the modes, in order to answer the requirements of the statute, and, the slightest degree of either mode is effectual as to such revocation, provided it appears that the act was done with the intent to have it constitute a revocation." The conclusion consequently follows that by tearing is not meant ■ literal tearing to pieces: the slightest act of tearing with intent to revoke the whole Will thereby is sufficient for the purpose. This view is in agreement with the principle deducible from *Bibb d. Mole v. Thomas* (2), *Clarke v. Scripps* (4), *Elms v. Elms* (1), *Price v. Powell* (3) and *Williams v. Tyley* (5). On these grounds, I agree with the learned Chief Justice that the judgment of Mr. Justice Chaudhuri must be affirmed.

Appeal dismissed.

(4) 2 Rob. Ecc. 563.

(5) (1858) Johnson 530; 123 R. R. 223; 5 Jur. (N. S.) 35; 7 W. R. 116; 70 E. R. 531.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 168 OF 1915-16 OF
SULTANPUR DISTRICT.

February 23, 1916.

Present:—Mr. Holms, S. M.

JHUMAK LAL—PLAINTIFF—
APPELLANT

versus

SARJU PRASAD AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Ejectment, notice of, validity of—Holding of father succeeded to by two sons—Patwari's papers showing only one son's name—Notice issued against such son alone, when valid.

Where two brothers jointly succeeded ■ ordinary tenants to their father's holding, but the name of only one of them was entered in the *patwari's* papers, and it was not clear as to whether the landlord ever accepted rent from the other as co-tenant:

Held, that the notice of ejectment issued against that son alone whose name appeared in the *patwari's* papers, was under the circumstances perfectly valid. [p. 712, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 4th October 1915, reversing that of the Assistant Col.

(3) (1858) 3 H. & N. 341 at p. 350; 117 R. R. 719.

DURAI SWAMI REDDIAR v. RAJAGOPALA REDDIAR.

lector, Sultanpur, dated the 25th June 1915.

Babu Rudra Datta Sinha, for the Appellant.

Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for the Respondents.

FACTS—The landlord issued a notice of ejectment against one of his tenants, Jhumak Lal, who filed a suit to contest it on the ground that it ought to have been issued not only as against him but also as against his younger brother, Jantri Lal, who was his co-tenant.

The Assistant Collector found on the evidence, that the holding in suit had originally belonged to one Lachhman Lal, who died leaving two sons, Jhumak Lal and Jantri Lal; that Jhumak Lal's name alone had been entered in the *patwari's* papers in respect of Lachhman Lal's holding; that both the brothers had been in joint cultivation of the land in suit; and that sometimes one and sometimes the other paid rent to the landlord. He held, therefore, that both of them had succeeded as tenants-in-chief to their father's holding, and that the entry in the *patwari's* papers was wrong, and thus he cancelled the notice.

On appeal the Commissioner found that Lachhman Lal had been holding a smaller number of plots than those in suit in the years 1300, 1309 and 1312 *Fasli*; that Jhumak Lal must, therefore, be taken to have got an entirely new holding and not to have succeeded to that of his father; that Jantri Lal's being a brother of and joint cultivator with Jhumak Lal did not make him a co-tenant of the latter; that to hold otherwise meant foisting on the landlord a person as tenant as to whom there was no evidence that he had ever been accepted as such; and that the Assistant Collector confused relationship with tenancy. He, therefore, set aside the order of the Assistant Collector and upheld the notice.

A further appeal was preferred to the Board of Revenue.

JUDGMENT.—The Commissioner has apparently overlooked the *khatauni* of 1313 *Fasli* in which Lachhman Lal is recorded as a tenant of the whole of the land in suit.

Presumably, then, Jhumak Lal and his brother, Jantri Lal, succeeded jointly to the holding; but neither of them took the trouble to get the ~~name~~ of Jantri Lal entered in the papers and Jhumak Lal apparently was alone recorded as head of the family, and it is by no ~~means~~ clear on the evidence that the *zamindar* accepted rent from Jantri Lal except, as the appellant says, in his own absence. The only other point urged is as to improvements, and no written permission is on the record.

Appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1623 AND 1624 OF 1914.

March 28, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

DURAI SWAMI REDDIAR—DEFENDANT—
APPELLANT IN BOTH

versus

IN S. A. No. 1623 OF 1914

RAJAGOPALA REDDIAR, MINOR, BY HIS
NEXT FRIEND RANGAPPA REDDIAR
—PLAINTIFF—RESPONDENT

AND

IN S. A. No. 1624 OF 1914

GOVINDA REDDIAR AND ANOTHER—
PLAINTIFFS—RESPONDENTS

Evidence Act (I of 1872), s. 92—Partition, registered deed of, purporting to divide moveables—Evidence that some moveables were left undivided, whether admissible.

Notwithstanding the apparent tenor of a deed of partition, it is open to parties to prove either that the partition was incomplete or that certain properties were reserved for future division. [p. 713, col. 1.]

Plaintiff sued for division of paddy belonging to the parties. Defendant pleaded that there was already a registered partition-deed purporting to divide all the 'moveables' of the family and that oral evidence was inadmissible to prove that paddy was not divided.

Held, that the use of the expression 'moveables' in the partition-deed did not make it clear that even paddy was divided and that evidence was admissible to prove that it was left undivided. [p. 713, col. 1.]

Fathuma Bivi Ammal v. Hanumantha Row, 17 M. L. J. 296 and *Lachmi Chand Jhavar v. Hemendra Prosad Ghosh*, 26 Ind. Cas. 736 & 935; 18 C. W. N. 1260, distinguished.

MUHAMMAD ALI MUHAMMAD V. SHAUKAT ALI.

Second appeals respectively against the decrees of the District Court of South Arcot, in Appeal Suits Nos. 244 and 245 of 1913, respectively, preferred against those of the Court of the District Munsif of Chidambaram, in Original Suits Nos. 693 and 694 of 1912.

Mr. T. R. Venkatarama Sastriar, for the Appellant.

Mr. G. S. Ramachandra Aiyar, for the Respondents.

JUDGMENT.—The elaborate argument addressed to ■■ by Mr. Venkatarama Sastriar may be shortly disposed of. The partition-deed is silent regarding the paddy which is now sought to be divided. Consequently evidence is admissible under clause (2) of section 92 of the Indian Evidence Act. We do not accede to the contention that the use of the expression 'moveables' in connection with live stock makes it clear that even paddy was divided.

As regards the argument that the document is registered and contains a clause of mutual release between the parties and that, therefore, oral evidence is not admissible to add to its terms, it is enough to say that it is well settled that notwithstanding the apparent tenor of a deed of partition, it is open to parties to prove either that the partition was incomplete or that certain properties were left out for future division.

The decisions in *Fathuma Bivi Ammal v. Hanumantha Row* (1) and *Lachmi Chand Jhavar v. Hemendra Prosad Ghosh* (2), to which our attention was drawn, related to negotiable instruments. As these documents were intended to pass from hand to hand they ought to be strictly construed. Courts should not allow evidence to be adduced which will have the effect of adding new terms to such formal documents. That principle does not affect the present case. This is the only point argued. We agree with the lower Appellate Court and dismiss the second appeal with costs.

Appeal dismissed.

(1) 17 M. L. J. 296.

(2) 26 Ind. Cas. 736 & 935; 18 C. W. N. 1260.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 193 of 1915-16 of
BARA BANKI DISTRICT.

April 3, 1916.

Present:—Mr. Holms, S. M.

THE HON'BLE SIR Raja MUHAMMAD ALI
MUHAMMAD KHAN BAHADUR—

PLAINTIFF—APPELLANT

versus

Munshi Shaikh SHAUKAT ALI—

DEFENDANT—RESPONDENT.

Decree, ex parte order setting aside—Civil Procedure Code (Act V of 1908), s. 105 (1)—Resumption—Service-grant—Suit, non-maintainability of.

An order setting aside ■■ *ex parte* decree cannot subsequently be questioned under section 105 (1), Civil Procedure Code, in appeal from the decree passed after restoration, as that order does not affect the decision of the case with reference to its merits. [p. 713, col. 2.]

A suit for resumption of ■■ service-grant is, in the absence of any allegation of specific service, not maintainable. [p. 713, col. 2.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 8th November 1915, upholding the order of the Deputy Commissioner, Bara Banki, dated the 19th July 1915, upholding that of the Assistant Collector, Bara Banki, dated the 18th May 1915.

Syed Zahur Ahmad, for the Appellant.

JUDGMENT.—The first point raised by the appellant is that even supposing the order of the 12th April 1915 is not appealable (though in the connected appeal* I have held it is), that order can be questioned in the present appeal under section 105 (1) of the Code of Civil Procedure. There is authority, however, against this contention, ■■ this intermediate order of restoration did not affect the decision of the ■■■■ with reference to its merits.

The Hon'ble Raja seems to have filed this appeal on very insufficient grounds. He makes no clear allegations as to when he gave the service-grant and does not even say in his plaint what the specific service was which he no longer required. In the absence of any allegation of specific service the suit for resumption can hardly hold good. The only other ground which is argued is that there is no evidence to support

*See 34 Ind. Cas. 702; 3 O. L. J. 229—Ed.

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

the finding that the land has been held rent-free for 50 years. In the *jamabandi* of 1271 *Fasli*, which began in 1863 A. D., the land is entered as rent-free. The suit was instituted in October 1912. There is evidence then on the record that for a period not much short of 49½ years the land was held rent-free. Taking this evidence coupled with the *farman shahi* which refers to this village and is probably in favour of the ancestors of the respondent who were apparently the only *qazis* in the village, I think there is ample evidence for the finding of the lower Courts.

Appeal dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT. FULL BENCH.

FIRST CIVIL APPEAL No. 1253 OF 1912.

May 19, 1916.

Present:—Mr. Justice Rattigan, M. Justice Shah Din and Mr. Justice LeRossignol.

GOKAL CHAND AND OTHERS—DEFENDANTS
—APPELLANTS
versus

THE FIRM OF HUKAM CHAND-NATHU MAL, THROUGH HUKAM CHAND—
PLAINTIFF, ACHHRU MAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family trade—Debt incurred by manager—Property acquired to detriment of family property, liability of—Special education of co-parcener, funds for—Presumption, initial—Evidence Act (I of 1872), s. 44—Cessor of commensality, whether amounts to separation—Division Bench—Difference of opinion—Reference to Full Bench, competency of—Punjab Courts Act (III of 1914), s. 10—Civil Procedure Code (Act I of 1908), s. 98 (2), O. XLI, rr. 4, 33—Non-appealing parties, right of, to be heard in support of appeal.

Per Rattigan and LeRossignol, JJ. (Shah Din, J., dissenting).—A member of a joint Hindu family which admittedly possesses joint property, must be presumed in the ordinary course of things to have received his education, whether special or ordinary, at the expense of his family and his family property and the burden of proving the contrary would rest upon him. [p. 718, col. 1; p. 729, col. 1.]

Per LeRossignol and Shah Din, JJ.—Property acquired by a member of a joint Hindu family to the detriment of the family and as the result of a special education or training received with the help of the joint property is liable for a debt contracted by the manager in the course of a joint family business. [p. 722, col. 2.]

Order XLI, rules 4 and 33, Civil Procedure Code, do not apply to parties who do not exercise the

right of appeal and are made *pro forma* respondents by the parties who have appealed from the decree which was passed against them. The non-appealing parties cannot claim the right to be heard in support of the appeal. [p. 715, col. 2; p. 718, col. 2.]

Per LeRossignol, J.—Mere cessor of commensality is not conclusive proof of disruption of a joint Hindu family, especially when the cessor was a mere accident and was forced upon some of the members by the circumstances of their professions. [p. 716, col. 2.]

A minor co-parcener in a joint Hindu family carrying on an ancestral business is liable during his minority only to the extent of his interest in the joint family property. On reaching majority, however, he may sever his connection with the joint family and partition his net share, i. e., his share after deduction of the joint family debts incurred during jointness and thereafter be free from all liability in respect of the family he has quitted. Should, however, he elect to remain in the family, he impliedly undertakes responsibility for future family debts, but, except in cases when he is an actual contracting party, his liability is confined to his share in the joint estate. Unlike a contractual partner, he will incur no personal liability. [p. 717, col. 1.]

The credit which the manager of a joint family is entitled to pledge is the credit, not of the several members, but of the family as a *quasi-corporate* body. [p. 717, col. 2.]

Chalamayya v. Varadayya, 22 M. 166; 9 M. L. J. 3, followed.

As accretions to joint property due to the employment of joint property are joint property, property acquired by members with the help of the family property till partition and disruption is liable for the debts of the joint family business. [p. 717, col. 2.]

Where a member of a joint Hindu family has received a special education or training, the presumption is that it was acquired with the assistance of the family funds. The presumption may, however, be rebutted by any person asserting the contrary. [p. 718, col. 1.]

Durvasula Gangadharudu v. Durvasula Narasammah, 7 M. H. C. R. 47 at p. 50, relied upon.

Per Shah Din, J.—There is no initial presumption that a special education or training received by a member of a joint family was to the detriment of the family estate and the onus is on the creditor, seeking to make the separate or acquired properties of such member liable for a family debt, to prove that the acquisition was made with the assistance of the joint funds. [p. 722, col. 1.]

Durvasula Gangadharudu v. Durvasula Narasammah, 7 M. H. C. R. 47 at p. 50, not approved.

Mul Chan l v. Sadhu Singh, 59 P. R. 1893, explained.

Pauliem Taloo Chetty v. Pauliem Sooryah Chetty, 1 M. 252; 4 I. A. 109; 1 Ind. Jur. 323; 3 Suth. P. C. J. 387; 3 Sar. P. C. J. 698, referred to.

Per Curiam.—A Divisional Bench of the Punjab Chief Court cannot make a reference under section 10 (2) (b) of the Punjab Courts Act when the members of that Bench have differed on a point of law, as that section comes into operation only when any given contingency is not provided for by any other enactment in force. The proper course is to refer the point of law under the proviso to section 98, Civil Procedure Code. [p. 727, col. 1.]

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

First appeal from the decree of the District Judge, Ferozepore, dated the 30th May 1912, decreeing the claim.

The appeal first came on for hearing on March 17, 1915, before Mr. Justice Shah Din and Mr. Justice LeRossignol, who after hearing the arguments of Mr. Broadway (with him Mr. Sundar Das), for the Appellants, and the Hon'ble Mr. Muhammad Shafi (with him Lala Khairati Ram), for Respondent No. 1, Mr. Kirkpatrick, for Respondent No. 3, and Mr. Mukand Lal, for Respondent No. 4, passed the following

ORDER.

LEROSSIGNOL, J.—(March 17, 1915).—The District Judge has decreed plaintiff's claim on four *hundis* aggregating Rs. 7,200 against all the defendants, the five sons of Joti Mal, in their capacity of surviving members of the joint family which owned the shop trading under the style Nagar Mal-Joti Mal.

The proceedings took place in the presence of three of the sons and *ex parte* against Achhru Mal and Mela Ram.

The only appellants are Gokal Chand and Amar Nath, the two youngest sons of Joti Mal, for whom it is contended (1) that the *hundis* being unsigned are incomplete by law and custom, (2) that as they were not presented the appellants cannot be held liable upon them, (3) that even if they be held to be valid and their presentment not essential, they were without consideration as the earlier *hundis* which they replaced had not been returned, and the claim is time-barred, (4) that the *hundis* were not drawn by Girdhari Lal as manager of joint Hindu family business of which they were members, (5) that the *hundis* were not executed in the regular course of business, having been executed after the firm had ceased to do business, and finally that in no case were the appellants personally liable, but at the most only to the extent of their interest in the joint family property.

In the lower Court Gokal Chand denied all knowledge of the matter and pleaded that there was no cause of action against him.

Amar Nath tendered much the same plea, but added that the debt had been paid off.

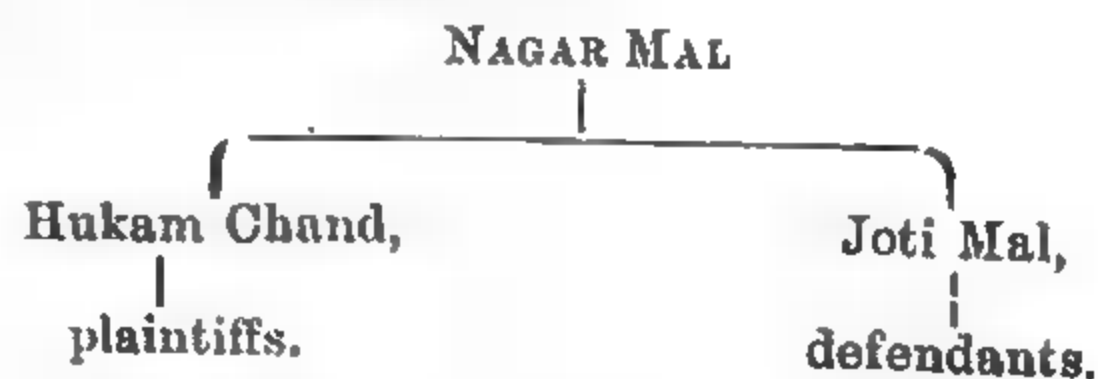
Girdhari Lal denied that the *hundi* had been presented, alleged that his father Joti Mal was sole owner of the firm, that the debt had been paid and that he was not personally liable.

It will thus be seen that the objection to the absence of signature on the *hundis* was not raised at all in the pleas and the District Judge states that it was raised at a very late stage.

In this Court Girdhari Lal was represented by Counsel who claimed the right to be heard in support of the appeal. He based his claim on rule 4 and rule 33 of Order XLI, but we hold without any hesitation that the authorities he cited in support of his claim are not to the point. Rule 33 confers certain powers on Appellate Courts in very peculiar cases of the nature described in the illustration, whilst rule 4 deals with cases where one defendant or more profess to appeal on behalf of all defendants and not as in this case, where two defendants appeal on their own behalf solely and implead the non-appealing defendants as respondents. These rules, however, are quite beside the point; the rule which defines the procedure in appeal and the respondent's right to be heard is rule 16 of the same Order, which provides that the respondent shall be heard against the appeal. The only other rule that might be applicable is rule 22, but it does not apply in this particular case.

We, therefore, decided that Mr. Kirkpatrick could not be heard except against the appeal; to have held otherwise would have been to set at naught the clear provisions of the Code, the Limitation Act and the Court Fees Act.

The following table illustrates the relationship of the parties:—



The debtor firm Nagar Mal-Joti Mal failed in 1900 and after that the only busi-

GOKAL CHAND V. BUKAM CHAND-NATHU MAL.

ness done was that of liquidation. Joti Mal's death occurred in 1906, but the *hundis* sued upon were in respect of debts incurred by the defendant firm as early as 1902.

In the lower Court the defendant Amar Nath, called as a witness by the plaintiff, was not examined in detail, but his statement in a previous case, *Girdhari Lal v. Achhru Mal*, was read to him or by him and he admitted its correctness.

The earlier statement was not, however, put on the record and appellants' Counsel contended that it was not evidence in this case; as, however, it was obvious that this procedure was adopted by plaintiff and not objected to by defendants solely with the object of avoiding useless repetition and of bringing the relevant portions of the earlier statement on the record, the appellants' contention was overruled, for plaintiff could not be made to suffer for the carelessness of the lower Court.

Defendants-appellants raised a further contention that they were sued as owners of the firm, i.e., as contractual partners and that they had no notice that they were sued as members of a joint Hindu family owning a family business, but respondent-plaintiff shewed that the matter was made clear in the replications and involved in two of the issues.

Respondent-plaintiff next urged that the appellants must be confined in appeal strictly to the objections taken by them in their pleadings, consequently they could not be heard to argue that the *hundis* were incomplete for want of signature, that the claim was bad for want of presentation, that the family was not joint and that there was no family business. On a careful consideration of the rule regarding pleadings, we hold that the appellants cannot avail themselves of the pleas preferred by their co-defendant who has not appealed and consequently, we overrule the objections that the *hundis* are defective because they are not signed and that the suit must fail for lack of presentment of the *hundis*, and we take this course all the more readily in that we held that in equity these objections have no foundation. With these objections admittedly disappear the cognate objections that the suit is time-barred and that the *hundis* were without consideration. Remain

then the main questions in this case, viz., whether the appellants were members of a joint Hindu family carrying on an ancestral family business, whether the *hundis* were executed by the family manager in the ordinary course of business and whether the appellants are liable at all, and if so, in what degree?

On these latter points my learned brother will write his conclusions in a separate judgment.

A careful consideration of the depositions of Girdhari Lal, Achhru Mal and Amar Nath, all defendants who were examined as witnesses by the plaintiff, forces me to the inevitable conclusions that the sons of Joti Mal with their father constituted a joint Hindu family, that there was never any disruption of that family, that the family carried on an ancestral family business, that the *hundis* in dispute were drawn in liquidation of a debt incurred whilst the family business was in an active condition, for the purposes of that business, and that though the business languished in 1900, there was no formal closure of the books till about 1906.

It was argued that the appellants, one being an Indian Civilian, the other a Pleader, had left the family and quitted the paternal home, but I see no reason to doubt that this cessor of commensality was a mere accident, forced upon them by the circumstances of their professions. Mere cessor of commensality is not conclusive proof, by any means, of disruption and in this case it is amply counter balanced by other facts tending to shew that the family is still joint, more particularly, that Gokal Chand has not severed his connection with the family, and has thrown his surplus income into the family hotchpot. In his pleas he did not even allege severance and claimed absolution from personal liability, solely because he was not privy to the transaction. Gokal Chand, moreover, has not gone into the witness-box to deny on his own behalf the admissions of his brothers and I cannot regard this circumstance as other than most significant. There is on the record not an iota of evidence to show that he ever separated from his family, nor is his Counsel able to suggest any definite date of such separation; all he can say is that in 1899, his

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

client joined the Government service in the United Provinces. As I have remarked above, this forced cesser of commensality is *per se* no adequate proof of separation.

My conclusion is that the appellants, as members of a joint Hindu family carrying on an ancestral family trade, are liable on the *hundis*, executed in payment of a trade debt of long standing.

There has been no argument on the lukewarm objection raised by Amar Nath alone of appellants that the *hundis* had been repaid.

The final point for decision is the extent of the appellants' liability, whether it is unlimited or is confined merely to their interest in the family property.

We have been referred to many rulings, but very few are in point.

The most apposite are: *Ramlal Thakursidas v. Lakhmichand Muniram* (1); *Chalamayya v. Varadappa* (2); *Bishambhar Nath v. Fateh Lal* (3).

My deductions from the authorities are that a minor co-parcener in a joint Hindu family carrying on an ancestral business is liable during his minority, only to the extent of his interest in the joint family property, that on reaching majority he may sever his connection with the joint family and partition his net share, *i. e.*, his share after deduction of the joint family debts incurred during jointness, and thereafter be free from all liability in respect of the family he has quitted; should, however, he elect to remain in the family, he impliedly undertakes responsibility for future family debts but except in cases when he is an actual contracting party, his liability is confined to his share in the joint estate. Unlike a contractual partner, he will incur no personal liability.

As to the meaning to be attached to the expression 'joint family credit' as used in *Ramlal Thakursidas v. Lakhmi Chand Muniram* (1) and *Johurra Bibee v. Sreegopal Misser* (4), I adopt the view taken in *Chalamayya v. Varadappa* (2) that the

credit which the manager is entitled to pledge is the credit, not of the several members, but that of the family as a quasi-corporate body.

In this case, although I hold it proved that after 1900 the original business of the family languished, I hold it also proved that the family funds were diverted into other channels, *i. e.*, the working of the factories and that in this new form of business the appellants took an interest of a more or less active nature, yet I am unable to find that they ever took on themselves the burden of personally discharging the *hundis* in suit.

My view then is that the appellants are members of a joint Hindu family carrying on an ancestral business, that disruption has not been established and that they are liable in respect of these *hundis* not personally but to the extent of their shares in the whole of the joint family property.

What is joint family property is a matter which might be left for decision in execution, but as the lower Court has considered the point and it is necessary to determine the principle involved, I would hold that the appellants' acquired property till partition and disruption, if and when they occur, is joint family property.

This conclusion I base on the doctrine that accretions to joint property due to the employment of joint property are joint property.

Now the question in this case is, whether the appellants obtained from the family the funds which enabled them to acquire not their ordinary education, but the special training which enabled one to enter the Indian Civil Service, and the other the profession of a Pleader.

On that point practically no evidence has been tendered and the question then arises: on whom does the onus lie? Which side would fail in the absence of all evidence on the point? Having regard to the common course of natural events and human conduct, I consider that section 114 of the Evidence Act justifies a very strong presumption that the appellants were provided with their special training at the expense of the family. Amar Nath indeed admits his indebtedness in this respect to the

(1) Bom. H. C. R. Appendix II.

(2) 22 M. 116; 9 M. L. J. 3.

(3) 29 A. 176; 4 A. L. J. 94; A. W. N. (1907) 13.

(4) 1 C. 470.

GOKAL CHAND V. HUKAM CHAND NATHU MAL.

family, whilst Gokal Chand has never suggested that the cost of his training in England was defrayed from any other source and has not troubled to tender himself ■ ■ witness.

On the other hand, it is clear that he has been throwing his surplus income into the family hotchpot, has acted as adviser in business matters, and ■ was stated before us has taken ■ share in mills in his own name.

My conclusion then is that in all human probability the appellants received their special training to the detriment of the family funds, that the onus of proving the contrary lay very heavily on them and that this onus has not been discharged.

I am fortified in this view by the remark in *Durvasula Gangadharudu v. Durvasula Narasammah* (5): "The fair presumption would be that such attainments as the Vakil possessed had been acquired with the assistance of the family means, and this presumption does not seem to be rebutted in this case by evidence of the acquisition of such attainments without such assistance."

In this view I would maintain the lower Court's decree, with the slight modification above set forth, so far as appellants are concerned and dismiss the appeal on all other points, but in the circumstances I would leave parties to bear their own costs in this appeal.

SHAH DIN, J.—(March 24, 1915.)—The questions which require determination in this case and which were argued at considerable length by the learned Counsel on both sides have been stated in the judgment of my learned colleague. As pointed out by him, the District Judge decreed the plaintiff's claim in full against all the five defendants, sons of Joti Mal; and the present appeal has been preferred to this Court only by two out of the five defendants, namely, Mr. Gokal Chand, who is a member of the Indian Civil Service, and Lala Amar Nath, who is a Pleader.

Girdhari Lal, who contested the plaintiff's claim in the lower Court, did not appeal to this Court from the District Judge's decree: but in the course of the argument before

■ Mr. Kirkpatrick, who appeared for him, desired to be heard in support of the appeal filed by Mr. Gokal Chand and Lala Amar Nath and asked us, in the event of our accepting the appeal, to reverse the decree of the District Judge not only in favour of the appealing defendants, but also in favour of Girdhari Lal. In support of this position he relied upon rule 4 and rule 33 of Order XLI of the Civil Procedure Code. It is clear that Girdhari Lal had acquiesced in the lower Court's decree so far ■ it affects him, and, ■ stated by my learned colleague, after hearing Mr. Kirkpatrick we ruled that we were not prepared to allow his client to impugn the decree, the rules of the Civil Procedure Code relied upon by him not being intended to apply to ■ case of this kind. The pleadings of the parties in the lower Court have been summarised in my learned colleague's judgment; and I may say at once that in view of those pleadings, I agree with him that it was not open to the appellants to raise at ■ late stage of the case the contentions that the *hundis* sued upon were not signed and were, therefore, incomplete and that the suit was not maintainable because the *hundis* had not been presented for payment on maturity. The fact that the *hundis* were not signed by Girdhari Lal or by any other member of the firm of Nagar Mal-Joti Mal, was mentioned for the first time in the evidence of Girdhari Lal when he was examined as ■ witness for the plaintiffs on the 12th January 1912. After that date there was an interval of about two months, and when on the 14th March 1912, the plaintiffs produced further oral evidence they tried to prove that the *hundis* in question, although they were not signed, were valid and could be sued upon under ■ special mercantile usage. The defendants produced rebutting evidence on this point on the 25th March 1912, and thereafter the point was argued before the District Judge without any definite issue being drawn upon it. In these circumstances, I agree with my learned colleague that the appellants were precluded from questioning the validity of the *hundis* because they were not signed; and for the purposes of this appeal we must consider the *hundis* to have been validly executed. As regards the non-presentment of the *hundis* at the due date, this point ■ not raised

GOKAL CHAND V. HUKAM CHAND NATHU MAL.

by the present appellants in their pleas which were filed separately from those of Girdhari Lal, and they should not have been allowed to take this point in argument before the lower Court. As stated by my learned colleague, if the *hundis* are to be regarded as properly drawn, the questions of novation and bar by limitation which have been raised in the grounds of appeal do not arise and need not be discussed.

The crucial points which require decision in this appeal are (1) whether the appellants were, at the time when the *hundis* in suit were executed, members of a joint Hindu family carrying on an ancestral family business; (2) whether the *hundis* were executed by the manager of the family in the ordinary course of that business; and (3) whether the present appellants are personally liable on the *hundis*.

Upon the first question our attention was drawn by the learned Counsel for the appellants to a judgment of this Court in First Appeal No. 852 of 1912, *Amar Nath v. Gurdas Mal* (6). That was a case in which the present appellants, along with their brothers, were sued by certain plaintiffs on four *hundis* which were alleged to have been executed by Girdhari Lal, brother of the appellants, as a manager of the family firm of Nagar Mal-Joti Mal. The present plaintiffs were not parties to that suit; and this Court decided that, in view of the pleadings of the parties, the question whether Joti Mal and his sons constituted a joint family or not at the time when the *hundis* then in suit were executed did not arise for decision, and that upon the evidence on the record of that case it was not proved that the appellants were (apart from their capacity of members of an alleged joint Hindu family) partners of the trading firm known as Nagar Mal-Joti Mal. The appellants' alleged liability on the *hundis* was, therefore, held not established. Obviously the findings in that case are not relevant to the present case and this was frankly conceded by the learned Counsel for the appellants.

In the present case there is some evidence, though not of a very satisfactory

character, that in June 1905, when the *hundis* in suit were executed by Girdhari Lal, the appellants were members of a joint Hindu family which was carrying on an ancestral business under the name and style of Nagar Mal-Joti Mal. It is in evidence that the firm of Nagar Mal-Joti Mal had failed in 1900, but the business of winding up the firm appears to have continued for some years and the account-books were not closed till after the death of Joti Mal in April 1906 (paper-book A, page 7, sixth plea filed by Girdhari Lal, and page 18, line 12; of Achhru Mal's statement). The legal presumption in favour of Joti Mal and his sons constituting a joint family receives strong support from the evidence of Achhru Mal and Lala Amar Nath appellant. The latter was not examined in detail in this case, but the statement made by him in December 1910 in a case in which his brother Girdhari Lal was plaintiff and his other brothers were defendants was read out to him, and on his admitting it to be correct it was placed on the present record as evidence in the case. It is printed at page 23-31 of the supplementary paper-book B. Reading that statement with that of Achhru Mal in this suit, the conclusion that Joti Mal and his sons formed a joint Hindu family at the time when the *hundis* in suit were executed is justified. That the family was at the time carrying on an ancestral business is also proved by the evidence of Achhru Mal read with that of Girdhari Lal; and it is, in my opinion, further proved that the *hundis* sued upon were executed by Girdhari Lal as manager in the ordinary course of the ancestral business.

It remains now to consider whether the present appellants are liable on the *hundis* sued upon; and, if they are liable, what is the nature and extent of their liability. Upon the determination of this question the following facts have a material bearing. We were told in the course of the argument, and it may be taken as an undisputed fact, that Mr. Gokal Chand, appellant, was in England from 1892 to 1899 during which years he was being trained there for the Indian Civil Service. There is

(6) 22 Ind. Cas. 716; 63 P. W. R. 1914; 94 P. L. R. 1914.

GOKAL CHAND v. HUKAM CHAND-NATHU MALL.

nothing on the record to show that before he left for England in 1892 he took an active part in the business of the firm; and indeed it is clear that he could not have taken any such part, ■ he must then have been ■ minor. On his return to India in 1899 he was, we were told, posted to the United Provinces, and it has not been proved in this case that since 1899 he has ever actively participated in the firm's business. In the statement of Lala Amar Nath in paper-book B there are ■ references to a dispute which had arisen between him (Lala Amar Nath) and his brother Girdhari Lal regarding Lala Amar Nath's share or interest in certain factories (which we were told in argument were situated in Kaithal, Lyallpur, &c., and in which third parties were also co-sharers); and according to Lala Amar Nath, Mr. Gokal Chand intervened in the dispute and took some part in the settlement of it. It is not satisfactorily shewn that the factories in question were part of the joint property of the family, but assuming that they may be treated ■ such it is not proved that Mr. Gokal Chand ever took an active part in their management, and indeed being ■ member of the Indian Civil Service he was from his position clearly precluded from doing so. The mere fact that he had a share in the factories or in the joint property, if any, of the family is insufficient to establish his active participation in the conduct of the business relating to the factories or to the family property. So much for Mr. Gokal Chand. As regards Lala Amar Nath appellant, in the course of his statement printed in paper-book B, he says at page 27:—"In 1899 I went to Lahore for prosecuting my studies. Till that time I had not interfered in the business of the shop. I was studying at Ferozepore. I obtained the degree in 1906. I studied in the Law College till the end of 1908. I gave up my studies for one year, i. e., 1903-1904." This statement is sufficient to shew that Lala Amar Nath had no concern with the managements of the business of the family firm between 1899 and 1908, nor does the evidence of the other witnesses produced by the plaintiffs connect him with

its management. In fact, of the five brothers only Achhru Mal and Girdhari Lal are proved by the evidence on the record to have had a direct share in the management of the business, the remaining three brothers being concerned in it simply and solely in their capacity of members of a joint Hindu family carrying on ■ ancestral business. Such being the facts, the law applicable to the case, so far as the liability of the present appellants on the *hundis* in suit is concerned, is that laid down in *Chalamayya v. Varadayya* (2) and *Bishambhar Nath v. Fateh Lal* (3). In the first mentioned case Subramania Ayyar, J., explained the law in the following terms:—

"No doubt where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other co-parceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such co-parcener is absolutely responsible. Equally he would be responsible, though he did not assent to the particular contract, if there had been such acquiescence on his part in the course of dealings, in which the particular contract ■ entered, as to warrant his being treated in the matter as a contracting party. When, however, such is not the case, but the contract ■ of a character such as, under the law, to entitle the manager to enter into, independently of the consent of the other members of the family, so ■ to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property. As regards the other property in the hands of ■ co-parcener, no other co-parcener, whether he be the manager or not, has any title whatsoever. The legal individuality of ■ co-parcener is not merged in the manager, so far as the co-parcener's self-acquired or other separate property is concerned. Even, when, under the Hindu Law, according to the *Smritis*, the family was paramount it did not entirely absorb the legal individuality of the members of whom it consisted."

After reviewing several authorities bearing

GOKAL CHAND v. HUKAM CHAND-NATHU MAL,

on the question before him, the learned Judge held that the separate or self-acquired property of a member of a joint Hindu family is not liable for the payment of a debt which had been incurred by the manager of the family for a family purpose, but that such member was liable for the payment of such debt to the extent of his share in the family property.

In the Allahabad case cited above the learned Judges, following *Chalamayya v. Varadayya* (2), drew a distinction between a joint ancestral family business under the Hindu Law managed by the adult members of the family and an ordinary contractual partnership, and they went on to observe:—

"In the case of the latter, each partner is a contracting party, all the partners holding themselves out as trading on the credit of their combined and separate funds. Whereas in the case of a joint family ancestral business there is no contract of partnership whatever between the members of the joint family. The family frequently contains amongst its members minors who acquired their interest in the business by birth. Indeed it may be safely assumed that in most of the existing Hindu joint family trading firms the parties now interested in them acquired their interest by birth and not by contract. Admittedly minor members are liable to the extent of their respective interests in the joint family property for the acts of the managers of the joint family business. But we do not think that their liability extends further. If any of the members of a joint family happen to have separate estates, we know of no good reason why such separate estate should be held so liable. We do not think that the rule laid down in the case of *Goode v. Harrison* (7) that a minor on attaining majority must promptly notify his disaffirmance of a partnership if he is to avoid future liabilities can, bearing in mind the dissimilarity in the way in which a contractual partnership and a Hindu joint ancestral family trading business originate, be applicable."

"In conclusion, then, our view is that the defendant-appellant, never having held himself out as a partner and never having taken any part whatever in the transactions

out of which the plaintiff's claim has arisen, even though he had attained majority at the time, is not liable to satisfy that claim out of his separate property, in other words, that he did not after he had attained full age, by any consentient act, become a partner in the joint ancestral family business and thereby render his separate estate liable to satisfy the obligations of the firm."

No relevant authorities to the contrary have been cited before us. *Mul Chand v. Sadhu Singh* (8), on which reliance was placed by the learned Counsel for the respondents, does not lay down the law differently. All that is decided is that, in the circumstances stated in the judgment in that case, the minor member of the family was liable equally with his major brother who was the manager of the ancestral family business, for payment of the debt incurred by the manager in the course of the said business to the extent of his (minor's) share in the family property. There was in that case no question whatever of the separate or self-acquired property of the minor being made liable for the payment of the debt in question. Most of the authorities cited and relied on by the lower Court are noted in the decision just cited, and it is clear that the lower Court has entirely misunderstood the law on the question under consideration. On the strength of *Mul Chand v. Sadhu Singh* (8), therefore, the personal liability of the present appellants, that is to say, their liability beyond their shares in the ancestral family business or family property, if any, is not established. That they are liable on the *hundis* in suit, so far as their shares in the joint family property are concerned, is, in my opinion, upon the facts found, beyond question.

The next question for consideration is whether their separate or self-acquired property is liable for payment of the amount of the *hundis* on the ground that, the appellants having received their special training at the expense of the joint family property, their self-acquisitions must be considered as forming part of the joint family property and as such must be held liable for payment of the debts of the joint family. Although on this point no evidence has been tendered,

(7) (1821) 24 R. R. 307; 5 B. & Ald. 147; 106 E. R. 1147.

(8) 59 P. R. 1893.

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

my learned colleague holds that section 114 of the Evidence Act justifies a very strong presumption that the appellants were provided with their special training at the expense of the family.

My learned colleague continues:—

"Amar Nath indeed admits his indebtedness in this respect to the family, whilst Gokal Chand has never suggested that the cost of his training in England was defrayed from any other source and has not troubled to tender himself as witness.

"On the other hand, it is clear that he has been throwing his surplus income into the family hotchpot, has acted as adviser in business matters, and, as was stated before us, has taken a share in mills in his own name.

"My conclusion then is that in all human probability the appellants received their special training to the detriment of the family funds, that the onus of proving the contrary lay very heavily on them and that this onus has not been discharged."

In support of his view my learned colleague refers to and relies upon certain observations of Kindersley, J., in the case of *Durvasula Gangadharudu v. Durvasula Narasammah* (5).

I regret that I cannot agree in the conclusion arrived at by my learned colleague. As I shall show presently, in my opinion, there is no initial presumption in this case that the appellants had received their special training at the expense of the joint family business or of the joint family property, if any; but assuming that such presumption can be legitimately raised in this case, my own view is that it has been rebutted by the facts disclosed by the evidence on the record, at least so far as Lala Amar Nath is concerned. I may also point out that the soundness of the decision of the Madras High Court in the case of *Durvasula Gangadharudu v. Durvasula Narasammah* (5), which has been referred to by my learned colleague, was doubted by their Lordships of the Privy Council in the well-known case of *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (9). After referring to a decision of Mr. Justice Jackson and Mr. Justice

Mitter in *Dhunookdharee Lall v. Gunput Lall* (10) and Madras High Court decisions reported as *Chalakonda Alasani v. Chalakonda Ratnachalam* (11) and *Durvasula Gangadharudu v. Durvasula Narasammah* (5), their Lordships say:—

"It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine in the Courts of Madras."

It seems to me that in the present case in order to establish the liability of the appellants for payment of the amount of the *hundis* in suit, so far as their separate or self-acquired property is concerned, it is necessary for the plaintiffs to prove that the appellants had received their special education at the expense of the joint family business in connection with which the *hundis* were executed. It is not definitely proved on the present record that there was or is any joint property of the family of the appellants apart from the ancestral family business which was carried on under the names of Nagar Mal-Joti Mal, and it is obvious that there is no presumption that the joint family held any joint property independently of the said business. It is not shown that Joti Mal, father of the appellants, had inherited any property from his own father which became the nucleus of his acquisitions, if any, apart from the assets of the firm of Nagar Mal-Joti Mal, and it seems to me that if Joti Mal provided the appellant, Mr. Gokal Chand, with funds out of any property held by him which did not form part of the assets of the firm, it would not be correct to say that Mr. Gokal Chand received his training in England at the expense or to the detriment of the joint family property. The observations of their Lordships of the Privy Council in the case of *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (9) above referred to at pages 260 and 261 of the report have a material bearing on this point. So far as Lala Amar Nath, appellant, is concerned

(9) 1 M. 252; 4 I. A. 109; 1 Ind. Jur. 323; 3 Suth. P. C. J. 367; 3 Sar. P. C. J. 608.

(10) 10 W. R. 122; 11 B. L. R. 201.
(11) 2 M. H. C. R. 56.

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

he received his special training, ■ I shall show later on, with the funds supplied to him by his brother, the other appellant, and not at the expense of the joint family property, assuming that the family had joint property when Lala Amar Nath received his training as a Pleader between 1906 and 1908.

The fact that Mr. Gokal Chand had not gone into the witness-box in this case was strongly commented upon by the learned Counsel for the respondents, but, speaking for myself, I fail to ■ why, in view of the pleadings of the parties, it was incumbent on Mr. Gokal Chand to offer himself as ■ witness in the case. The observations made by their Lordships of the Privy Council in *Kishori Lal v. Chunni Lal* (12), which were relied upon by the respondents' Counsel, apply to a case where ■ party to a suit deliberately abstains from giving evidence in Court in regard to transactions to which he was a party and which are otherwise proved to have taken place so that he is imperatively called upon for an explanation. In the present case the plaintiffs examined three of the defendants, Girdhari Lal, Achhru Mal and Lala Amar Nath, as their witnesses, and in the course of the evidence given by them nothing was said regarding Mr. Gokal Chand's active participation in the family business or his having received large sums out of the funds of that business or out of the other family property, if any, for the purposes of his education in England so ■ to make it imperative for him to explain any transactions or circumstances appearing against him in the evidence. I do not, therefore, think that the fact of Mr. Gokal Chand not having put himself into the witness-box in any way tells against him, and from that fact no inference adverse to him as a defendant should be drawn in this case.

I may note here that the statement of Lala Amar Nath, appellant, printed at pages 23-31 of the supplementary paper-book B, is the only portion of that paper-book which can be, and which has been, treated ■ evidence in this case. The rest of the docu-

ments printed in that paper-book ■ inadmissible in evidence and Counsel for the respondents was not allowed to refer to them in argument. Confining our attention, then, to the statement of Lala Amar Nath just referred to and to the other evidence on the record, I can find no definite evidence showing that Mr. Gokal Chand and Lala Amar Nath received their special education at the expense of the ancestral family business or to the detriment of the joint family property. Lala Amar Nath tells us that he came to Lahore to prosecute his studies in 1899, that he obtained his degree (presumably a degree in Arts) in 1906, and that he studied in the Law College till the end of 1908. It is not shewn that before 1899 he received any special education at Ferozepore, nor is it shewn that after 1899, when he ■ to Lahore till he passed out of the Law College in 1908, the expenses of his special education, assuming that his education for the degree examination up to 1906 was education of ■ special character, were defrayed out of a joint family fund. On the contrary, there are indications in his evidence that that was not the case. He says: "After the return of Mr. Gokal Chand from England" (i.e., after 1899) "Jadu Nath, Mul Chand and I, according to general practice, received expenses from Lala Gokal Chand direct. In the beginning every one of us got Rs. 25 per month. Afterwards every one of us got Rs. 30, and then Rs. 40 per month. Lala Jadu Nath studied in the M. A. Class and he sometimes got Rs. 50 per month. We got the above money besides the expenses in connection with books, clothing and admission fee. Generally we received the said money direct. Lala Gokal Chand used to come here twice ■ year and each time he gave Rs. 15 or Rs. 16 to the children of Lala Girdhari Lal." (Pages 27-28—B.) This evidence shows that Lala Amar Nath ■ receiving a monthly allowance to meet the expenses of his education in Lahore direct from Mr. Gokal Chand who ■ then serving ■ an Indian Civil Servant in the United Provinces, and not from the manager of the joint family out of the joint family funds in Ferozepore. At page 25 of paper-book B the following question and answer occur:—

"Question:—Did you demand from Gir-

(12) 1 Ind. Cas. 128; 31 A. 116; 9 C. L. J. 172 (P. C.); 5 M. L. T. 58; 13 C. W. N. 370; 11 Bom. L. R. 196; 19 M. L. J. 186; 36 I. A. 9.

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

dhari Lal any maintenance allowance out of the joint property before May 1907, viz., during the period intervening between 1902 to May 1907?

Answer :—I must have demanded several times.....”

This part of the statement is insufficient to shew that any maintenance allowance and, if so, what amount out of the joint funds was given to Lala Amar Nath while he was studying in Lahore. The monthly allowance which, according to him, he was receiving from Mr. Gokal Chand direct in those days was, in the ordinary course of affairs, sufficient for his needs; and in the absence of direct evidence on the point we cannot assume that remittances were made regularly to him out of the funds in Ferozepore. My conclusion, therefore, is that upon the record as it stands it is not proved that Lala Amar Nath received his special education as a Pleader at the expense or to the detriment of the joint family property.

Next, we must see whether it is proved that Mr. Gokal Chand received his special education in England with funds supplied to him out of the joint family property. In my opinion there is no initial presumption in a case like this that the kind of training received by Mr. Gokal Chand between 1892 and 1899 was received by him at the expense of the family property, and the fact must be proved like any other fact, especially when there is no definite evidence on the record as to the circumstances under which Mr. Gokal Chand went to England and prosecuted his studies there. No questions were put to his brothers Girdhari Lal, Achhru Mal or Lala Amar Nath on this point, and it is, therefore, impossible to form any idea as to how much money was spent on Mr. Gokal Chand's education and from what source the funds were supplied. So far as the record goes we are entirely in the dark on this point. Are we then justified in presuming that because Mr. Gokal Chand was a member of a joint Hindu family, the whole of the expenses of his education in England during the seven years that he was there from 1892 to 1899 were defrayed from the joint family funds? We know nothing as to the volume of the business which the firm of Nagar Mal-

Joti Mal was carrying on, nor have we any conception of the net income which the family was making out of that business or out of the joint property, if any, independently of that business. We have no evidence whatever that the manager of the joint family business remitted any sums of money to Mr. Gokal Chand in England, which fact could have been proved without much difficulty, nor have any entries in the account-books of the firm relating to the expenses incidental to Mr. Gokal Chand's education been produced and proved. Such being the case, we are not justified in making the assumption that Mr. Gokal Chand must have received his special education and training in England at the expense of the ancestral joint family business or the joint family property.

The District Judge in recording his finding on the third issue says that “Very large sums of money which came from the funds of the joint family business were spent in the education of Mr. Gokal Chand and Lala Amar Nath, and that they cannot, therefore, say that they are not responsible for the liabilities of that business which perhaps were incurred to provide money for them.” No evidence in support of this finding was pointed out to us in the course of the argument, and I have not been able to discover any; and I, therefore, find myself unable to uphold the District Judge's finding on this point, if he intended to hold, as apparently he did, that the self-acquisitions of Mr. Gokal Chand and Lala Amar Nath were liable for the payment of the amount of the *hundis* in suit.

The learned Counsel for the respondents also urged that Mr. Gokal Chand, after his return from England, had been throwing his surplus income into the joint stock of the family and that by this conduct he must be deemed to have admitted that his earnings and his self-acquisitions were part and parcel of the joint family property. In support of this contention the learned Counsel relied on Lala Amar Nath's statement at page 25 of paper-book B, line 21, where he says that “Lala Gokal Chand used to send Rs. 150 or 200 per mensem which was distributed.” The precise meaning of this sentence with reference to

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

the context I have not been able fully to grasp; but whatever may be its true import, it means nothing more than that Mr. Gokal Chand being in receipt of a handsome salary used to send money to be distributed amongst his relations according to their needs. This is corroborated by what Lala Amar Nath says in the last paragraph at page 27 about Mr. Gokal Chand sending money to his brother Amar Nath and to the other young ■■■ of his family for their educational expenses in Lahore. The rendering of such pecuniary assistance by a well-to-do member of a family to his needy relations, even in cases where no joint family exists, is a well-known feature of Indian society; and, therefore, from the mere circumstance that Mr. Gokal Chand used to send money home it is not proper to draw the inference that he used to throw his surplus income into the joint stock.

The law applicable to this branch of the case is thus stated in Mulla's Principles of Hindu Law, page 182:

"The income of a member of ■ joint family is his separate property, if it has been obtained

(1) by his own exertions, and

(2) without the aid of joint family property.

"Where the income has been obtained by the practice of a profession or occupation requiring special training, it is called 'gains of science.' Such income is the self-acquired property of the member who earns it, if the special training was not imparted at the expense of the joint family property. If such training was imparted at the expense of the joint family property, the income obtained by means of it becomes the joint property of the family. But a mere elementary education imparted at the expense of the joint family property does not render the income the joint family property."

The leading authorities on which the above statement of the law is based are *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (9); *Lakshman Mayaram v. Jamnabai* (13); *Krishnaji Mahadev Mahajan v. Moro Mahadev Mahajan* (14); *Lachmin Kuar v.*

Debi Prasad (15); *Durga Dutt Joshi v. Ganesh Dutt Joshi* (16); and an unpublished ruling of our own Court in Civil Appeal No. 145 of 1900 is to the same effect. When these cases ■ carefully examined it will be found that before applying the law, as stated above, to the facts of the case before them, the learned Judges who decided the case considered it necessary to come to a finding upon the evidence on the record, whether the special training imparted to the member of the Hindu family concerned, whose self-acquisitions were alleged to form part of the joint family property, had or had not been imparted to him at the expense of the joint family property. They did not start with any initial presumption that every member of ■ joint Hindu family who has received a special training must have done so at the expense of the joint property of the family, where such property exists, and that the income obtained by such ■ member by the practice of ■ profession or occupation for which he had had ■ special training must be presumed to be joint family property. For instance, in the unpublished decision of our own Court above referred to, the question was whether certain property which had been acquired in his own name by one Joti Parshad, a Pleader of Delhi, who was a member of ■ joint Hindu family carrying on an ancestral business, was to be treated as his separate property or as part of the joint property of the family. Evidence was given in that case that Joti Parshad had received his special education as a Pleader with funds advanced out of the family chest, and this fact was supported by regular entries in the account-books of the family. In the course of their judgment the learned Judges say:—

"It appears that Joti Parshad before he was enrolled as ■ Pleader..... had studied for some time at Allahabad. The amount shewn in the firm's account-book as sent to him for his expenses come to about Rs. 100 per annum in 1931 and 1932, and in 1933 ■ considerable outlay seems to have been incurred in setting him up in practice, perhaps Rs. 1,000." Later on the learned Judges

(13) 6 B. 225 at p. 243.

(14) 15 B. 32,

(15) 20 A. 435; A. W. N. (1893) 101.

(16) 5 Ind. Cas. 400; 32 A. 315; 7 A. L. J. 213.

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

remark:—"The District Judge held that the family had spent very little more on his (Joti Parshad's) special training than it would have been obliged to spend on ordinary education. This seems doubtful. The accounts do not shew what was expended on him from the family funds previous to 1930, but since that date the expenditure was considerable, and before he commenced practice, more money was spent in order to equip him fully with books and other necessities." After referring to certain authorities bearing on the point before them, the learned Judges say: "We conceive we shall not be disregarding the principle of Hindu Law of the Mitakshara School, as we understand it, in holding in the present case that such gains ■ Joti Parshad had acquired in his profession may, under the circumstances, be properly treated as partible. It seems clear that he had received ■ special training at the expense of the family and had not picked up his legal knowledge for himself."

In the present case it appears from the evidence of Lala Amar Nath, which stands uncontradicted on this point, that he received his special training in Lahore after 1899, both as an Arts student and as a student of the Law College, with the monthly allowance sent to him by Mr. Gokal Chand direct; and it is not proved that he owed any obligations to the joint family in this respect. And so far as Mr. Gokal Chand himself is concerned, it is not proved, as I have said above, that the funds with which he defrayed the expenses of his education in England were advanced to him out of the joint family property.

For the foregoing reasons, I would hold that the appellants are liable on the *hundis* in suit to the extent of their respective shares in the joint family property, if any, but that their separate or self-acquired property cannot be treated as the joint property of the family and is not, therefore, liable for payment of the amount due in respect of the *hundis* in question.

I would accordingly accept the appeal and modify the decree of the lower Court to the extent specified above, but would leave the parties to pay their own costs throughout.

As my learned colleague and I differ on the question whether the separate or self-acquired property of the appellants can be

treated as the joint property of their family and as such is liable for payment of the amount of the *hundis* in suit, I would propose, if he agrees, to refer the question to ■ Full Bench for decision under section 10 (2) (b) of the Punjab Courts Act.

Owing to this difference of opinion the matter was laid before the Chief Judge, who constituted a Full Bench consisting of Rattigan, LeRossignol and Shah Din, JJ., under section 10 of the Punjab Courts Act to re-hear the appeal.

The appeal coming on 21st January 1916 before the said Judges, and on hearing the arguments of Messrs. *Broadway* and *Sundar Das*, for the Appellants, and the Hon'ble Mr. *Mohammad Shafi*, K. B. (with him *Lala Khairati Ram* and *Bakhshi Tek Chand*), for the Respondents, their Lordships passed the following as the

ORDER OF THE FULL BENCH.

LEROSSIGNOL AND RATTIGAN, JJ.—(*January 21st, 1916.*)—The question referred to this Bench has not been very precisely stated, but a perusal of the judgments of the Division Bench and of the referring order leaves no doubt that the question on which this Bench is asked to make a pronouncement is as follows:—

In a case where ■ member of a joint Hindu family has received a special training to qualify him for some learned profession, is it ■ fair presumption, in the absence of all evidence on the point, that he received that training at the expense of the joint family, or is this a point which in the absence of evidence must be decided in the negative?

One of the members of the Division Bench held that the presumption was ■ fair one, the other member held that the presumption could not be made.

Before discussing the matter referred, however, we must be satisfied that the reference has been legally made under section 10 (2) (b) of the Punjab Courts Act to this Bench.

The respondent contends that the reference cannot legally be decided by a Bench including either of the members of the Division Bench, that section 98 of the Civil Pro-

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

cedure Code and not Punjab Courts Act, section 10 (2) (b), is the law applicable.

After due consideration we hold that this reference cannot be legally heard by this Bench.

Section 10 of the Punjab Courts Act comes into operation only when any given contingency is not provided for by any other enactment in force.

Now section 98 of the Code is in force and provides that when there is no majority of the Appellate Judges concurring in a judgment varying or reversing the decree under appeals the decree shall be confirmed.

The Division Bench might, therefore, have confirmed the first Court's decree but as a fine point was involved, they might have adopted the course which, be it remarked, was not obligatory but merely optional, of referring the point of law upon which alone they differed, under the proviso to section 98 of the Code.

If the reference could have been made under section 10 (2) (b) of the Courts Act, it would have been obligatory and not optional and the reference would have been properly made to a Full Bench. The proviso to section 98 of the Code provides on the contrary for a reference only of the point of law in dispute to and for the decision of the appeal by one or more of the *other*, i. e., other than the referring Judges of the Court.

It is a further significant fact that the rules made by this Court to regulate references by a Bench of two Judges, when such Judges differ on a point of law, follow the provisions of section 98 of the Code. *Vide* Rules and Orders of Chief Court, Volume V, No. 10.

Section 10 (2) (a) of the Punjab Courts Act deals with cases in which the Bench in which there is no majority is a Full Bench or a Bench exercising original civil jurisdiction.

Section 10 (2) (b) of the same Act would provide for a case in which the Appellate Judges are agreed that the decree of the Court below cannot stand, but are in disagreement as to the decree which should be substituted, and this disagreement need not be based on a point of law. Under section 10 of the Courts Act the whole case

may be referred, under section 98 of the Code only the point of law may be referred.

The appellants' argument, therefore, that section 98 of the Code and section 10 of the Punjab Courts Act overlap each other, has no force.

Our conclusion then is that this reference, purporting to be one under section 10 (2) (b), to a Full Bench is badly founded, and should have taken the form of a reference solely of the law point, under section 98 of the Code, to one or more of the *other* Judges of this Court.

As the object of the reference is to secure a majority, we think that the reference should be heard by only one or at any rate by an odd number of the Judges of this Court other than those making the reference.

For the foregoing reasons we decline to consider the point referred. Costs of this hearing to be costs in the case. The record will now be returned to the Division Bench.

SHAH DIN, J.—(*January 24th, 1916.*)—I agree generally in the foregoing order and in the conclusion come to by my learned colleagues, namely, that this reference to a Full Bench is not justified by the terms of section 10 of the Punjab Courts Act.

The appeal having again been posted for orders before the Division Bench, the Court passed on the 3rd March 1916 the following

ORDER.—The Full Bench has decided that the reference made to it by the Division Bench under section 10 of the Punjab Courts Act was not competent under that section, inasmuch as the said section applies only in cases for which no provision is made by any other enactment for the time being in force. Since the Judges composing the Division Bench differed in opinion on a point of law, the proviso to sub-section (2) of section 98 of the Civil Procedure Code applied to the case, and the Division Bench should have made the reference, not to a Full Bench which included the members of the Division Bench, but to one or more of the other Judges of the Court. The Full Bench has accordingly declined to consider the point referred, and the record has been returned to the Division Bench.

As required by section 98 of the Civil Procedure Code, we now proceed to state

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

the point of law on which we have differed in opinion, and we refer it to ■ third Judge for decision. The question may be stated as follows:—

In a case where a member of ■ joint Hindu family has received ■ special training to qualify himself for ■ profession or for the service of State, is there an initial presumption, in the absence of all evidence on the point, that he received his training at the expense of the joint family property, or should this fact be alleged and proved like any other fact in a case and be found in the negative if no evidence at all were given on either side?

The reference came before Rattigan, J., who passed on the 13th April 1916 the following

ORDER.—My learned brothers Shah Din and LeRossignol, when hearing an appeal from the decree of Mirza Zaffar Ali, District Judge, Ferozapore, dated the 30th May 1912, differed in opinion on ■ point of law, and after an infructuous reference to ■ Full Bench they have, under section 98 (2) of the Civil Procedure Code, made the following statement of the point of law upon which they differed and by direction of the Chief Judge, the appeal has been heard by me upon that point. The statement referred to runs as follows:—

“In a case where a member of ■ joint Hindu family has received ■ special training to qualify himself for a profession or for the service of State, is there an initial presumption, in the absence of all evidence on the point, that he received his training at the expense of the joint family property, or should this fact be alleged and proved like any other fact in a case and be found in the negative if no evidence at all were given on either side?”

Both Mr. Broadway, for the appellants, and Mr. Shafi, for the respondents, endeavoured from time to time during the course of the arguments before me to discuss the facts of the case and it was not without some difficulty that they were induced to realise that I had no jurisdiction to consider and determine anything but the question of law as above stated. In this respect the present

Code has made a radical alteration, in the Code of 1882, section 575, providing that in the event of ■ difference of opinion, “the appeal” should be referred to one or more of the other Judges, whereas the proviso to section 98 (2) of the present Code in clear and definite terms restricts the reference to the *point of law only*.

For the purposes of the present reference, the facts upon which the question of law arises must be assumed by me to be (1) that there is ■ joint Hindu family; (2) that the member of that joint family with whom I am concerned has received a special training to qualify himself for a profession or for the service of State; and (3) that the joint family is possessed of a nucleus of joint property.

The question, it is to be noted, makes no reference to any property in the hands of the specially trained member of the family, nor am I asked to give an opinion on the more difficult question whether ■ member of a joint family which possesses ■ nucleus of joint property, can claim as his “self-acquisition” property earned by him ■ (e.g.) a Government servant or as a member of ■ learned profession, unless he can first show that his education or training for such service or profession was not imparted at the expense of the joint fund, or, in other words, whether when he has been able to shew that the property in his hands has been acquired by him independently of his family and his family property, it must nevertheless be regarded as joint property unless and until he proves that his special training ■ education was not obtained to the detriment of the joint property. I refer to this matter because I find ■ lengthy discussion thereon in the judgments of my learned brethren and also because both Mr. Broadway and Mr. Shafi appeared to be under the impression that that was the actual question before me and under this misapprehension referred me to ■ number of well-known authorities upon the question of “gains of science or of learning,” such ■ *Chalakonda Alasani v. Chalakonda Ratnachalam* (11); *Durvasula Gangadharudhu v. Durvasula Narasammah* (5); *Bai Manchha v. Narotamdas Kashidas* (17); *Lakshman Mayaram v. Jam-*

GOKAL CHAND v. HUKAM CHAND-NATHU MAL.

nabai (13); *Dhunookdharee Lall v. Gunput Lall* (10). With that question, however, I am not here concerned and I must confine my answer to the point of law actually before me. As to this I have no hesitation in saying that a member of a joint Hindu family which admittedly possesses joint property must be presumed in the ordinary course of things to have received his education, whether special or ordinary, at the expense of his family and his family property and that the burden of proving the contrary would rest upon him. Indeed, I think I might safely go further and add that a like presumption would arise in the case of every person who has received education. Presumably the cost of his education has been borne by his father, though no doubt this is merely a presumption open to rebuttal. But be this as it may, there can, in my opinion, be no question that the initial presumption is that an educated member of a joint Hindu family, possessing joint property, has had the costs of his education defrayed out of the joint fund. Members of such a joint Hindu family, under the Mitakshara system, are presumed to be joint as regards all property [see *Lal Bahadur v. Kanhaiya Lal* (18)] and it would surely be anomalous in such a case to hold that, while that is undoubtedly the ordinary presumption, the cost of educating a member of that family is outside its scope and that there is no initial presumption that such education was imparted to the detriment of the joint property. It may, of course, happen that a boy or youth is trained or educated at the expense of some kindly relative or friend, or it may be that he has by his own abilities succeeded in winning scholarships which enabled him to educate himself. But the burden of proving such facts would lie on him and unless he could prove the contrary, the Court would be justified in presuming that it was at the expense of the joint family property that he had received his training or education.

With this expression of my opinion on the point of law referred to me, I direct that the record be placed before the Division Bench which made the reference for final orders.

(18) 29 A. 244 at pp. 254, 255; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 9 Bom. L. R. 597 (P. C.).

The appeal having been posted for final judgment before Shah Din and LeRossignol, JJ., the Court passed on the 19th May 1916 the following

FINAL JUDGMENT.

LE ROSSIGNOL, J.—The question calling for decision in this case and the findings thereon are set forth *in extenso* in our judgments, dated 17th March 1915 and 24th March 1915, respectively.

From those judgments it will appear that we were agreed that the appellants were liable on the *hundis* in suit to the extent of their shares in the joint family property, but we were divided on the point whether their separate or self-acquired property could be regarded as joint family property for the purpose of this decree.

The legal point out of which this disagreement arose was referred by us to a third Judge of this Court in obedience to the provisions of section 98 (2) of the Civil Procedure Code, with the result that the separate property of the first appellant (Gokal Chand) must be held to be joint family property liable for the satisfaction of this decree.

As this Bench was divided on the question of fact whether appellant Amar Nath had received his special training at the expense of the joint family, the plaintiff-respondent states that he will be satisfied with a decree against the defendants' shares in the joint family property, which shall be deemed to include Gokal Chand's separate property.

We accept the appeal and substitute for the District Judge's personal decree a decree in the terms above mentioned and we further direct that parties shall bear their own costs throughout.

Decree modified.

RAVU SESHAYA GARU v. RAJAH OF PITTAPUR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 886 OF 1914.

March 24, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

Sree RAVU SESHAYYA GARU—
DEFENDANT—APPELLANT

versus

THE RAJAH OF PITTAPUR, Sree Raja
RAVU VENKATA KUMARA MAHI-
PATHI SURYA RAO BAHADUR
VARU—PLAINTIFF—
RESPONDENT.

Madras Estates Land Act (I of 1908), s. 1 (1), (15), (16)—“Agriculture,” meaning of—“Rent,” whether includes pasturage dues—Tenant holding land merely for pasturing purposes, whether a ryot—“Cultivable” land, meaning of—“Jeroyati,” meaning of—Suit by land-lord to recover land let out for pasturing purposes—Jurisdiction.

The ordinary meaning of “agriculture” is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. [p. 731, col. 2.]

Rajah of Venkatagiri v. Jayampu Ayapa Reddy, 21 Ind. Cas. 532; 25 M. L. J. 578; 14 M. L. T. 405; (1913) M. W. N. 919; 38 M. 738, followed.

Although an extended meaning is sometimes given to the word by special definitions, yet there is a clear intention on the part of the Legislature not to include “pasture” in the definition of the term “agriculture” as used in section 3 (1) of the Madras Estates Land Act. [p. 731, col. 2.]

A tenant holding land merely for pasturing purposes does not become a ryot within the meaning of section (3), clause (15), of the Estates Land Act, although the use of the land solely for pasture does not deprive him of his claim to be called ryot provided that he has the right to use it for agriculture. [p. 732, col. 1.]

Imandi Appalaswami v. Rajah of Vizianagaram, 20 Ind. Cas. 838; 25 M. L. J. 50; (1913) M. W. N. 106 followed.

Unless the land is of such a nature that it is ordinarily cultivable or cultivable at intervals of not unusual length, it is not “cultivable” land within the meaning of section 3, clause (16), of the Act and, therefore, not ryoti land, and the tenant of such land is not a ryot. [p. 732, col. 1.]

“Rent” under the definition in clause (1) of section (3) of the Estates Land Act is what is payable for the use of land for purposes of agriculture and does not include pasturage dues; consequently a suit therefor is not exempted from the cognizance of Civil Courts. [p. 732, col. 2.]

The term *jeroyati*, as used in some parts of the Telugu country, means merely ‘non-inam’. [p. 732, col. 2.]

Where, therefore, land (not being the zemindar’s private land) was let out to a tenant for pasturing purposes, and the landlord sued to recover the land:

Held, that the suit was cognizable by a Civil and not a Revenue Court. [p. 732, col. 2.]

Gajapathi Karupamaya Ananga Bheema v. Sondi Prahaladha Bissayi Ratno, 21 Ind. Cas. 833; 14 M. L. T. 562; (1914) M. W. N. 179, followed.

Murugesu Chetti v. Chinnathambi Goundan, 24 M. 421; *King-Emperor v. Alexander Allan*, 25 M. 627; 12 M. L. J. 393; 1 Weir 727; *Ramachandra Mardaraja Deo v. Dukko Podhano*, 31 Ind. Cas. 852; *Rajah of Venkatagiri v. Jayampu Ayapa Reddy*, 21 Ind. Cas. 532; 25 M. L. J. 578; 14 M. L. T. 405; (1913) M. W. N. 919; 38 M. 738; *Maharajah of Venkatagiri v. Velikanti Rami Reddi*, 34 Ind. Cas. 607, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in Appeal Suit No. 232 of 1913, preferred against that of the Court of the District Munsif, Peddapur, in Original Suit No. 578 of 1909.

Mr. B. Narasimha Rao and the Hon’ble Mr. B. N. Sarma, for the Appellant.

The Hon’ble Mr. S. Srinivasa Aiyangar, Advocate-General, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. The suit was brought by his landlord (the Rajah of Pittapuram) for recovering the plaint land, which had been enjoyed by the defendant as pasture land from 1877. The plaintiff did not state in his plaint whether the land was (a) private home-farm land of the zemindar, or (b) old waste being ryoti land, or (c) old waste which was not ryoti land, or (d) other non-ryoti land. Nor did he say whether the defendant was a ryot. He contented himself with saying that the land was pasture land and that the defendant obtained the land every year on cowle for that year for the purpose of grazing cattle.

The defendant contended that the land was ryoti land, that the defendant has been enjoying the land “as it suited him” and not merely as pasture land, and that the defendant had, therefore, occupancy right in the land. The defendant did not expressly state that he was a “ryot” within the definition of that term in the Estates Land Act.

On the above pleas of the defendant, two main issues were framed by the District Munsif:

1. Is the suit land not a ryoti land and is plaintiff entitled to eject the defendant?

2. Has this Court (the Civil Court) jurisdiction to try the suit?

It will be again observed that the question whether the defendant was a ryot is not expressly raised though it might be taken as involved in the 1st issue. The

RAVU SESHAYYA GARU v. RAJAH OF PITTAPUR.

District Munsif found (I am giving the substance of his findings as I understand them):—

1. That the land was "private land" and not *ryoti* land;

2. That the defendant has not acquired occupancy rights in the land (a) the land was not *ryoti* land, having been "separated from the private land of the Rajah" for letting it to the defendant "only for purposes of pasture" (*ryoti* land is cultivable land other than private land. See definition in section 3, clause 16, of the Estates Land Act), (b) as the defendant was not "a *ryot*," because he held only non-*ryoti* land for the purpose only of pasture and not of agriculture [*ryot* is a person who holds (a) for the purpose of agriculture; (b) *ryoti* land. See section 3, clause 15].

On these findings the suit was decreed, the Civil Court's jurisdiction being upheld.

The Subordinate Judge, on appeal, held similar views, though his judgment is somewhat obscure on the point whether the land not being *ryoti* land was due to its being private land or due to its being non-cultivable land.

It was conceded in the lower Appellate Court (and not disputed here) that if the land was non-*ryoti* land, or if the defendant was not a *ryot*, the Civil Court's jurisdiction was not ousted and the defendant cannot claim occupancy right. I think it must be admitted that the evidence to prove that the land was private land of the Rajah is very meagre, the description of the land in Exhibits A and B as "*seri*" and "separated from the *seri*" not being of much value, having regard to the presumption laid down in section 185 of the Estates Land Act that every land shall be "presumed not to be private land until the contrary is shown." [See *Karupamaya Ananga Bheema v. Sondi Prahaladha Bissoyi Ratno* (1).] But there is abundant evidence to support the finding of the lower Courts that the land was let for purposes of pasture and not for purposes of agriculture and also that it is not cultivable land. Mr. Sarma argued that "agriculture" includes "pasture" and

relied on observations found in the judgments in *Murugesu Chetti v. Chinnathambi Goundan* (2) and *King-Emperor v. Alexander Allan* (3). In the first case, there is an observation (at page 424) that "a lease of land..... will be a lease for agricultural purposes" within the meaning of that phrase in section 117 of the Transfer of Property Act. The above observation is an *obiter dictum* and it is not clear from the context whether it was intended to apply in a case where the lease included primarily other lands held for raising cultivated crops besides the land let as pasture for the ploughing cattle, the latter being intended to be used for cultivating the cultivable lands also let to the tenant. In the other case, *King-Emperor v. Alexander Allan* (3), it was held that the proviso to clause 3 of section 63 of the Madras District Municipalities Act, exempting from taxation lands used solely for agricultural purposes, applied to lands under grass let by the owner for pasturing cattle, and that, therefore, the owner was not liable criminally for refusing to pay the tax imposed on such land. I have considered the question as to the meaning of the word "agriculture" in *Rajah of Venkatagiri Jayampu v. Ayapa Reddy* (4) and notwithstanding the strenuous contention of Mr. Sarma, I see no reason to resile from the view I have expressed in that case, namely, that the ordinary meaning of "agriculture" is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. I admit that in particular Acts or Statutes, a much larger meaning is sometimes given to that word by special definitions and if the definition in the Estates Land Act gives such a wide meaning so as to include "pasturing," we are, of course, bound to give that special extended meaning. Far from indicating any such intention to include "pasture" in "agriculture," the Legislature has given only one particular extension in the Estates Land Act to the meaning of the word "agriculture," namely, that it shall include horticulture. The dropping out by the Select Committee of the words "silviculture" and "pasturing," which

(2) 24 M. 421.

(3) 25 M. 627; 12 M. L. J. 393; 1 Weir 727.

(4) 21 Ind. Cas. 532; 38 M. 738; 25 M. L. J. 578; 14 M. L. T. 405; (1913) M. W. N. 919.

(1) 21 Ind. Cas. 833; 14 M. L. T. 562; (1914) M. W. N. 179.

RAVU SESHAYYA GARU v. RAJAH OF PITTAPUR.

were in the clause in the original draft of the Bill which finally became section 3, clause (1), seems to me almost conclusive on the point. The meaning given to the phrase "agricultural purposes" in two other Acts by decisions which were passed before the Estates Land Act was enacted, is also of not much relevancy when we have to decide the meaning of the phrase "for purposes of agriculture" as used in the Estates Land Act. (I was not able to quite follow the rather subtle distinction made between the phrase "agricultural purposes" and the phrase "purposes of agriculture" by the learned Advocate-General). The decision in *Rajah of Venkatagiri v. Jayampu Ayapa Reddy* (4) has, besides, been approved by the learned Chief Justice and Phillips, J., in *Maharajah of Venkatagiri v. Velikanti Rami Reddi* (5). I, therefore, hold that land held only for pasturing purposes by a tenant does not make him a "ryot." Mr. Sarma relied on certain documents in the case for showing that his client did not hold the land only for pasturing purposes and that he was also entitled to cultivate it if he liked. But the lower Courts cannot be said to have ignored the said documents and they rely on other evidence, oral and documentary, for their conclusion of fact that the land was let only for pasturing purposes. It may be that the use of the land solely for pasture may not deprive the tenant of his claim to be called "ryot" provided that he has the right to use it for agriculture [see *Imandi Appalaswami v. Rajah of Vizianagaram* (6)], but the finding of fact in this case is that it was not let for agriculture and hence the tenant had no right to so use it. Assuming, however, that the lower Courts were wrong in holding that the land was let solely for pasture, the next question for consideration is whether it was cultivable land and, therefore, *ryoti* land. I am clear on the precedents that unless the land is of such a nature that it is ordinarily cultivable or cultivable at intervals of not unusual length, it is not "cultivable" land and, therefore, not "*ryoti* land" and the tenant of such a land is not a *ryot*. The plaint land is saline grazing land and the finding

of the lower Courts that it is not cultivable land ought, it seems to me, to be accepted in second appeal. The argument that because the land has been called "*jeroyati* land" in some of the plaintiff's own documents it is *ryoti* land, is sufficiently met by the finding of the lower Courts, that *jeroyati*, as used in some parts of the Telugu country, means merely "non-inam" and their finding is supported by the observations in *Ramachandra Mardaraja Deo v. Dukko Podhano* (7) by Abdur Rahim and Spencer, JJ.

Assuming further in defendant's favour that the land is *ryoti* land, the defendant can claim occupancy right under section 6, only if it is *ryoti* land "not being old waste" and also if his case is not governed by the explanatory (or it may be the exception) clause forming sub-section 4 of section 6, which provides that admission to waste land under a contract for pasturage shall not confer on the tenant a permanent right of occupancy and shall not convert a land which is not *ryoti* land into *ryoti* land. As I have already dealt with the contentions as to "*ryot*" and "*ryoti* land," it remains only to consider the question whether the land is "old waste." It is clear to me from the facts found by the lower Courts (without adopting the views of the 1st Court that the land is "private" land) that the plaint land is old waste. The definition of old waste in section 3 (7) (1) of the Act clearly applies to the land in dispute and on this ground also (a ground argued before us though not taken in the lower Courts), the defendant cannot claim occupancy rights in the land. "Rent" again under the definition in clause 1 of section 3 is what is payable for the use of land for purposes of agriculture and pasturage dues are, therefore, not "rent" and a suit therefor is not exempted from the cognizance of Civil Courts.

In the result, I would dismiss the appeal with costs.

MOORE, J.—I agree.

Appeal dismissed.

V.R.P.

(7) 31 Ind. Cas. 852.

(5) 34 Ind. Cas. 607.

(6) 20 Ind. Cas. 838; 25 M. L. J. 50; (1913) M. W. N. 806.

UMED ALI v. ANWAR HUSAIN.
COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 25 OF 1915-16 OF
BARA BANKI DISTRICT.

April 8, 1916.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

UMED ALI—DEFENDANT—APPELLANT
versus

Chaudhri ANWAR HUSAIN AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Partition—Under-proprietor or lessee, person holding as, subsequently becoming co-proprietor but ceasing to be so in course of partition—Status, decision as to, ineffectual.

A person holding some land in a village, either as under-proprietor or as heritable non-transferable lessee, acquired a certain proprietary share in the village. The village was subsequently partitioned among the co-proprietors and his holding fell into the different *mahals* created by the partition. He ceased to be a co-proprietor just before or just after the confirmation of the partition proceedings, and the Court then decided the question of his status as under-proprietor or permanent lessee:

Held, that the status of the said person as under-proprietor or permanent lessee being entirely apart from his status as proprietor, it was quite unnecessary to decide for the purpose of the partition proceedings precisely what his status was, and that, therefore, no adjudication in the course of the partition proceedings or any entry in any *kura* would be held to decide the question of his status as under-proprietor or permanent lessee, which must be settled by law in the usual way.

Appeal against the order of the Commissioner, Fyzabad, dated the 22nd December 1915, reversing that of the Deputy Commissioner, Bara Banki, dated the 26th April 1915, upholding that of the Assistant Collector, Bara Banki, dated the 26th August 1914.

Babus Bisheshwar Nath Srivastava and Bishambar Nath Srivastava, for the Appellant.

Mr. Mohammad Wasim, for the Respondents.

JUDGMENT.

HOLMS, S. M.—(April 5th, 1916.)—Umed Ali got certain rights whether as under-proprietor or a heritable non-transferable lessee from one Ghulam Ali who was sole proprietor in the village. Later on, the respondents, Anwar Husain and others, acquired a certain proprietary share in the village and Umed Ali himself also acquired a similar share. In the partition which has been confirmed, the area held by Umed Ali either as under-proprietor or as

JADHU MAHTO v. KALI PRASONNO BHATTACHARJEE.

permanent lessee which is stated to be 96 *bighas* odd (it possibly may be 86 *bighas*) was divided among the different *mahals*. Umed Ali now appears, either just before or just after the confirmation of the proceedings of the partition, to have ceased to be proprietor. His status as under-proprietor or permanent lessee is entirely apart from his status as proprietor and the Commissioner has held there was no merger. It is quite unnecessary to decide for the purpose of the partition proceedings precisely what his status was.

I would, therefore, modify the orders of the lower Courts to this extent that no adjudication in the course of the partition proceedings or any entry in any *kura* will be held to decide the question of his status as under-proprietor or permanent lessee, which must be settled by law in the usual way. Parties to bear their own costs.

CAMPBELL, J. M.—I agree.

Order modified.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 340 OF 1914.

March 28, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

JADHU MAHTO—PLAINTIFF—APPELLANT
versus

KALI PRASONNO BHATTACHARJEE—
DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), s. 47—Sale of raiyati right in execution of mortgage decree, objection to, in execution—Duty of executing Court.

An objection to the sale of a raiyati right in execution of a mortgage decree under section 47 of the Chota Nagpur Tenancy Act may be taken after the passing of the decree and it is the duty of the executing Court to determine the question. [p. 734, col. 1.]

Lakshmi Bibi Kujrani v. Atal Behari Haldar, 21 Ind. Cas. 117; 40 C. 534, referred to.

Second appeal from the decision of the Additional District Judge, Manbhum, dated the 26th March 1914, modifying the order of the Munsif, 1st Court of Purulia, dated the 29th July 1913.

Mr. P. R. Das (with him Messrs. A. Sen and Jatindra Mohan Chowdhry), for the Appellant.

JADHU MAHTO v. KALI PRASONNO BHATTACHARJEE.

Mr. Abani Bhusan Mukherji (with him Mr. Sishir Kumar Mitra), for the Respondent.

JUDGMENT.—The respondent to this appeal obtained a decree for the sale of a tank and certain other property which had been mortgaged to him by the appellant. On the respondent putting in an application for the sale of the property in execution of the decree, the appellant objected that the sale was prohibited by section 47 of the Chota Nagpur Tenancy Act, VI of 1908. The first Court allowed the objection, but on appeal the Additional Judge of Manbhum held that the sale of the property was not prohibited by the section referred to. It was contended before us that the objection to the sale had been taken too late and that if the appellant desired to raise this objection he should have done so before the decree was passed. In the case of *Lakshmi Bibi Kujrani v. Atal Behari Halder* (1) it was decided that an objection of this kind might be taken after the passing of the decree for sale on a mortgage. We are of the same opinion. Section 47 of the Chota Nagpur Tenancy Act provides that no decree or order shall be passed by any Court for the sale of the right of a *raiya* in his holding, nor shall any such right be sold in execution of any decree or order. It appears to us that the second portion of this provision applies to the present case and that it was the duty of the Court executing the decree to consider whether the sale of the property was forbidden by the section.

As regards the tank, it is sufficient to say that there is no evidence whatever that it forms part of an agricultural holding. This appeal so far as it relates to the tank must be dismissed.

The remainder of the land is held by the appellant under a *mukarrari* lease of *Asarh* 1248 *Fasli* granted by one Sree Gulap Singh, who describes himself as a *jagirdar*. The material portion of the lease is as follows: "I grant you a *mukarrari* lease in respect of (the land is described) at an annual rental of Rs. 5-8-0 on receipt of a premium of Rs. 11. I cease to have any right to the said land from this date and

you acquire the right thereto. You will continue to enjoy the land from generation to generation by payment of the said rent from year to year without any enhancement or reduction. If I or my heirs claim the land from you or your heirs, the claim will be null and void."

The area of the land is not given in the lease. One of the witnesses examined in this case says that the area is more than 100 *bighas*.

The evidence on both sides shows that portions of the land have been sold by the "lessees," but the dates of the sales have not been proved.

The decree-holder contends that the judgment-debtor is a tenure-holder while the judgment-debtor contends that he is a *raiya* in respect of the land in question.

In the Chota Nagpur Tenancy Act "tenure-holder" means primarily a person who has acquired from the proprietor, or from another tenure-holder, a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it; and includes (a) the successors-in-interest of persons who have acquired such a right, and (b) the holders of tenures entered in any register prepared and confirmed under the Chota Nagpur Tenures Act, 1869; but does not include a *mundari khunt-khattidar*.

"*Raiya*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have such a right, but does not include a *mundari khunt-khattidar*.

Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be a *raiya* unless he holds land either immediately under a proprietor or immediately under a *mundari khunt-khattidar*.

(3) In determining whether a tenant is a tenure-holder or a *raiya*, the Court shall have regard to—

(1) 21 Ind. Cas. 117; 40 O. 534.

RUDRAPPA ACHARY v. CORPORATION OF MADRAS.

- (a) local custom, and
- (b) the purpose for which the right of tenancy was originally acquired.

It is, therefore, necessary to ascertain the purpose for which the right to hold the land was acquired. The purpose for which the lease was granted is not stated in the document and the Courts below do not seem to have devoted much attention to the question. The result is that the oral evidence on the subject is extremely vague.

We direct that the record be returned to the lower Appellate Court in order that a definite finding may be recorded as to the area of the land, the purpose for which the lease was granted and as to the dates and particulars of transfer of the land effected by the lessees. The Court should also ascertain whether the lessor was a *zamindar* or a tenure-holder. "Jagirdar" is not conclusive.

Issue remitted.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 11 OF 1915.

March 31, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

S. RUDRAPPA ACHARY, BROUGHT ON
RECORD IN THE PLACE OF S. KOLANDAI

ASARI (*vide* ORDER, DATED THE
1ST DECEMBER 1915)—PLAINTIFF'S SUCCESSOR
—APPELLANT

versus

THE CORPORATION OF MADRAS—
DEFENDANT—RESPONDENT.

Madras City Municipal Act (III of 1904), s. 247—Erection of fence in private street—'Obstruction'—Power of Corporation to order removal—Acquisition of portion of private street by Corporation—Connection with public street—Statutory powers of Corporation.

The Madras Corporation acquired a house at the end of a private street, demolished it and connected it with the public street close by. The plaintiff, the owner of the private street, put up demarcation stones to prevent access by the public to the unacquired portion of the private street. The Corporation, in the exercise of its powers under section 247 of the Madras Municipal Act, ordered the plaintiff to remove the stones. The plaintiff instituted the present suit for a declaration of his right to keep the stones and for an injunction restraining the Corporation from directing their removal.

Held, that the plaintiff's action contravened section 247 of the City of Madras Municipal Act

and the Corporation acted within its powers in ordering the plaintiff to remove the stones put up by him. [p. 736, cols. 1 & 2.]

Per Phillips, J.—The powers given by section 247 of the Madras Municipal Act are for the purpose of promoting the health, safety and convenience of the public and should be strictly construed. The plaintiff, by putting up the stones, erected an obstruction on his private street within the meaning of the section. [p. 736, col. 1.]

Per Wallis, C. J., dubitante.—The putting up of stones by the plaintiff is not an obstruction as they do not obstruct any one's lawful right of passage; they are only a boundary fence, but under the express language of section 247, the Corporation was justified in directing their removal. [p. 736, col. 2.]

Per Curiam.—The Corporation, by their purchase of the house, did not acquire for the public any further right than that of access to the house as an easement of necessity as had been previously enjoyed and the plaintiff was entitled to restrain the public from trespassing to the same extent to which he was before entitled. [p. 736, cols. 1 & 2.]

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 440 of 1913.

Mr. T. Ethiraja Mudaliar, for the Appellant.

Mr. P. Duraiswami Aiyangar, for the Respondent.

JUDGMENT.

PHILLIPS, J.—I have no hesitation in agreeing with the City Civil Court Judge's finding that the plot marked green in the plan is a private street within the meaning of section 3 (26) of Act III of 1904. It is a place 40 feet wide running round the plaintiff's temple, and bordered by houses and is called *Mada "Vidhi,"* which means a street, and it is certainly a pathway made by the plaintiff for the convenient use of or for access to his temple.

The next question is whether the plaintiff is entitled to put up an obstruction at the end of the street. The defendant, the Madras Corporation, acquired two houses at the end of the private street, to which the street gave access, pulled them down and this left an open way from the private street to the public street close by. No doubt this will have the effect of considerably increasing the traffic on the private street, unless the plaintiff takes strict measures to prevent trespass, and in effect the street is likely to be turned into a thoroughfare. However, it will be evident that it is a public convenience, and in a town,

RUDRAPPA ACHARY v. CORPORATION OF MADRAS.

private owners have to put up with inconvenience in many respects *pro bono publico*. Can the Corporation be said to have done any wrong in pulling down the houses they acquired and making the sites into a public way? I do not think so. Nor can they by so doing forfeit whatever right of access to the private street they had as owners of the site, but they cannot give the general public any greater right than they had before, and the plaintiff will be entitled to restrain the public from trespassing to the extent to which he was before entitled. The Municipal Act gives the Corporation considerable powers, and these are given for the purpose of promoting the health, safety and convenience of the public and consequently I think that the sections of the Act which give powers or restrict the rights of individuals must be strictly construed. Section 247 is such a section and undoubtedly the plaintiff has erected an obstruction on his private street within the meaning of the section. The removal of the obstruction as ordered by the defendant may ultimately have a wider effect than merely freeing the street from obstruction, as it will afford access to the street from the neighbouring public thoroughfare. This may or may not be prejudicial to the plaintiff, but it will probably be beneficial to the public, and, therefore, I can see no reason why the Corporation should be restrained from exercising the power which they undoubtedly have under section 247 of the Act. I would dismiss the appeal.

WALLIS, C. J.—This was clearly a street, and if so, a private street, running round the temple with the temple wall on one side and houses opening into the street on the other. Formerly there was only one approach to it through the main entrance of the temple. Recently the Corporation purchased from the temple authorities a house at the back of the temple opening into this street pulled it down, and converted the site into a street connecting the private street, with other streets beyond and enabling traffic to pass through it. Though the Corporation by their purchase of the house acquired as an easement of necessity such

right of access to the house as had previously been enjoyed, they did not acquire any right for the public from the streets beyond over the acquired site into the private street, and the temple authorities to prevent them from asserting or acquiring such a right have erected certain demarcation stones, which they call them, at the western edge of the street to prevent carriages and cattle passing to their private street. The Corporation object to the erection of these stones without their permission being in contravention of section 247 of the Madras City Municipal Act, III of 1904, which forbids any one "to build any wall or erect any fence or other obstruction or encroachment in any street or in or over any drain except as hereinafter provided." The plaintiff then brought the present suit against the Corporation for a declaration of the right of the temple to keep the stones there and for an injunction. The City Civil Court Judge held that they are an obstruction within the meaning of section 247 as they prevent access from the public streets to the private street, to those who are entitled to use it. The only easement which existed was one of access to and from the house which has been pulled down to the private street, and it is not shown that the stones which have been left standing would have obstructed such right of access which existed. Now that the house has been pulled down I do not think they are an obstruction within the meaning of the section, as they do not obstruct any one in the exercise of his lawful right of passage. They appear, however, to constitute a fence, *Ellis v. Arnison* (1), and are in fact a boundary fence. It may seem strange that the Legislature should prevent the owner of a private street from erecting a fence for the preservation of their rights: but the language is express and I am reluctantly compelled to concur with my learned brother in holding that the appeal should be dismissed.

Appeal dismissed.

V.R.P.

(1) 1 B. & C. 70; 2 D. & R. 161; 5 B. & Ald. 47; 1 L. J. (o. s.) K. B. 24; 25 R. R. 314; 106 E. R. 1111.

SUBBAROYAR v. KOTTAYA GOUNDAN.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 96
OF 1915.

January 21, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.SUBBAROYAR—DEFENDANT—
APPELLANT*versus*KOTTAYA GOUNDAN—PLAINTIFF—
RESPONDENT.*Transfer of Property Act (IV of 1882), ss. 54, 55
(4)—Contract to sell—Breach—Compensation—Mesne
profits.*

On an agreement to convey properties, a person is not entitled to possession or mesne profits as such before the date of the execution of the registered conveyance in his favour, having regard to section 54, paragraph (2), and section 55, sub-section (4), clause (a), of the Transfer of Property Act. He will, however, be entitled to compensation for breach of the contract to convey, in addition to suing for the execution of the conveyance. And the compensation will be the value of the mesne profits which could have been obtained between the date when the breach of contract took place and the date when the conveyance was actually executed. Such claim is not strictly one for mesne profits. [p. 737, col. 2; p. 738, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 79 of 1914, against the decree of the Court of the District Munsif, Arni, in Original Suit No. 32 of 1913.

FACTS.—The defendant agreed to sell certain property to the plaintiff and execute a registered conveyance in his favour. He accordingly received a portion of the sale amount and delayed executing the conveyance on the ground that the balance of the sale amount must be paid before he would execute the sale-deed. The plaintiff brought a suit in the District Munsif's Court of Arni for a declaration that the plaintiff property belonged to him and for recovery of mesne profits consequent upon his not being put in possession of the property by the defendant. The District Munsif decreed the suit, and directed that, on receipt of the balance of the sale amount, the defendant should execute a registered conveyance and put the plaintiff in possession of the property. The plaintiff then withdrew his claim for mesne profits, with liberty to bring a fresh suit for the same. This decree was confirmed on appeal by the defendant. The defendant thereupon executed a registered conveyance and put the plaintiff in possession of the

property. Subsequently the plaintiff brought the suit out of which the present appeal has arisen, for the recovery of mesne profits or damages during the pendency of the previous suit, claim to which he had then withdrawn. The District Munsif held that the buyer would be entitled to the mesne profits of the property sold only after possession thereof passed to the buyer by means of a registered conveyance under the Transfer of Property Act and, therefore, rejected the plaintiff's claim prior to the date of the delivery of possession. On appeal the Subordinate Judge of North Arcot held that either mesne profits or as damages the plaintiff would be entitled to the income accruing from the property from the date of the agreement and remanded the suit for disposal. Against this order of remand the defendant preferred a civil miscellaneous appeal to the High Court.

Mr. C. Rajagopala Aiyangar, for the Appellant.

Mr. A. K. Madhava Rao, for the Respondent.

JUDGMENT.—Having regard to section 54, paragraph 2, of the Transfer of Property Act and section 55, sub-section (4), clause (a), we are disposed to agree with the argument advanced with much ability by the appellant's learned Vakil that the respondent was not entitled to possession or mesne profits as such before the date of the execution of the registered conveyance in his favour. He is, however, entitled to sue for compensation for the breach of the contract to convey, in addition to suing for the execution of the conveyance, such compensation naturally being the value of the mesne profits which the plaintiff could have obtained between the date when the breach of contract took place and the date when the conveyance is actually executed.

The plaintiff did pray for that additional relief of compensation in the former suit of 1910 (though he inaccurately called the relief as one for mesne profits) and under Order XXIII of the Civil Procedure Code, he withdrew his prayer for that relief with liberty to bring a fresh suit for the same.

The present suit is brought substantially for the said claim so withdrawn with liberty.

MUNESHAR BAKHSH SINGH v. ARJUN SINGH.

While we agree with the Subordinate Judge that the claim for the value of the profits for the period between 12th January 1910 and 15th July 1911 is a claim for damages for the breach of contract, we do not agree with him that the claim for the value of the profits for the period between 15th July 1911 and October 1912 is strictly one for mesne profits. We do not think that the decree dated 15th July 1911 could pass title to the land itself or could give the plaintiff the right to claim mesne profits as such from that date and prior to the execution of the registered conveyance. But this error of the Subordinate Judge has not affected the merits of the order of remand.

As regards the question of limitation, we do not think that it is so clear that the Subordinate Judge ought to have decided it against the respondent and dismissed the suit on that ground. His remanding of the suit in order that the Court of first instance might deal with that question along with the other questions not dealt with by the District Munsif, was not illegal.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 56 OF 1914.

April 25, 1916.

Present:—Mr. Stuart, J. C., and

Mr. Kanhaiya Lal, A. J. C.

MUNESHAR BAKHSH SINGH—

DEFENDANT No. 2—APPELLANT

versus

ARJUN SINGH AND OTHERS — PLAINTIFFS,

MUNNU SINGH—DEFENDANT No. 1

—RESPONDENTS.

Hindu Law—Joint family comprising minor members—Manager, power of—Ancestral estate, property acquired at expense of—Minor members, whether bound by transfer made by manager—Benefit, enjoyment of, effect of—Transfer by manager, whether holds good—Property, ancestral, and property acquired by it, both mortgaged—Mortgagee, position of—Equity—Court, discretion of.

There is nothing in the Hindu Law to prevent the head and manager of a joint family, comprising minor members, from doing anything in the interests of the family which any other prudent manager may have done under similar circumstances, e.g., an advantageous acquisition of some property at the expense of the ancestral estate. And a transfer of such estate

made in the interests of the family, that is, to enlarge the means of its subsistence, may thus be binding on the minor members as one made to pay antecedent debts or to meet an immediate necessity; and they cannot, on attaining majority, impeach the transfer of which the benefit has been enjoyed. [p. 739, col. 2; p. 740, col. 1.]

Annamalai Chetty v. Murugasa Chetty, 30 I. A. 220 at p. 228; 26 M. 544; 7 C. W. N. 754; 8 Sar. P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494; *Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81 note; *Sevestre* 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147; *Kapildeo v. Thakur Prasad*, 21 Ind. Cas. 868; 11 A. L. J. 961; 36 A. 17 and *Ratnam v. Gorindarajulu*, M. 339, referred to.

Where the ancestral property of a joint Hindu family and some other property acquired at the expense of the former property are both mortgaged, the Court may in equity not allow the mortgagee to proceed against the former property so long as the latter is not exhausted, if the latter property is available and adequate to satisfy his debt. [p. 741, col. 1.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 24th February 1914.

Mirza Sami Ullah Beg, for Mr. A. P. Sen and Babu Basdeo Lal, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—The plaintiffs are the sons of Munnu Singh and seek to impeach a mortgage and a charge, created by their father in favour of Muneshar Bakhsh Singh. It is not disputed that the plaintiffs and Munnu Singh were living jointly, and that the plaintiffs were minors on the date of the mortgage and charge. It was suggested in the Court below that Har Narain Singh, one of the plaintiffs, was born after the date of the mortgage; but the finding of the Court below was to the contrary and that finding has not been challenged at the hearing of the appeal. The allegation of the plaintiffs was that the mortgage and the charge in question were effected to obtain property by pre-emption, and were prejudicial to the interests of the family inasmuch as the property, obtained by pre-emption, as well as the ancestral property of the family were hypothecated to obtain a loan for the purpose of paying the pre-emption money. The property, in respect of which the decree for pre-emption was obtained, belonged to a distant branch of the family, to which the plaintiffs and Munnu Singh belonged, and was similar in extent to the ancestral share possessed

MUNESHWAR BAKHSH SINGH v. ARJUN SINGH.

by the plaintiffs and Munnu Singh. The decree for pre-emption was obtained by Munnu Singh and his eldest son Arjun Singh, who was then and is still a minor, and a sum of Rs. 10,300 was required to pay the purchase-money. Munnu Singh on behalf of himself and acting as guardian of Arjun Singh secured that money by executing on the 30th November 1907 a mortgage-deed for Rs. 10,000 and a deed of further charge for Rs. 300 in favour of Muneshwar Bakhsh Singh, bearing simple interest at Rs. 7-8 per cent. per annum. On the 15th November 1909 Muneshwar Bakhsh Singh obtained a decree for the moneys, due on this mortgage and deed of further charge, then amounting to Rs. 11,396-7-9, making Munnu Singh the sole party to that decree. On the 10th December 1910 the decree for sale was made absolute, and in pursuance thereof Muneshwar Bakhsh Singh proceeded to bring to sale the entire ancestral property of Munnu Singh and the plaintiffs, and a 9-biswansis 10-kachwansis share of Udanpur out of the pre-empted property. The plaintiffs contended that they were not bound by the decree obtained by Muneshwar Bakhsh Singh against their father for the sale of the ancestral property, and that Arjun Singh was not bound by the decree in respect of the pre-empted property. They, therefore, claimed that the portion of the pre-empted property sought to be sold and a 5/6ths share of the ancestral property, mortgaged by Munnu Singh, should be exempted from the sale. The defence, so far as it is material for the purpose of this appeal, was that the mortgage and charge were made for the benefit of the family, and that the name of Arjun Singh was entered in those deeds fictitiously as a co-executant. It was further urged that the decree for sale was obtained against Munnu Singh as the head and manager of the family and was binding on the plaintiffs. The learned Subordinate Judge found that the mortgage and charge aforesaid were not made for any legal necessity and were not binding on the plaintiffs. He, therefore, decreed the claim. The only points for consideration in the appeal are whether the mortgage and charge in question were made for the benefit of the family, and whether the decree obtained by the appellant on foot of the said mortgage and charge was

binding on the plaintiffs. There were other pleas too in the memorandum of appeal, but they were expressly surrendered at the hearing.

It is admitted in paragraphs 1 and 2 of the plaint that the value of the ancestral property, in which the plaintiffs claim a 5/6ths share, is Rs. 23,000 and that the pre-empted property, in regard to which a decree for possession was obtained on payment of Rs. 10,300, was similar in extent to the ancestral property. The value of the pre-empted property, according to that computation, would be the same as that of the ancestral property in which the plaintiffs claim a 5/6ths share. The decree for pre-emption, therefore, secured to the plaintiffs and their father property belonging to one of their paternal kinsmen, which is admittedly worth Rs. 28,000, on payment of a sum of Rs. 10,300 bearing interest at Rs. 7 8-0 per cent. per annum. No evidence was adduced to show the profits derivable from the ancestral property, but even if the profits were not sufficient to pay the interest, which was by no means excessive, it is difficult to believe that a transaction which secured to the family in 1907 property now worth Rs. 23,000 at less than half its price can be regarded as anything but advantageous to the persons for whose benefit it was entered into. The plaintiffs were minors at the time of the suit for pre-emption, and it was not in consequence possible for Munnu Singh, who was the head and manager of the family, to consult them or to ascertain their wishes. There is nothing in the Hindu Law to prevent the head and manager of the joint family, comprising only minor members, from doing in the interests of the family which any other prudent manager may have done under similar circumstances. The growth and development of joint family interests would depend very largely on the prudence, care and skill with which the management may be exercised, and it would be in the highest degree deleterious to the interests of such minor members, if the head and managing members of the family were restrained from doing anything, however beneficial to their interests, which necessitated the raising of a loan on the security of the ancestral property, till the minors attained majority and were in a position

MUNESWAR BAKSHI SINGH v. ARJUN SINGH.

to judge for themselves whether the transactions would be to their benefit or not. That the Hindu lawyers contemplated the acquisition of property at the expense of the ancestral estate is shown by the provision made that whatever is acquired at the charge of the patrimony is subject to partition, and anything acquired by a co-parcener without detriment to the father's estate is excluded from it (Mitakshara, Chapter 1, section 4, paragraphs 1 and 29). Dealing with the power of the father in regard to immoveable estates, the author of the Mitakshara cites with approval a text of Vrihaspati to the effect, "Even a single individual may conclude a donation, mortgage, or sale, of immoveable property, during a season of distress (*apatkale*), for the sake of the family (*kutumbarthe*), and especially for pious purposes (*dharmarthe*);" and then goes on to say:—"The meaning of that text is this; while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, at a time of calamity, affecting the whole family, or for its support, or for the discharge of indispensable duties, such as the obsequies of ancestors and the like." (*Ibid*, Chapter I, section 1, paragraphs 28 and 29.) The instances given are illustrative and not exhaustive and a transfer made in the interests of the family, that is to enlarge the means of its subsistence, might thus be binding as one made to pay antecedent debts or to meet an immediate necessity. The powers of a manager are necessarily wider, where the necessity is pressing or the need immediate, for in such cases he can act on his own initiative and responsibility, and bind the other members of the family; but where he acts in the professed interests of the family to secure some benefit for it without consulting the adult members, if any, it is open to such adult members, or those who were minors, on attaining majority, to impeach the transaction on the ground that they were not benefited by it. A transaction of which the benefit has been enjoyed cannot, however, be so impeached, for, as pointed out by their Lordships of the Privy Council in

Annamalai Chetty v. Murugasa Chetty (1), the relation between the manager of a joint Hindu family and the other members of that family is not that of an agent and principal or that of partners, but is much more like that of a trustee and *cestui que trust*; and on that principle any debts incurred by a manager, or a co-parcener in his absence, for the family benefit are declared to be binding on the other co-parceners. Thus Yagnyavalkya (1145) says:—"A debt which has been incurred for family purposes by the undivided members should be paid by the co-parceners, when the head of the family is either dead or has gone abroad" and commenting on this passage, the author of the Mitakshara observes:—"A debt which has been incurred for family purposes *katumbartham* either by the many undivided members or by each separately, the head of the family should pay. When he is either dead or has gone abroad, his co-parceners should pay." Discussing the case of a mother managing as guardian for an infant heir their Lordships of the Privy Council in *Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree* (2) observed:—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate." "It is obvious," they went on to say, "that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management." What a guardian acting on behalf of an infant heir can do can also be done by a person who is the manager of a joint family. "In every case the question," as pointed out by Mayne, "is one of fact, whether the transaction was one which a prudent owner, acting for his own benefit,

(1) 30 I. A. 220 at p. 228; 26 M. 544; 7 C. W. N. 754; 11 Sar. P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494.

(2) 6 M. L. A. 393; 18 W. R. 81 note; Sevestre 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

NIDAMARTHI KRISHNAMOORTHY v. GARIGIPARTI GANAPATILINGAM.

would enter into" (Mayne's Hindu Law, 8th edition, page 469). It was stated by Munnu Singh in the pre-emption case that he had filed the suit for pre-emption for the benefit of his sons. In the plaint the plaintiffs treated the pre-empted property as accretion to the family estate and sought to have the entire portion thereof, against which the defendant-appellant took out execution, exempted from the sale. The learned Counsel, who appears for the plaintiffs, now states that his clients were willing to give up all interests in the pre-empted property, but that statement has been made too late, and considering that the plaintiffs are still minors, it is doubtful how far he is competent to make it and to forego rights on their behalf.

The plaintiffs have presumably enjoyed the profits of the pre-empted property in common with the other members of the family since the date of its acquisition. The burden imposed on the ancestral estate is nothing as compared with the benefit derived if the price paid and the value at which the pre-empted property is now assessed be considered. The rate of interest was not high, and the transaction cannot be regarded otherwise than as a prudent act of management, conceived to promote the best interests of the family and widen the means of its subsistence. In the case of *Kopildeo v. Thakur Prasad* (3) it was held that the members of a joint family cannot retain the benefit of a purchase without paying the liability incurred in connection therewith. In *Ratnam v. Govindarajulu* (4) a mortgage made to make additions and improvements to the family dwelling-house, by which the value of the estate was increased, was similarly upheld.

It seems inequitable, however, that the mortgagee should be allowed to proceed against the ancestral property when the pre-empted property of equal value, comprised in the mortgage, is available and adequate to satisfy his decretal money. The interests of the plaintiffs will be served, if the pre-empted property proves sufficient to satisfy the decretal debt.

The appeal is, therefore, allowed and the plaintiffs' claim dismissed except in so far that the defendant mortgagee will not be allowed to proceed against the ancestral property of the family comprised in the mortgage, until he has exhausted his remedies against the pre-empted property covered by his decree for sale. A declaration will be granted to the plaintiffs to the above effect. The plaintiffs will, in the circumstances, bear their own costs and pay those of the defendant-appellant in both the Courts.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 325 AND 326 OF 1914.

February 25, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

IN L. P. A. No. 325 OF 1914

NIDAMARTHI KRISHNAMOORTHY AND ANOTHER—DEFENDANTS-PETITIONERS—APPELLANTS

versus

GARIGIPARTI GANAPATILINGAM—PLAINTIFF—RESPONDENT.

IN L. P. A. No. 326 OF 1914

NIDAMARTHI KRISHNAMOORTHY—DEFENDANT No. 1—PETITIONER—APPELLANT

versus

GARIGIPARTI GANAPATILINGAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, s. 1, paragraph (1)—Reference to arbitration—Application for adjournment praying for records to be sent to arbitrators, whether falls under Sch. II, s. 1.

An application for adjournment, in which the Court is asked to send the records to a certain arbitrator to whom the parties had already referred the matter in dispute in the pending suit, is an application under Schedule II, section 1, paragraph (1), Civil Procedure Code, to the Court itself to make a reference to the said arbitrator. [p. 742, col. 1.]

Ghulam Khan v. Muhammad Hassan, 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; *Tallapragada Suryanarayana Row v. Tallapragada Sarabayah*, 9 Ind. Cas. 173; 21 M. L. J. 263; (1911) 1 M. W. N. 151, referred to.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble

(3) 21 Ind. Cas. 868; 11 A. L. J. 961; 36 A. 17.

(4) 2 M. 339.

MANDIL DAS V. MEGH NARAIN DUBEY.

Mr. Justice Oldfield, reported in 25 Ind. Cas. 583, in Civil Revision Petitions Nos. 595 and 596 of 1913, respectively, on the file of the High Court, referred against the decrees of the District Court of Godaveri, in Appeal Suit No. 52 of 1912, (Original Suit No. 50 of 1911, on the file of the Court of the Temporary Subordinate Judge of Rajahmundry).

Mr. T. Prakasam, for the Appellants.

Messrs. P. Narayanamurthi and P. Soma-sundaram, for the Respondent.

JUDGMENT.—The application for adjournment, in which the Court was asked to send the records to the arbitrator to whom the parties had already referred the matter in dispute in the pending suit, seems to have been treated by all parties as an application to the Court itself to also make ■ reference to the said arbitrator under Schedule II, paragraph 1, of section 1. The Court acted upon that application on that footing, and we think the appellant is estopped from contending that the application was not of such a character.

Further, we think we are bound by the interpretation put upon the Privy Council decision in *Ghulam Khan v. Muhammad Hassan* (1) by the Full Bench of this Court in *Tallapragada Suryanaraina Row v. Tallapragada Sarabaya* (2).

The Letters Patent Appeals Nos. 325 and 326 of 1914 are dismissed with costs.

Appeals dismissed.

V.R.P.

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226.

(2) 9 Ind. Cas. 173; 21 M. L. J. 263; 9 M. L. T. 251; (1911) 1 M. W. N. 151.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 316 OF 1911.

March 29, 1916.

Present:—Mr. Justice Chapman and
Mr. Justice Atkinson.

MANDIL DAS—APPELLANT

versus

MEGH NARAIN DUBEY AND OTHERS—

RESPONDENTS.

Hindu Law—Joint family—Debt by manager—Liability of co-parceners—Family necessity—Burden of proof—Duty of lender.

A lender of money, when advancing money to a manager of ■ joint Hindu family, is bound to satisfy himself by due enquiry, honestly made, that the advance is required by the manager, as borrower, for a valid family necessity and for the benefit of the estate. The debt binds the other co-parceners, whether they be adults or minors. [p. 743, col. 2.]

Per *Atkinson, J.*—If the lender acts honestly and makes due enquiry, then, even though the necessity may not in fact exist, he has satisfied the onus imposed on him by law. [p. 743, col. 2.]

Second appeal from the decision of the Sub-Judge, 2nd Court, Shahabad, dated the 8th May 1911.

Mr. Lachmi Narain Sinha, for the Appellant.

Mr. Pugh (with him Messrs S. Sinha and Kulwant Sahai), for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit upon ■ mortgage-bond, dated the 2nd April 1896, executed by one Ram Ratan Dubey. Ram Ratan died in August 1897. The mortgagee sought in the present suit for a mortgage-decree against the other members of the Hindu joint family, namely, the brother of Ram Ratan, his widow and the sons of the brother. The learned Subordinate Judge has dismissed the suit upon the ground that the other members of the joint family could not be held, in the circumstances of the case, to be liable under the bond executed by Ram Ratan. There are certain other issues in the case, namely, whether the defendant No. 6 is or is not the son of the brother of Ram Ratan, but ■ after hearing the appellant we are not satisfied that the learned Subordinate Judge is wrong on the main point it is not necessary for us to go into these other issues. The bond sued upon is for the amount of Rs. 905. Of this amount Rs. 166-8 was on account of previous loans and Rs. 738-2 was on account of cash advanced at the time of the execution of the bond. The interest was at the rate of Rs. 2 per cent. per month; interest to be compound with yearly rests. The suit was brought in May 1909, when the 12 years' period of limitation after the due date was about to expire, so that at the exorbitant rate of interest the amount due had increased from Rs. 905 to Rs. 16,177-13. When it is desired to attach liability to the members of ■ joint family by reason of an act done by one of them without

MANDIL DAS V. MEGH NARAIN DUBEY.

the consent of the others, it is necessary to show that the act was the act of a prudent manager or that enquiry into the prudence of the act was made. On the face of it the transaction was not prudent, and the further we enquire into the details of the matter the more are we satisfied that there is no substantial ground for interfering with the decision of the first Court. The first transaction between Ram Ratan and the mortgagee was in June 1894, when he seems to have taken a loan of Rs. 79 for the payment of Government revenue and road-cess. There is no recital in the bond to the effect that this Rs. 79 could not have been paid from the family funds, and the family *mukhtear* who, it is said, had made a temporary advance of this sum, was not examined by the mortgagee. The next transaction was in November 1895, when a bond was executed by Ram Ratan in which it is recited that under the bond of June 1894, Rs. 106-13-6 was now due and a further sum of Rs. 43-2-6 was taken in cash for necessary and valid expenses. Here again there is no recital that the Rs. 43-2-6 was necessary for the purposes of the family or that those expenses, whatever they were, could not be met from other family funds. We then come to the bond in suit, dated the 22nd April 1896. It is there recited that further money is required for household expenses, for necessary and valid expenses of litigation and there is great necessity for money. It is said that money had been previously borrowed for the *karaj sradh* of Ram Ratan's father. There is evidence that after the expiry of several years after this bond money was borrowed by members of the family with some frequency and to a considerable extent, but there is not a scintilla of evidence that at the time that this bond was executed the family was not in a flourishing condition. The mortgagee says that he enquired from Ram Ratan and was satisfied with what he said. No further enquiry appears to have been made except that a servant of the mortgagee states that he, with another servant who is now dead, went into the village and enquired whether the property which it was proposed to hypothecate was encumbered. Certain witnesses were called to suggest rather than prove by their evidence that certain moneys were actually borrowed

previously for the purposes of the father's *sradh* and that certain moneys were spent in the purchase of bullocks. These witnesses are none of them independent and it is not possible to say that the learned Subordinate Judge was wrong in not giving any credit to what they said. If we are to grant a decree in this case the result would be that it would be sufficient, in order to charge members of a joint family, for the managing member merely to recite that the money was required for certain specified purposes. He would be relieved from the duty of exercising prudence. The result would also be that a mortgagee would be relieved from the duty, which has been laid upon him in many decisions of the Privy Council, of making proper enquiry into the necessity of the loan before he can charge members of a joint family who have not consented to the transaction. In all the circumstances of the case we are not satisfied that the learned Subordinate Judge fell into error in the view which he took. We, therefore, dismiss the appeal with costs. The costs will be the costs on the principle given effect to by the first Court, *viz.*, defendants Nos. 1—5 one set of costs, defendant No. 6 another, and the defendants Nos. 17-19 according to the value of his incumbrance.

ATKINSON, J.—In my opinion a lender of money similarly situated to the plaintiff in this case is bound, when advancing money to a manager of a joint Hindu property, to satisfy himself by due enquiry, honestly made, that the advance is required by the manager, as borrower, for a valid family necessity and for the benefit of the estate. If he acts honestly and makes due enquiry, then, even though the necessity may not in fact exist, he has satisfied the onus imposed upon him by law, if he has reason to believe the truth of the information given to him by reason of such enquiry. This rule of law applies to loans raised by a manager of a joint Hindu family whether the co-sharers be adults or minors. In this case I am satisfied that the plaintiff made no adequate or proper enquiry as to the existence of any legal necessity prior to making the loan or loans in question in this suit. Whether any necessity in fact existed at the time of this loan in 1896 has not been shown by any reliable evidence and, in my opinion, the plaintiff did not *bona fide* take any honest

KAPINI GOUNDAN v. SARANGAPANI.

steps to discharge the onus cast upon him by law as to enquiring into the family necessity or necessities of the defendants. Further, this claim, in my opinion, is grossly extravagant and extortionate; and nothing could more strongly demonstrate the extortionate nature of the plaintiff's demand than the fact that he lies by for 12 years all but two days without seeking to enforce his security, although admittedly default had been made many years previously in payment of the principal and interest, while interest with interest accumulates with compound interest, piling up a huge load of debt on the defendants. I entirely concur in the view of my learned colleague that this action should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1415 OF 1914.

January 26, 1916.

Present:— Justice Sir William Ayling, Kt., and
Mr. Justice Napier.

KAPINI GOUNDAN AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

SARANGAPANI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law – Gift to daughter and son-in-law, whether creates joint tenancy—Devolution of estate on daughter's death—Transfer of Property Act (IV of 1882), s. 53—Transfer in favour of children—Fraudulent transfer.

Where a Hindu male owner gives his property to his daughter and son-in-law during their marriage to be enjoyed by them in common, they take the property as tenants-in-common and not as joint tenants with right of survivorship. [p. 745, col. 1.]

Jogeswar Narain Deo v. Ram Chandra Dutt, 23 C. 670; 23 I. A. 37, followed.

On the death of the daughter her moiety of the gift would descend in accordance with the rules governing *stridhanam* property to her son, unless she has effected a valid transfer of it during her life. [p. 745, col. 1.]

A transfer of all the properties of a person in favour of his children by his first wife, at a time when he was about to marry a second wife and in consideration of his being permitted to do so by the relations of his first wife, is not a transfer in fraud of creditors and is not voidable under section 53 of the Transfer of Property Act, 1882, even though the transferor was heavily indebted at the time. [p. 745, col. 1.]

Second appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 7 of 1913, preferred against that of the Subordinate Judge, Nilgiris, in Original Suit No. 115 of 1911.

FACTS.—Plaintiff sued for a declaration of his right to attach certain land as the property of the 1st defendant in execution of a money-decree obtained against him. The 1st defendant's maternal grandfather had given certain property to his daughter and son-in-law (1st defendant's father) during their marriage to be enjoyed by them in common. The daughter predeceased her husband and the latter before his death executed a Will by which he gave all his property to the 1st defendant, so that he might transfer it to his minor children when they attained majority. Subsequently 1st defendant transferred all his interest in the property in favour of his four minor children. Plaintiff sought to attach this property as the property of the 1st defendant and on the ground that the transfer by him in favour of his minor children was in fraud of creditors. The District Munsif gave the plaintiff a decree, but on appeal it was set aside on the ground that the 1st defendant's father had under the deed of gift only a moiety of interest in the property which had passed to him by the Will and as regards the other moiety, *i. e.*, his mother's share, he succeeded to it, being her *stridhanam* property. The entire property had vested, therefore, in the 1st defendant which he had a right to transfer to his minor children. The plaintiff preferred a second appeal to the High Court.

Messrs. A. S. Cowdell and S. Krishnamachariar, for the Appellants.

Messrs. R. Shadagopachariar and O. Rajagopala Aiyangar, for the Respondents.

This second appeal coming on for hearing on the 21st September 1915, the Court (Ayling and Tyabji, JJ.) delivered the following

JUDGMENT.—We must accept the finding of the lower Appellate Court as to the genuineness of the Will, Exhibit I, and we agree in its construction of the gift-deed, Exhibit II, as being in favour of the two persons Arunachella and Balammal, and not, as appellant contends, for the sole benefit of Balammal.

JAGAT PAL SINGH v. HARNAM SINGH.

These two persons would, however, take the gift ■ tenants-in-common; and not ■ joint tenants with right of survivorship, *Jogeswar Narain Deo v. Ram Chandra Dutt* (1).

It follows that, as regards Arunachella's moiety of the property, the title of defendants Nos. 2 to 5 is established and the suit must fail.

The case of the other moiety which belonged to Balammal is more doubtful. It is admitted before us that on her death it would descend in accordance with the rules governing devolution of *stridhanam* property to her son, 1st defendant; but respondents contend that it passed from him by deed of gift, Exhibit C, to defendants Nos. 2 to 5, and is, therefore, not liable under the decree against 1st defendant. This question has not been enquired into, though it is suggested indirectly by the pleadings. Appellant impugns Exhibit C, on the ground that it is a transfer in fraud of creditors and voidable under section 53 of the Transfer of Property Act.

We must, therefore, call for a finding on this issue:—

Is Exhibit C a valid transfer: or is it voidable under section 53 of the Transfer of Property Act?

Fresh evidence may be adduced. The findings should be submitted within two months from this date and seven days will be allowed for filing objections.

[The District Judge returned a finding to the effect that Exhibit C was a valid transfer, being executed when 1st defendant, though heavily in debt, was contemplating remarriage and was permitted to do so by the relatives of his first wife, on the condition that he transferred all his properties in favour of his children by his first wife.]

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

(1) 23 C. 670; 23 I. A. 37.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 of 1915.

April 25, 1916.

Present:—Mr. Stuart, J. C.

JAGAT PAL SINGH—DEFENDANT—
APPELLANT

versus

HARNAM SINGH—PLAINTIFF—
RESPONDENT.

Mortgage by conditional sale—Redemption, suit for—Plea of transfer of equity of redemption to mortgagee—Finding against defendant—Appeal, second—Change of defence—Foreclosure by consent of parties, plea of, whether can be urged—Delivery of possession to mortgagee—Oral agreement for enjoyment of profits in lieu of interest, admissibility of—Evidence Act (I of 1872), s. 92.

Where, in a redemption suit, the defendant pleaded that the mortgagor had transferred the equity of redemption to the mortgagee, but, it having been found that no such transfer had been made, he pleaded in second appeal that there had been a foreclosure under the terms of the mortgage to which the parties had assented:

Held, that it was not open to the defendant to take up such ■ plea and change his ground of defence at that stage. [p. 746, col. 1.]

A finding of fact based on admissible evidence cannot be impugned in second appeal. [p. 746, col. 2.]

Where a period is fixed for redemption or foreclosure, in cases in which the mortgagor does not redeem and the mortgagee does not foreclose, interest continues to run after that period at the former rate until the mortgage is actually terminated. [p. 746, col. 2.]

Therefore, an oral arrangement between the parties to a mortgage, by which the mortgagee is put in possession of the mortgaged property in order that he may enjoy the profits and devote them towards the satisfaction of the interest due, is perfectly legal, although under the terms of the mortgage-deed there is no provision enabling the mortgagee to be put in possession and the mortgagor is entitled to redeem on ■ certain date and in default of his redeeming the mortgagee is entitled to foreclosure and from that date the interest is to cease, inasmuch as such an arrangement does not vary, contradict, or add to the terms of the deed but provides for the satisfaction of one of its conditions. [p. 746, col. 2.]

Where a mortgagee obtains possession under the above circumstances, he cannot set up adverse proprietary possession in spite of his assertion to that effect. [p. 747, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 7th December 1914, reversing the order of the Munsif, Purwa, dated the 4th July 1914.

Syed Zahur Ahmad, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Tara Shankar, for the Respondent.

JAGAT PAL SINGH V. HARNAM SINGH.

JUDGMENT.—This is an appeal against a decree allowing the plaintiff-respondent to redeem a certain deed of mortgage. The first ground of appeal is to the effect that it is not established that the plaintiff-respondent derives title from the representatives-in-interest of the original mortgagor. That ground of appeal has been dropped in argument and is decided against the appellant. The other grounds of appeal may be taken together. The facts are as follows. The deed of mortgage was a mortgage by conditional sale and under its terms interest was to accrue upon the principal amount secured and on a certain date the mortgagee was entitled to obtain foreclosure in default of redemption by the mortgagor. The case for the appellant in the lower Courts was that the mortgagor had transferred to his predecessor-in-interest the equity of redemption by a sale. The learned Subordinate Judge has found that no such transfer was made. His finding to that effect is a finding of fact which cannot be impugned in second appeal. It is urged on the appellant's behalf that even though it is not open to him now to plead that the right of equity of redemption was transferred by sale, it is open to him to plead that there was a foreclosure under the terms of the mortgage to which the parties assented. I find that it is not open to him to take up any such plea at this stage. In the lower Courts he made a clear assertion that the equity of redemption had been transferred by sale. He had to stand or fall on that assertion. The point has been decided against him and he cannot now change his ground and assert that there was a foreclosure by act of parties, the existence of which operates as an estoppel against the plaintiff-respondent. It is unnecessary for me to decide whether if such a plea were open to him it would or would not be a good plea in law, as I decide that the plea is not open to him.

The learned Subordinate Judge next decided that the mortgagee had been put in possession of the mortgaged property by the mortgagor in order that he might enjoy the profits and devote the profits to the satisfaction of the amount of interest due on the mortgage. There is a finding

of fact to the effect that such an oral arrangement was made. That finding of fact is based upon admissible evidence and cannot be impugned in second appeal. We thus have it that the mortgagee was put in possession of the mortgaged property by the act of the mortgagor, in order that he might enjoy the profits and devote those profits towards the payment of the interest due on the principal amount, and that this arrangement was arrived at in spite of the fact that under the terms of the original deed of mortgage there was no provision enabling the mortgagee to be put in possession. Taking this finding of fact as unassailable, it remains to be seen whether the arrangement at which the parties had arrived is a good arrangement or not. It is true that under the terms of the original deed of mortgage the mortgagor was entitled to redeem on a certain date and in default of his redeeming, the mortgagee was entitled to foreclosure and from that date the deed reads that though no interest would be charged. But it is a well-known rule of law that where a period is fixed for redemption or foreclosure in cases in which the mortgagor does not redeem and the mortgagee does not foreclose, interest continues to run after that period at the former rate until the mortgage is actually terminated. I find, therefore, that even after the period mentioned interest ran on the principal sum. In these circumstances there is nothing illegal in an arrangement between the parties by which the mortgagee is put in possession of the mortgaged property in order that he may enjoy the profits and devote the amount realized towards the satisfaction of the interest. I need not quote authorities in support of this view as it is a view which is generally accepted. There is nothing in such an agreement which varies, contradicts, or adds to the terms of the original deed. It is an arrangement which provides for the satisfaction of one of the conditions of the deed. I, therefore, decide that the mortgagee obtained possession by a legal arrangement under which he was to enjoy the profits and devote the amount realized to the satisfaction of the interest which was legally due under the terms of the deed. In these circumstan-

CHINTAMAN SINGH v. CHUNI SAHU.

ces the mortgagee cannot set up adverse possession. He obtained possession ■ mortgagee and, however he may have chosen to assert proprietary rights, his assertion of such rights cannot possibly operate as giving him title of a proprietary nature by means of adverse possession. This concludes the points raised in the grounds of appeal, with the exception of the point contesting the finding with regard to the jointness of the family. This point really does not arise in view of my decision on the previous points. But as ■ matter of fact it was dropped in argument and in no circumstances would require decision. For the above reasons I dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1679 AND 2111
OF 1914.

March 30, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

CHINTAMAN SINGH—DEFENDANT—
APPELLANT

versus

CHUNI SAHU—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 144, 47—Scope of s. 144.—Ex parte decree—Sale of defendant's holding in execution—Setting aside of decree—Mesne profits enjoyed by decree-holder purchaser, claim for, in restitution—Nature of remedy—Conversion of plaint into application under s. 47.

Section 144, Civil Procedure Code, is intended to be confined to cases in which the decree of a Trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior Court. In such cases, claims for restitution can only be enforced by proceedings in the suit under the said section. [p. 748, cols. 1 & 2.]

Where a decree is varied or set aside by the Court passing it, a claim in restitution enforced by means of a suit is not barred by the provisions of section 144, Civil Procedure Code. [p. 748, col. 1.]

Plaintiffs obtained an *ex parte* decree against the defendants, and in execution thereof caused the defendants' holding to be sold and purchased it themselves. The *ex parte* decree was afterwards set aside. The defendants instituted the present suit for the value of crops reaped by the plaintiffs before the cancellation of the decree. It was pleaded in defence that the suit was barred both under sections 47 and 144, Civil Procedure Code:

Held, (1) that section 144, Civil Procedure Code, was no bar to the suit; [p. 748, col. 1.]

(2) that as the purchasers at auction were the decree-holders themselves and the sale was, as a matter of course, liable to be set aside at the instance of the judgment-debtors, the absence of a specific prayer for setting aside the sale was not a defect fatal to the suit, and that if necessary, the plaint might be amended so as to include that prayer; [p. 748, col. 1.]

(3) that if the relief could be had exclusively by means of an application under section 47, Civil Procedure Code, the plaint might be treated as an application under the said section. [p. 748, col. 1.]

Quære.—Whether the relief claimed could be obtained only by means of an application under section 47, Civil Procedure Code? [p. 748, col. 1.]

Second appeal from the decision of the District Judge, Bhagalpur, dated the 14th April 1914, confirming that of the Munsif at Madhipura, dated the 12th May 1913.

Mr. Guru Das Sinha, for the Appellant.

Mr. Lai Mohan Ganguli, for the Respondent.

JUDGMENT.—The appellants obtained an *ex parte* decree for rent against the respondents in execution of which they caused the respondents' holding to be put up for sale and purchased it themselves. Subsequently the *ex parte* decree was set aside, but in the meantime the appellants had been placed in possession and they had reaped the crops on the land. The *ex parte* decree having been set aside, the suit was restored to the pending file and the appellants have, we are told, obtained another decree for rent against the respondents. In the suit out of which this appeal has arisen the respondents claim ■ decree for Rs. 723 odd on account of the value of the paddy and other produce of the land taken by the appellants during the time that they had possession of the holding. The Courts below have concurred in decreeing the claim.

In second appeal the *first* point taken is that the suit is barred by the provisions of section 144 of the Code of Civil Procedure. That section provides that where, and in so far as ■ decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, etc. This section takes the place of section 583 of the Code of Civil Procedure, 1882. The latter section was confined to cases where ■ party was entitled to any benefit by way of restitution or otherwise under a decree passed in ■

BETIREDDI SOMIREDDI v. BETIREDDI TATAYYA.

appeal under Chapter XLI of that Code. On the strength of the omission of the words "decree passed in appeal", it is contended in the present case that section 144 of the present Code applies to the case of a decree being varied or set aside by the Court which passed it. It seems to us, however, that the words "Court of first instance" show clearly that section 144 is intended to be confined to cases in which the decree has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. The words "Court of first instance" are to be used to distinguish the Court which is to grant the restitution from some other Court which has varied or reversed the decree. In our opinion the suit is not barred by section 144 of the Code of Civil Procedure. Next, it is contended that the suit is not maintainable in view of the fact that the execution sale has not yet been set aside, and that even if section 144 does not apply to this case, section 47 applies and the respondent should have presented an application under that section both to have the sale set aside and to obtain the value of the crops and other produce gathered by the appellants. It is true that there is no formal prayer that the sale may be set aside, but it is conceded that the decree having been set aside under which the sale was held, and the purchasers at auction being the decree-holders themselves, the sale must, as a matter of course, be set aside at the instance of the judgment-debtors. In these circumstances the absence of a specific prayer that the sale may be set aside cannot be treated as a fatal defect in the suit. If necessary, the plaint might be amended so as to include a prayer that the sale may be set aside. The contention that the relief claimed might have been obtained by means of an application under section 47 of the Civil Procedure Code, may or may not be correct. If such an application should have been presented instead of the present suit being brought we may treat the plaint in the present suit as an application under section 47. Previous to the passing of the present Code of Civil Procedure great confusion and much injustice resulted from the difficulty of determining whether a suit should be brought or an application presented under what was then section 244 of the Code. Sub-section (2) of

section 47 of the present Code was designed to meet cases like the present one. According to the decisions of the Calcutta High Court to which our attention has been drawn, it would appear that the proper course for the plaintiffs in the present suit to pursue was to present an application under section 47, while according to the Allahabad High Courts no such application could have been presented and the proper remedy was by suit. Following the Calcutta decisions we propose to treat the plaint in this suit as an application under section 47. On the merits there can be no doubt that a decree was rightly passed in favour of the respondents. This appeal is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 73 OF 1915.

January 3, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

BETIREDDI SOMIREDDI AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

BETIREDDI TATAYYA, MINOR, BY MOTHER
AND GUARDIAN SUBBAMMA. AND
OTHERS—DEFENDANTS—

RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Hindu widow—Transfer of life-interest for value exceeding Rs. 100—Registration.

A transfer by a Hindu widow of her life-interest to the reversioners for a price exceeding Rs. 100 must be by an instrument in writing and registered. [p. 749, col. 1.]

Ariyaputhira Padayachi v. Muthukumarasamy Padayachi, 15 Ind. Cas. 343; 37 M. 423; (1912) M. W. N. 854; 23 M. L. J. 339; 12 M. L. T. 425, followed.

Appeal against the order of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Suit No. 145 of 1914, preferred against the decree of the Court of the District Munsif, Narasapur, in Original Suit No. 435 of 1912.

Mr. P. Chenchiah for Mr. T. Prakasam, for the Appellants.

Mr. B. Somayya for Mr. P. Narayanamurthi, for the Respondents.

JUDGMENT.—The transaction relied on by the respondents was in substance a transfer by the widow of her life-interest to

RAMZAN ALI KHAN v. MUHAMMAD QAYUM KHAN.

the reversioners for a price which was over Rs. 100, and hence it required a writing registered to make it valid. See also *Ariyaputhira Palayachi v. Muthukumara-sawmy Padayachi* (1).

The Subordinate Judge ■■■ also wrong on the question of limitation, the plaintiffs' suit having been brought in the very year of the death of the widow.

The lower Appellate Court's decision is reversed and that of the Court of the District Munsif restored with costs on the respondents in this and in the lower Appellate Court.

Appeal allowed.

V. R. P.

(1) 15 Ind. Cas. 343; 37 M. 423; (1912) M. W. N. 854; 23 M. L. J. 339; 12 M. L. T. 425.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 10 OF 1915-16 OF
RAE BARELI DISTRICT.

April 19, 1916.

Present:—Mr. Campbell, J. M.

RAMZAN ALI KHAN—OBJECTOR—
APPELLANT

versus

MUHAMMAD QAYUM KHAN AND OTHERS
—APPLICANTS—RESPONDENTS.

Annual registers, correction of, application for—Possession, main factor to be considered—Taluka, disputes regarding, referred to arbitration—Award given effect to by private partition—Entry, wrong in annual registers—U. P. Land Revenue Act (III of 1901), s. 138.

In an application for a correction of the annual registers prescribed by section 32, U. P. Land Revenue Act, possession is, in view of section 40 of the Act, the main factor to be considered. [p. 751, col. 1.]

The disputes between the members of a *talukdar's* family regarding the *taluka* were referred to arbitration, and an award was made, by which the villages in the *taluka* were separately allotted to each of them while one of them was to remain the *talukdar*. To give effect to the terms of the award, it was followed by a private partition and the different members of the family remained ever since in separate possession of the villages. But the name of the member who was the *talukdar* continued all along to be wrongly recorded in the annual registers, prescribed by section 32 of the U. P. Land Revenue Act, as the sole owner, as well as the *talukdar*, of his own share and those of the remaining members. These members subsequently applied for a correction of the annual registers

stating that the *talukdar's* ■■■ should continue to be recorded ■■ *talukdar* and *lambardar* of each village and the entire *taluka*, but that they should be recorded as co-sharers in possession:

Held, that section 138 of the U. P. Land Revenue Act was no bar to the granting of the application and to corrections being made accordingly, unless and until the award itself was set aside by a competent Court as invalid. [p. 751, col. 1.]

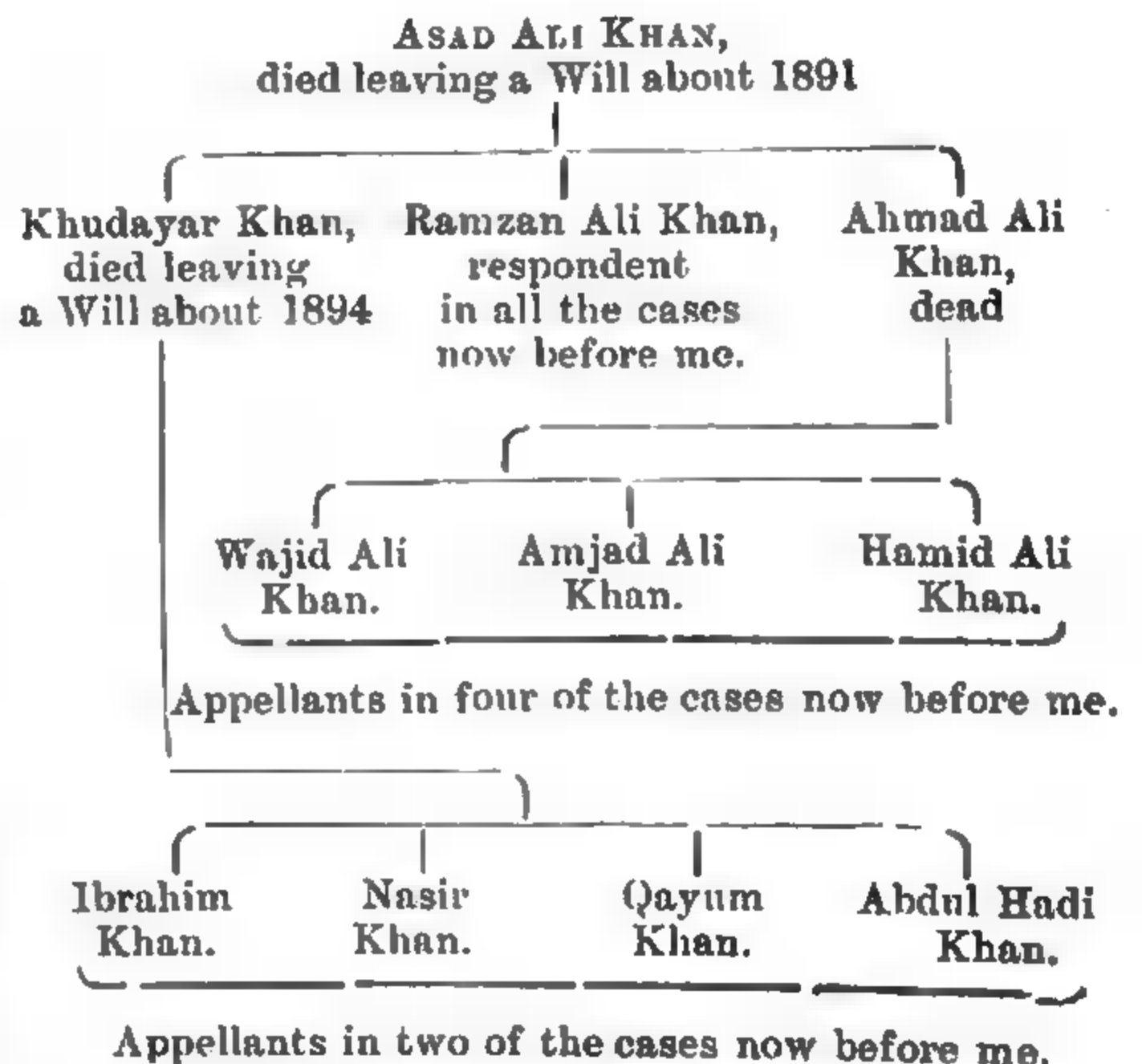
Appeal against the order of the Commissioner, Lucknow, dated the 11th September 1915, reversing that of the Deputy Commissioner, Rae Bareli, dated the 9th April 1915, reversing that of the Assistant Collector, Rae Bareli, dated 9th January 1915.

FACTS of the case clearly appear from the order of the Commissioner, which was as given below:—

"The parties to this and the companion cases are all descended from Najib Khan, the original Pahremau Talukdar, and from his son Asad Ali Khan.

"Najib Khan had 4 sons and each of these received 4 annas of the original *taluka* and became owner of a new *taluka*.

"The following tree shows the descendants of Asad Ali Khan who are also the parties to the present cases:—



"Asad Ali Khan's Will directed that, while his estate should go in equal portions to his three sons, Khudayar Khan would become *talukdar*, Ramzan Ali would succeed Khudayar, and Ahmad Ali Khan would succeed Ramzan Ali. The *talukdar* of the family would annually receive Rs. 400 of the profits

RAMZAN ALI KHAN v. MUHAMMAD QAYUM KHAN.

of the *taluka*, over and above his proportionate share.

"Khudayar Khan succeeded his father and was wrongly recorded as sole owner, as well as *talukdar*, of his own share and the shares of his brothers. He died and was succeeded by Ramzan Ali Khan. There was a family quarrel which was referred by all concerned, Abdul Hadi Khan being then a minor, to the arbitration of Mohammad Muslim Khan. This gentleman made an award on November the 6th, 1897, directing that the whole 4-annas *taluka* inherited from Asad Ali Khan should be equally divided among Ramzan Ali Khan (one-third), the sons of Khudayar Khan (one-third) and Amad Ali Khan (one-third): Ramzan Ali Khan, as *talukdar*, would receive extra shares in three villages. The award also divided the debts of the estate. The award was followed by a private partition under which the 4-annas *taluka* was divided into three equal lots, with the exception only of the villages of Ashrafabad, Bahadurnagar and Basalatnagar. These went to Ramzan Ali Khan over and above $\frac{1}{3}$ rd share, in place of a *talukdari* allowance.

"In 1898 Ramzan Ali, the three major sons of Khudayar Khan and Amad Ali Khan asked that effect might be given to this partition in the Government papers. The Deputy Commissioner treated the application as one for '*phant bandi*', and granted it, stating that joint responsibility would remain for payment of revenue. Some litigation followed between Abdul Hadi Khan and Ramzan Ali Khan.

"Now Abdul Hadi Khan and his brothers (the four sons of Khudayar) and Wajid Ali Khan, Amjad Ali Khan and Hamid Ali Khan (the three sons of Ahmad Ali Khan) ask for entry of their names in the *khewats* of the villages which fell to their share by the private partition. They are willing that the name of Ramzan Ali Khan should remain as *talukdar* and *lambardar* of the original 4-annas *talukdari* share in each village. But, as under the partition the 4-annas *talukdari* share in every one of the villages fell to them, and as of each of these 4-annas shares they are in possession, they claim that their names should be entered accordingly in each *khewat*.

"The Court of first instance granted their petitions, but the Deputy Commissioner rejected them on the ground that the provi-

sions of section 138 (3), Revenue Act, had not been observed and the partition of the *talukdari mahal* had not been sanctioned by Government.

"This seems to me a wrong order. It is admitted on both sides that the appellants are in '*de facto*' possession of the 4-annas share in all these villages. They themselves do not ask to be entered as *talukdars* and consent to the continued entry of Ramzan Ali Khan's name as *talukdar* in regard to each share in issue. Their petition should, therefore, be granted.

"It is not for this Court in these proceedings to enquire into the legality of a partition which has long ago been given effect to and is now in living operation. Section 132 does not apply to present circumstances.

"I, therefore, set aside the order of the Deputy Commissioner in all these cases and restore the orders of the Court of first instance. Costs of all Courts on the respondent."

Syed Zahur Ahmad, for the Appellant.

Babu Lachhman Prasad Varma, for the Respondents.

JUDGMENT.—I think that the Commissioner's order in this case is a correct one. Pahreman is admittedly a *talukdari* estate or *mahal*, entered in Schedules I and III of Act I of 1869 (the Oudh Revenue Estates Act). The *mahal* could not, therefore, be partitioned under section 138 of the Revenue Act III of 1901 without the sanction of the Local Government previously obtained.

But we are not here asked to partition the *mahal*, but to give effect to an arbitration award, delivered in 1897, by which the villages in the *mahal* were allotted to the *talukdar* and various relatives of his, in order to put an end to endless quarrels among the members of the family. There can be no doubt that the award was given effect to, and that the different members of the family have for the last 18 years been in possession of the villages in accordance with its terms. The case for appellant is that this was not a proprietary possession, but possession in lieu of maintenance. This seems to me a far-fetched idea and I agree with the Commissioner that in

SESHAPPIER v. SUBRAMANIA CHETTIAR.

an application for a correction of the annual registers prescribed by section 32 of the Revenue Act, possession is the main factor to be considered (section 40). It is true that the registers have not yet been corrected in accordance with the award but I can see no sufficient reason for refusing to do so, unless and until the award itself is set aside by a competent Court as invalid.

Respondents are willing that appellant should continue to be recorded as *talukdar* and *lambardar* of each village, and the entire *mahal*. But that is no bar to respondents being recorded as the co-sharers in possession.

I uphold the Commissioner's order and dismiss this appeal with costs and Rs. 16 Pleader's fees in each connected case.

This order also governs Appeals Nos. 11 to 15.

Appeals dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 217 OF 1914.
February 29, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

SESHAPPIER—DEFENDANT NO. 3—
PETITIONER—APPELLANT

versus

SUBRAMANIA CHETTIAR AND OTHERS—
PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2—
RESPONDENTS.

Contract Act (IX of 1872), s. 178—Commission agent—Pledge of jewel entrusted to agent for sale—Suit for return of jewel by owner—Liability of pawnee—Redemption of pledge before decree—Pawnee in good faith—Limitation—Cause of action—Conversion of article—Limitation Act (IX of 1908), Sch. I, Art. 49.

A suit for the return of a jewel pledged by an agent, to whom it was entrusted for sale by the owner, or its value is governed by Article 49 of Schedule I of the Limitation Act, time running from the date of the plaintiff's knowledge of the pawnee's possession. [p. 752, col. 1.]

The plaintiff will not be entitled to a decree until payment of the amount due to the pledgee and interest that accrued due thereon under section 178 of the Contract Act. [p. 753, cols. 1 & 2.]

Three things are required by section 178, (1) juridical possession on the part of the pawnor as distinguished from mere custody, (2) good faith on the part of the pawnee and (3) lawful acquisition on the part of the pawnor. [p. 752, col. 2.]

Rameshar Chaubey v. Mata Bhikh, 5 A. 341; A. W. N. (1883) 48; *Ramlal v. Ghulam Husain*, 29 A. 579; A. W. N. (1907) 181; 4 A. L. J. 671; *Nandlal Thakersey v. Bank of Bombay*, 4 Ind. Cas. 652; 11 Bom. L. R. 926; *Nandlal Thakersey v. Bank of Bombay*, Ind. Cas. 457; 12 Bom. L. R. 316, followed.

Greenwood v. Holquette, 12 B. L. R. 42; 20 W. R. 467; *Biddomoye Dabee Dabee v. Sittaram*, 4 C. 497; 3 C. L. R. 398; *Seager v. Hukma Kessa*, 24 B. 458; 2 Bom. L. R. 403, followed.

Section 178 and exception 1 to section 108 of the Contract Act deal with cases where the pledgor has other than a limited interest and has lawful juridical possession unconnected and independent of any interest therein, such a juridical possession as a factor or agent has, in other words, such possession as is had by an agent entrusted as such and ordinarily having as such agent power of sale or pledge. [p. 753, col. 1.]

LeGeyt v. Harvey, 8 B. 501; *Naganada Davay v. Bappu Chettiar*, 27 M. 424; 14 M. L. J. 69, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment reported in 23 Ind. Cas. 174, of Mr. Justice Seshagiri Aiyar, dated the 13th February 1914, in Civil Revision Petition No. 122 of 1912, for revision of the decree of the Court of the Subordinate Judge of Nagapatam, in Small Cause Suit No. 1023 of 1911.

Mr. K. S. Jayarama Aiyar, for the Appellants.

Mr. T. V. Gopalasami Mudaliar, for the Respondents.

JUDGMENT.—This is a Letters Patent Appeal against the judgment of Mr. Justice Seshagiri Aiyar in Civil Revision Petition No. 122 of 1912. *

The material facts are as follows:—

On 19th May 1907 the 1st respondent entrusted a jewel to one Kolandaisami Pathar (the husband of the 2nd respondent and the father of the 3rd respondent) who undertook to sell it on commission. Kolandaisami pledged that jewel with the appellant, who is a money-lender, for Rs. 175 on 20th May 1907. Kolandaisami died two or three months afterwards without having redeemed the pledge. On 15th December 1909 the appellant took the jewel to the 1st respondent's shop, and asked him to sell it for him. The 1st respondent then came to know that the jewel had been improperly pledged and demanded its return. The appellant having refused to return it, the 1st respondent brought a Small Cause suit on 29th June 1911 for the return of

* See 23 Ind. Cas. 174.—Ed.

SESHAPPIER V. SUBRAMANIA CHETTIAR.

the jewel or its value of Rs. 400 and in answer to the suit, the appellant contended that he acted in good faith in advancing money on the pledge of the jewel, and that he was entitled to recover from the plaintiff the amount, Rs. 175, which he had advanced with interest. He further pleaded that the suit was barred by limitation. The Subordinate Judge gave the 1st respondent a decree against the appellant for the return of the jewel or its value.

The appellant filed a civil revision petition which was dismissed.

Two questions were argued before Mr. Justice Seshagiri Aiyar.

1. Whether the suit was barred by limitation?

2. Whether the appellant had a right to be paid back the money, Rs. 175, which he had advanced before he could be called upon to deliver up the jewel.

The learned Judge agreeing with the Subordinate Judge held that the Article applicable was Article 48, Schedule I, of the Limitation Act, and not Article 49, and that the suit having been brought within three years from the time (15th December 1909) when 1st respondent learnt that the jewel was in the appellant's possession was not barred by limitation.

We are of opinion that the learned Judge's decision on the question of limitation was right.

It is clear that the case was one of "conversion." The undertaking which Kolandaisami gave to sell the jewel on commission was not an unlawful one, and the property was not wrongfully taken from the owner's possession. It was only on 20th May 1907 when Kolandaisami treated the property as his own, and pledged it with the appellant that he wrongfully converted it to his own use. The decisions in *Rameshar Chaubey v. Mata Bhikh* (1) and *Ram Lal v. Ghulam Husain* (2) go to show that where specific moveable property which was originally obtained lawfully is wrongfully detained, the proper Article applicable is Article 48. See also

Nandlal Thakersey v. Bank of Bombay (3), *Nandlal Thakersey v. Bank of Bombay* (4).

It remains to consider the more difficult question whether the appellant can claim to be paid back the money for which the jewel was pledged with him before he is required to deliver it to the owner.

Mr. Jayarama Aiyar, for the appellant, relies on section 178 of the Indian Contract Act. Three things are required by that section, viz., (1) possession on the part of the pawnor, (2) good faith on the part of the pawnee and (3) lawful acquisition on the part of the pawnor.

It is clear, we think, that the appellant acted in good faith when he advanced Rs. 175 on the pledge of the jewel, and that he had no reason to suppose that the pawnor was acting improperly when he pledged the jewel. His conduct in taking the jewel to the 1st respondent and asking him to sell it indicates his *bona fides*. The second proviso to that section also does not apply as the article pledged had not been obtained from the lawful owner by means of "an offence or fraud." It has been held that to create a valid pledge under section 178 of the Indian Contract Act, the pledgor must be in "juridical" possession of the goods as distinguished from mere custody, so a servant entrusted by his master with the custody of the goods during his absence, or a wife in charge of her husband's articles of jewellery as custodian on his behalf, cannot make a valid pledge under the section. See *Greenwood v. Holquette* (5), *Biddomoye Dabee Dabee v. Sittaram* (6) and *Seager v. Hukma Kessa* (7).

The learned Judge observes that he was "satisfied that the statement in the plaint that Kolandaisami was given the jewel only for the purpose of showing it to intending purchasers had been established, and that the sale price was to be settled in the presence of the plaintiff." With all deference to the learned Judge we do not think that

(1) 5 A. 341; A. W. N. (1883) 48.

(2) 29 A. 579; A. W. N. (1907) 181; 4 A. L. J. 671.

(3) 4 Ind. Cas. 652; 11 Bom. L. R. 926.

(4) 5 Ind. Cas. 457; 12 Bom. L. R. 316.

(5) 12 B. L. R. 42; 20 W. R. 467.

(6) 4 C. 497; 1 C. L. R. 398.

(7) 24 B. 458; 2 Bom. L. R. 403.

KRISHNAPAL SINGH v. RAM DULARI.

there is any legal evidence to justify his finding.

In paragraph 1 of the plaint it is, no doubt, stated that Kolandaisami received the jewel saying "that he would show it and bring it back, and that if the purchaser liked the jewel he would settle the price in the presence of the plaintiff."

The evidence of the 1st respondent does not, however, bear out this statement. In his evidence he says, "Kolandaisami used to sell jewels. I gave him the jewel to be sold. Kolandaisami did not say how soon he would sell the jewel. He did not say with whom he had left the jewel. His commission was $6\frac{1}{4}$ per cent." The 1st respondent says nothing in his evidence about the jewel being taken to be shown to intending purchasers, or the price settled in his presence. There is the following significant entry in the 1st respondent's account book under date 19th May 1907. "Debit to Kolandaisami Pathar: To sell one pair of *thodu* set with English diamonds, Rs. 400."

We think that the evidence leads only to one conclusion, namely, that Kolandaisami was an agent for the sale of the jewel, and that the arrangement was that he was to sell the jewel, which was valued by the owner at Rs. 400, and receive his commission.

In *Greenwood v. Holquette* (5) Couch, C. J., held that the possession meant by section 178 of the Indian Contract Act was "that kind of possession which a factor or agent has" and this view was accepted in *LeGeyt v. Harvey* (8). We agree with the observations of Batchelor, J., in *Nandlal Thakersey v. Bank of Bombay* (4) that section 178 and Exception 1 to section 108 of the Contract Act deal with cases where the pledgor has other than a limited interest and has lawful juridical possession "unconnected with and independent of any interest therein", that is, such juridical possession as a factor or agent has, in other words, such possession as is had by an agent entrusted as such, and ordinarily having as such agent a power of sale or pledge. Reference may also be made to the judgment of Mr. Justice Subramania Aiyar in *Naganadu Daray v. Bappu Cheltiar* (9), where the learned Judge

points out the distinction between section 178 and section 179. In the present case we think that Kolandaisami who was entrusted with the jewel as an agent for sale had such "possession" as is contemplated by section 178 of the Contract Act, and that the appellant being a pawnee acting in good faith is entitled to the protection afforded by the section.

We accordingly hold that the appellant is entitled to be paid Rs. 175 and interest due till date of suit as claimed by him before he can be required to return the jewel. We, therefore, allow the appeal. The decree of the Subordinate Judge will be modified accordingly. First respondent must pay appellant's costs in all Courts. Two months' time from the receipt of records by the Subordinate Judge is granted to the plaintiff to pay up the amount due to the appellant for redeeming the jewel.

Appeal allowed; Decree modified.

V.R.P.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 183 OF 1915-16 OF
PARTABGARH DISTRICT.

April 4, 1916.

Present:—Mr. Holms, S. M.

Rai KRISHNAPAL SINGH—DEFENDANT—
APPELLANT

versus

Musammal RAM DULARI—PLAINTIFF—
RESPONDENT.

Ejectment case—Under-proprietary rights, decision as to prima facie claim—Revenue Court decision, interpretation of.

Where, in an ejectment case, the Revenue Court decides that the plaintiff is an under-proprietor, it simply means that the plaintiff has made out a *prima facie* claim to under-proprietary rights, and it does not bar the defendant's remedy of seeking from the Civil Court a declaration that the plaintiff is not an under-proprietor. [p. 754, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 21st October 1915, upholding that of the Assistant Collector, Partabgarh, dated the 8th July 1915.

Mr. Aliuddin Ahmad, for the Appellant.

Syed Ali Mohammad, for the Respondent.

JUDGMENT.—I am clearly of opinion that until the appellant obtains a declaration

(8) 8 B. 501.

(9) 27 M. 424 at p. 426; 14 M. L. J. 69.

MACKENZIE, K. L. v. RAMESHWAR SINGH.

that the respondent is not an under-proprietor in the Civil Court, the respondent cannot be ejected by notice. The Assistant Collector's finding that the plaintiff is under-proprietor in the land in suit is, of course, nothing more than a decision that he has made out a *prima facie* claim and the appellant is, of course, not debarred from seeking his remedy in the Civil Courts.

Appeal dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2891 of 1914.

March 28, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Roe.

K. L. MACKENZIE—DEFENDANT—
APPELLANT

versus

THE Hon'ble Maharaja Sir RAMESHWAR
SINGH BAHADUR—PLAINTIFF
—RESPONDENT.

Contract Act (IX of 1872), s. 23—Lease—Agreement to trade in particular place—Public policy—Kabuliat registered—Rent reserved, action for—Limitation Act (IX of 1908), Sch. I, Arts. 110, 116.

The defendant executed a *kabuliat* in favour of the plaintiff agreeing to pay him a specified rent for the privilege of carrying on a trade within a certain area. In an action for arrears of rent brought by the lessor, the defendant pleaded that the contract was in the nature of a monopoly and was, therefore, void under section 23 of the Contract Act:

Held, that, as the lessor did not bind himself against giving a similar lease to others, the contract was not opposed to public policy and was not void under section 23 of the Contract Act.

Somu Pillai v. Municipal Council of Mayavaram, 28 M. 520, distinguished.

A suit to recover the rent reserved in a registered *kabuliat* is governed by Article 116 and not by Article 110 of the Limitation Act.

Raniganj Coal Association, Limited v. Judoonath Ghose, 19 C. 489, relied on.

Second appeal from the decision of the District Judge, Purneah, dated the 28th July 1914, confirming that of the Sub-Judge, Purneah, dated the 25th September 1913.

Mr. Lal Mohun Ganguli, for the Appellant.

Mr. Purnendu Narayan Sinha, for the Respondent.

JUDGMENT.

MULLICK, J.—The defendant executed a *kabuliat* in favour of the Maharaja of Dar-

bhanga agreeing to pay a rent of Rs. 1,100 per year for the privilege of carrying on a trade in hides within *Zilla* Birnagar in *Pargana* Dharampur. In a suit for rent brought by the lessor the defendant pleads that the *kabuliat* is void on two grounds, *firstly*, under section 27 of the Contract Act as being in restraint of trade, and *secondly*, under section 23 of the Contract Act as being against public policy. The Courts below have both decreed the suit, and hence this second appeal by the defendant. The contention under section 27 of the Contract Act is given up. With regard to section 23 it is urged that a settlement to carry on trade in the whole of *Zillah* Birnagar tends to create a monopoly and is, therefore, against public policy. I do not think there is any substance in this contention. The terms of the lease do not say that the lessor binds himself against giving a similar lease to any one else and on a reading of the whole lease it is quite clear that nothing in it offends against public policy. Reference has been made to the case of *Somu Pillai v. Municipal Council of Mayavaram* (1). But that case does not help the appellant, because there the Court was dealing with contracts made by a Municipal authority under statutory orders. I hold that there is no substance in the argument based on section 23.

Then it is contended that the suit is barred by limitation under Article 110 of the Limitation Act. It is quite clear, on the authority of *Raniganj Coal Association Limited v. Judoonath Ghose* (2), that the proper Article applicable is Article 116 of the Limitation Act and that the period of limitation, the lease being a registered lease, is six years.

It was contended finally that the contract rate of interest should not have been decreed. No reason has been given why the lower Court's decree in this respect is wrong, and the result is that the appeal is dismissed with costs.

ROE, J.—I concur.

Appeal dismissed.

(1) 28 M. 520.

(2) 19 C. 489.

PILAKKATAN CHETTIOTAN v. VAZHAKARAMBATH MOIDIN.

KANDHAI PRASAD v. SURAJ BALI DAS.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1649 OF 1914.

March 22, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Bakewell.

PILAKKATAN CHETTIOTAN THARA-
MAL KUNHAMMA AND OTHERS—

DEPENDANTS NOS. 1 TO 4—APPELLANTS

versus

VAZHAKARAMBATH MOIDIN KUTTI
AND OTHERS—PLAINTIFF AND DEFENDANTS

NOS. 13 AND 14—RESPONDENTS.

Malabar Law — Kanom, subsisting — Melkanom,
grant of—Whether void or voidable—Kanom term,
expiry of—Tenant, whether can plead that he should
hold on.

A melkanom granted during the subsistence of a
previous kanom is not altogether void, but is only
voidable at the instance of the members of the
tarwad who were not parties thereto.

A tenant whose kanom has expired is not entitled
to plead that he should hold on even after such
expiry.

Second appeal against the decree of the
Court of the Subordinate Judge, South
Malabar, Calicut, in Appeal Suit No. 352
of 1913, preferred against that of the
Court of the Additional District Munsif,
Calicut, in Original Suit No. 98 of 1912.

Mr. C. Kunhi Raman, for the Appellants.

Mr. K. P. Ramakrishna Aiyar, for the
Respondents.

JUDGMENT.—A melkanom during the
subsistence of a previous kanom is not void
altogether, but is only voidable at the
instance of the members of the tarwad who
were not parties to it. In this case it is
found that the only remaining member of
the tarwad has recognized the melkanom
granted by his predecessor. The defendant
whose kanom has expired is not entitled to
plead that he should hold on even after the
expiry of his term.

The decision of the lower Appellate
Court is right. The second appeal is dis-
missed with costs.

Appeal dismissed.

V.B.P.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 137 OF 1915-16 OF
FYZABAD DISTRICT.

March 1, 1916.

Present:—Mr. Holms, S. M.
Bhaiya KANDHAI PRASAD AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Babu SURAJ BALI DAS—DEFENDANT—
RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107B (b)—
Judicial decision—Settlement Court decree—Admission
of claim.

A decree of the Settlement Court, passed at the
time of the first Regular Settlement and on the
then talukdar's admitting the claim, and directing
a land to be entered in the Settlement papers as
muafi of the claimant, is a judicial decision within
the meaning of section 107B (b) of the Oudh Rent
Act. [p. 756, col. 1.]

Muhammad Karimullah Khan v. Jhaman Singh,
18 Ind. Cas. 734; 11 A. L. J. 277 at p. 279, distinguish-
ed from.

Appeal from the decree of the Commis-
sioner, Fyzabad, dated the 22nd October
1915, reversing the order of the Deputy
Commissioner, Fyzabad, dated the 16th
August 1915, upholding that of the Assistant
Collector, Fyzabad, dated the 22nd May
1915.

FACTS.—This was a suit for resumption of
a muafi land, and the defence was that it was
not liable to resumption. It appeared that
in 1870 a claim had been made to have that
land entered as muafi in the Settlement
papers, that it had ended in the then talukdar
admitting the claim, and that thereupon a
decree had followed. Thus the question
for determination was whether the land was
held as muafi under a judicial decision as
contemplated by section 107B (b) of the
Oudh Rent Act. The Commissioner's finding
was in the affirmative. He referred to
Daya Shankar v. Syed Mazhar Husain (1) in
support of his finding, and distinguished the
ruling of the Allahabad High Court reported
as Muhammad Karimullah Khan v. Jhaman
Singh (2), on the ground that the powers of
Settlement Officers in the Province of Agra
were at that time very different from those
of Settlement Officers in Oudh at the time of
the First Regular Settlement.

Babu Basdeo Lal, for the Appellants.

(1) Selected Decision No. 6 of 1909.

(2) 18 Ind. Cas. 734; 11 A. L. J. 277 at p. 279.

NATESA UDAYAN v. ANNASAMI UDAYAN.

Babu Bipin Chandra Chatterji, for the Respondent.

JUDGMENT.—I agree with the Commissioner that the Allahabad ruling [*Muhammad Karimullah Khan v. Jhaman Singh* (2)], to which he refers, relates to a different set of circumstances. In this particular case, the order and decree of 1870 were passed by a Settlement Court which had powers to decide such disputes, and, had the *talukdar* contested the application, I do not think he could have contended that the subsequent decision was not a judicial decision within the meaning of section 107B (b). The fact that the *talukdar* did not contest the application seems to make no difference.

On the whole, I think, the view taken by the Commissioner was the right one and I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 104 OF 1914.

March 29, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

NATESA UDAYAN—DEFENDANT NO. 6—
APPELLANT
versus

ANNASAMI UDAYAN AND OTHERS—
PLAINTIFFS NOS. 3 TO 5 AND DEFENDANTS
NOS. 2 TO 5—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Transfer of Property Act (IV of 1882), s. 88—Mortgage-decree—Execution—Decree absolute, prayer for, absent in application—Prayer for sale, if implies prayer for making decree absolute.

A mortgage-decree was passed on 6th July 1901. The first application for execution was made on 6th July 1904, but this did not contain a prayer for making the decree absolute. The next two applications were made on 22nd March 1907 and 23rd September 1909 and these contained a prayer for a decree absolute. The next application was on 5th July 1910, but this contained only a prayer for sale. Every one of the above applications was returned for amendment and not re-presented. The last application was made on 5th July 1913 and this too did not contain a prayer for making the decree absolute.

Held, that a prayer for sale implied also a prayer for making the decree absolute and that the application was not barred by limitation. [p. 757, col. 1.]

Singaravelu Pillai v. Santhana Krishna Mudaliar, 31 Ind. Cas. 9; (1915) M. W. N. 643; *Mahammad Husain Saib v. Abdul Kareem Saib*, 29 Ind. Cas. 237; 17 M. L. T. 424 and *Balaji Rao v. Hariramu Chetty*, 32 Ind. Cas. 39, followed.

Appeal against the order of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 83 of 1914, preferred against that of the Court of the District Munsif of Valangiman, in Execution Petition No. 299 of 1913 in Original Suit No. 60 of 1901.

FACTS.—A mortgage-decree was passed on 6th July 1901 fixing one month's time for payment of the decree amount. Default having been made in payment of the decree amount on the due date, the decree-holder put in successive applications for sale of the mortgaged properties on 6th July 1904, 22nd March 1907, 23rd September 1909 and 5th July 1910. The applications of 1907 and 1909 alone contained a prayer for making the decree absolute and every one of the applications was returned for making some amendment or other and was not re-presented. An application was again put in on 5th July 1913 praying only for the sale of the mortgaged properties. The Court of first instance, *viz.*, the District Munsif of Valangiman, dismissed the application on the ground that the decree had not been made absolute till then and that the right to that relief had become barred by more than three years having elapsed from the date of the last application containing a prayer for such relief, *viz.*, the one of 1909. On appeal, the Temporary Subordinate Judge of Tanjore, following *Appa Rao v. Krishna Ayyangar* (1), reversed that decision and held that a prayer for sale implied one for an order absolute, that no express order making the decree absolute was necessary and that consequently the application was not barred by limitation. The defendant No. 6 appealed to the High Court.

Mr. N. Rajagopalachariar, for the Appellant.—This is a decree passed under the old Civil Procedure Code. Under that Code no execution was allowed or was possible without a prior order absolute for sale. Though according to *Appa Rao v. Krishna Ayyangar* (1) an order absolute for sale might have been passed on an application merely praying for sale, no such order was

BUDHAN LAL v. JAGAN NATH.

in fact passed in this case. Under the new Civil Procedure Code under which this application is made, no execution could take place until a final decree is passed and this has not been obtained in this case. The time for making an application for a final decree is only three years from the time the right to apply therefor accrued and such time is long since passed. In any event an application for a final decree must have been made within three years from the new Civil Procedure Code. *Vide Bisseshur Sanamat v. Jasoda Lal Chowdhry* (2). The new Civil Procedure Code is retrospective in its effect as pointed out therein. *Vide also Datto Atmaram Hasabnis v. Shankar Dattatraya* (3).

[COURT.—What do you say to these three recent decisions of this Court which apply exactly to this case, viz., *Singaravelu Pillai v. Santhana Krishna Mudaliar* (4), *Mahammad Husain Saib v. Abdul Kareem Saib* (5) and *Balaji Rao v. Harirama Chetty* (6) ?].

In none of them the objections pointed out in *Bisseshur Sanamat v. Jasoda Lal Chowdhry* (2) are referred to and, therefore, they are wrongly decided.

Mr. K. Ramachandra Aiyar, for the Respondents, was not called upon.

JUDGMENT.—The judgment under appeal is in accordance with a current of decisions of this Court [*Singaravelu Pillai v. Santhana Krishna Mudaliar* (4), *Mahammad Husain Saib v. Abdul Kareem Saib* (5) and *Balaji Rao v. Harirama Chetty* (3)] which, no doubt, are not yet included in the authorised reports, but in which we concur. The appeal against appellate order is, therefore, unsustainable and is dismissed with costs.

Appeal dismissed.

(2) 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622.

(3) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

(4) 31 Ind. Cas. 9; (1915) M. W. N. 643.

(5) 29 Ind. Cas. 237; 17 M. L. T. 424.

(6) 32 Ind. Cas. 39.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 329 OF 1913.

April 13, 1915.

Present:—Mr. Lindsay, J. C.

BUDHAN LAL AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

JAGAN NATH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Father—Mortgage of joint ancestral property—Sons, suit against—Legal necessity, want of, pleaded—Burden of proof—Proof, nature of—Mortgagee, what to prove—Immoral purpose of debt also pleaded—Sale of mortgaged property sought—Simple money-decree, prayer in appeal for, whether can be allowed.

Where in a suit against the sons of a Hindu father upon a mortgage of joint ancestral property executed by the father, the defence set up is that there was no legal necessity for the mortgage so as to bind them, it lies upon the mortgagee to prove either that the debt was borrowed for a legal necessity and is accordingly binding upon the joint family property or to show, at any rate, that he made some enquiries with the object of satisfying himself that the money was being taken for purposes which are considered legally binding. [p. 758, col. 2.]

Mahabir Prasad v. Busant Singh, 12 Ind. Cas. 347; 14 O. C. 299, referred to.

And, if in such a case there is a further defence that the debt, if incurred, was contracted for immoral purposes, but the mortgagee prays only for a decree for sale of the mortgaged property and the case is decided on the basis that there was no legal necessity for the mortgage, he cannot subsequently be allowed in appeal to ask in the alternative for a simple money-decree, inasmuch as the defendants would otherwise be put to a disadvantage for no issue as to the question of immorality had been raised and decided. [p. 759, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 22nd May 1913, reversing that of the Subordinate Judge, Sitapur, dated the 31st October 1912.

Mr. A. P. Sen, for the Appellants.

Babu Hari Kishen Dhaon holding brief of Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—These two appeals can be disposed of in one judgment. There were two suits between the parties, in which three mortgage-deeds were put forward which were said to have been executed by the father of defendants Nos. 1 to 3. The fourth defendant in the suit was a transferee of a certain share from the first defendant. The suits were for sale. The defence which was put up by the sons of the mortgagor was to the effect that the family was a

BUDHAN LAL v. JAGAN NATH.

joint family, that the property mortgaged was ancestral property, that their father had mortgaged the property without any legal necessity and that, therefore, the defendants were not bound. In paragraph 11 of the written statement the defendants Nos. 1 to 3 also set up a plea to the effect that if their father had borrowed any money from the plaintiffs it had been borrowed for immoral purposes. In the replication the plaintiffs did not deny that the mortgagor Har Bakhsh Singh was the head of the family consisting of himself and his sons. It was pleaded that these mortgages had been executed for the benefit of the family and it was also denied that Har Bakhsh Singh, the father of the defendants Nos. 1 to 3, had been a man of immoral character or had taken any money for immoral purposes. Before the case came on to trial, the defendants' Pleader admitted the execution of the deeds in suits and called upon the plaintiffs to specify the nature of the legal necessity for which the moneys had been advanced. The reply which was given on behalf of the plaintiffs by their Pleader was that the sums secured by the mortgage-deeds had been borrowed by Har Bakhsh Singh at a time of great distress and on account of household necessities. It was represented that in the years when the sums in suit were borrowed the crops had failed and that the mortgagor was obliged to take loans for the support of his family. The Court of first instance decreed the claim. The Subordinate Judge was of opinion that it was proved that the moneys had been borrowed for legal necessity. He also found that there was no proof that the debts were in any way tainted with immorality. The defendants went in appeal to the District Judge. He was of the opinion that no legal necessity had been proved by the plaintiffs. He discusses the evidence fully in his judgment and says that the case which the plaintiffs tried to make out by evidence was not the case which their Pleader had put up before the issues were tried.

The finding of the learned District Judge that there was no necessity for the loans in suit, appears to me to be a finding of fact which is binding upon me in second appeal and even if this matter be con-

sidered to involve any question of law, I am of opinion that the law has been properly applied by the Court below. It has been complained that in deciding this question the learned Judge has not correctly interpreted the ruling laid down in *Mahabir Prasad v. Basant Singh* (1), but I am unable to see in what way the learned Judge has fallen into error. It clearly lies upon the mortgagee in a case like this to prove either that the debt was borrowed for a legal necessity and is accordingly binding upon the joint family property or to show, at any rate, that he made some inquiries with the object of satisfying himself that the money was being taken for purposes which are considered legally binding. I am satisfied, therefore, that there is no ground upon which this Court can hold that the finding of the lower Appellate Court on the question of legal necessity is in any way wrong. It appears that the learned Judge was asked to give the plaintiffs a simple money-decree but he refused to allow such a case to be put forward in appeal. He said that no such claim had been made in the Court of first instance and that to allow such a claim to be put forward in appeal would be to put the defendants at a disadvantage, for no issue as to the question of immorality had been really raised and decided. It is true that in the written statement, as I have already mentioned, the defendants had pleaded that if their father had borrowed any money it had been taken for immoral purposes. In view of this plea it was open to the plaintiffs to ask for an amendment of the plaint and they might then in the alternative have asked for a simple money-decree in case it should be found that the sums taken under these mortgage-deeds had not been borrowed for legal necessity. But no such application was made and the plaint as it stands clearly asks only for a decree for sale. There is no prayer for the granting of a simple money-decree. In the way the case was presented in the plaint no issue regarding the morality or immorality of the mortgagor arose. The case was simply to be contested on the question of legal

(1) 12 Ind. Cas. 347; 14 O. C. 299,

THANGAVELU MUDALIAR v. MAHOMED IBRAHIM.

necessity. It would be quite impossible to entertain any claim for a simple money-decree without allowing the defendants an opportunity of showing that they were not liable for any personal debt contracted by their father on the ground that it was incurred for immoral purposes. As the plaintiffs did not choose to present their case in this way, I do not feel disposed to allow such a case to be put forward now. I think the Judge of the Court below was right in refusing the simple money-decree. These are the only points involved in these appeals. I find them against the appellants and direct that both the appeals be dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 10
OF 1914.

March 7, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

THANGAVELU MUDALIAR—CLAIMANT—
APPELLANT

versus

MAHOMED IBRAHIM SAHIB—DECREE-
HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Money-decrees against same judgment-debtor in two suits by two separate creditors—Judgment-debtor's property sold in execution of one decree—Subsequent attachment of same property in other decree—Objection—Purchaser, whether legal representative of judgment-debtor—Appeal—Second appeal.

Two persons A and B obtained separate money-decrees against C. In execution of A's decree certain immoveable properties belonging to C were brought to sale and purchased by D. B then executed his decree and had the property purchased by D attached. D thereupon filed a claim petition objecting to the said attachment and being unsuccessful before the District Munsif, appealed to the District Judge. This appeal being dismissed, he preferred a civil miscellaneous second appeal to the High Court:

Held, that both the appeal to the District Court and the second appeal to the High Court were incompetent, inasmuch as D was not the representative of C in the suit of B.

Nadamuni Narayana Iyengar v. Veerabhadra Pillai, 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928, referred to.

Appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 94

of 1913, preferred against that of the Court of the District Munsif of Conjeeveram, in Execution Appeal No. 22 of 1913, in Original Suit No. 590 of 1904.

Mr. N. Viswanatha Aiyar, for the Appellant.

Mr. C. Narasimhachariar, for the Respondent.

JUDGMENT.—The purchaser in execution of a money-decree passed in one suit (which might be called suit X) between decree-holder A and judgment-debtor B is not the representative of the judgment-debtor B in suit Y when he prefers a claim petition when the properties are or have been attached in execution of the money-decree passed in suit Y between decree-holder C and the judgment-debtor B, though the judgment-debtors are the same in both suits. He (the purchaser) cannot, therefore, take advantage of the provisions of section 47, Civil Procedure Code, and claim a right to prefer an appeal and a second appeal against the decision in the claim petition in the Y suit. [See observations in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (1) as to under what particular circumstances a Court auction-purchaser can be treated as representative of the decree-holder or judgment-debtor and as to what proceedings can be considered as falling under section 47, Civil Procedure Code, though a Court auction purchaser who cannot be considered the representative of either the decree-holder or the judgment-debtor is interested in the result of and is, therefore, made a party to the proceedings.]

The lower Appellate Court's view that no appeal lay to it is correct and we dismiss this second appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928.

MAHADEO PRASAD V. AJODHYA PRASAD.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION NO. 72 OF 1915-16 OF
HARDOI DISTRICT.

April 19, 1916.

Present:—Mr. Campbell, J. M.

MAHADEO PRASAD AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

AJODHYA PRASAD—PLAINTIFF—
RESPONDENT.*Lease—Circular No. 16 of 1874—Heritable lease—
Ejectment by notice.*

Leases granted under Circular No. 16 of 1874 are heritable leases, and a tenant holding under such a lease cannot be ejected by notice.

Appeal from the decree of the Commissioner, Lucknow, dated the 11th October 1915, upholding that of the Assistant Commissioner, Hardoi, dated the 8th April 1915.

FACTS.—This was a suit under section 108 (8) of the Oudh Rent Act for contesting notice of ejectment, on the ground that the plaintiff was not an ordinary tenant liable to ejectment by notice. It was found that the plaintiff occupied the holding of his deceased uncle Thakuri, who had been in possession by virtue of a lease granted to him under the Chief Commissioner's Circular No. 16/2234, dated the 3rd July 1874. Thus the decision of the case turned solely on the question as to what rights the lease conferred on the lessee. The Assistant Commissioner held that it conferred heritable rights and, therefore, he cancelled the notice of ejectment. On appeal the Commissioner held that the plaintiff was at any rate to be taken as holding under a special agreement within the meaning of section 52, i.e., an agreement concluded by landlords with Government for protection of subordinate rights. In support of his view he referred to a decision of the Board of Revenue on Petition No. 142 of 1898 99 of village Sikhraoli, district Hardoi, *in re Mangru and others*, and dismissed the appeal.

Mr. H. K. Ghosh, for the Appellants.

Babus Bisheshwar Nath Srivastava and
Bishambhar Nath Srivastava, for the Respondent.

JUDGMENT.—The Courts below have held, as a matter of fact, that respondent

RAGHAVACHARI V. PAKKIRI MAHOMMED.

is heir of Thakuri, who was holding the land in dispute under a lease granted under Circular No. 16 of 1874. There can be no doubt that such leases are heritable; and the finding of fact cannot be disputed in second appeal. It is settled law that a tenant holding under such a lease cannot be ejected by notice.

I uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 214 OF 1913.

February 16, 1916.

Present:—Mr Justice Sadasiva Aiyar and
Mr. Justice Moore.R. RAGHAVACHARI—RESPONDENT
No. 2—APPELLANT

versus

M. A. PAKKIRI MAHOMMED ROWTHER
AND OTHERS—PETITIONER AND RESPONDENTS
Nos. 1 AND 3 TO 12—RESPONDENTS.

Principal and agent—Unauthorized purchase by agent—Agent acting for himself—Ratification, whether possible—Contract Act (IX of 1872), ss. 196, 216—"Good faith", meaning of—Bona fide purchase at Court sale—Restitution—Civil Procedure Code (Act V of 1908), s. 144.

The right of a principal to ratify an unauthorized act of his agent, under section 196 of the Contract Act, is confined to cases where the agent purports to act on the principal's behalf. No ratification is possible where the agent acts on his own account, and, though without authority, not on behalf of the principal [p. 763, col. 1.]

Keighley Maxsted and Co. v. Durant, (1901) A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527 and *Kandasami Asari v. Somaskanta Ela Nidhi*, 5 Ind. Cas. 922; 20 M. L. J. 371; 7 M. L. T. 165; 35 M. 177; (1910) M. W. N. 580, followed.

Where property was purchased in Court auction by the decree-holder's agent acting on his own account and contrary to the principal's directions, the principal cannot ratify the act so as to give himself the benefit of the purchase, as it was not an act either done on behalf of the principal under section 196 or in the course of the agency under section 216 of the Contract Act. [p. 763, col. 1.]

Andrews v. Ramsay and Co., (1903) 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 19 T. L. R. 620; 52 W. R. 126, referred to.

Restitution cannot be demanded, under section 144, Civil Procedure Code, as against a bona fide purchaser at a Court sale, who was not a party to the decree, on the ground that, subsequent to the sale, the decree was reversed by the Appellate Court. [p. 763, col. 2.]

Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan, 10 A. 166 at p. 172; 15 I. A. 12; 5 Sar. P. C. J. 129, relied on.

RAGHAVACHARI V. PAKKIRI MAHOMMED.

Arthanari Chettiar v. Nagoji Rao, 14 Ind. Cas. 836; (1922) M. W. N. 513, explained.

The operation of the rule is not affected by the purchaser's knowledge of the pendency of an appeal on the day of sale. [p. 763, col. 2; p. 764, col. 1.]

Restitution can, however, be claimed as against the sale-proceeds paid to the decree-holder. [p. 763, col. 2.]

The expression 'good faith' explained. [p. 764, col. 2.]

Appeal against the order of the Court of the Subordinate Judge of Negapatam, in Miscellaneous Application No. 847 of 1912, in Original Suit No. 38 of 1903, on the file of the Court of the Subordinate Judge of Kumbakonam, under execution in the said Court of the Subordinate Judge of Negapatam.

Mr. T. R. Venkatarama Sastri, for the Appellant.

Mr. M. D. Devadoss (with him Mr. C. V. Ananthakrishna Aiyar), for the Respondents.

JUDGMENT.

MOORE, J.—This is an appeal by 2nd respondent in the lower Court against an order of the Subordinate Judge of Negapatam passed in execution. The circumstances which have given rise to the appeal are these:—The South Indian Export Company, Limited, obtained a mortgage decree in Original Suit No. 38 of 1903 on the file of the Court of the Subordinate Judge of Kumbakonam. The 1st respondent preferred an appeal and under the decree of the High Court, dated 8th April 1910, his share in the properties was exonerated. While the appeal was pending, certain properties were brought to sale in execution on the 8th October 1909 and the present appellant purchased in his own name for Rs. 525 some *nanja* lands in Peyur, which are referred to in the evidence as the *theerali* lands. The appeal relates to these properties which were, it appears, subject to a prior mortgage of about Rs. 5,000 in favour of a third party, the South Indian Export Company holding a subsequent mortgage over these and other properties on which they had obtained a decree for nearly Rs. 7,000. At the time of the sale the appellant was the agent of the Company. He left the Company's service in November 1911. The 1st respondent applied to the Subordinate Judge for restitution and delivery of his 10 1/6th share of the properties which had been taken possession of by

the South Indian Export Company and the appellant as purchasers at the auction sale. The decree-holder, it may be mentioned, had received permission to bid at the sale. The appellant opposed the application for restitution, on the ground that he had purchased the properties in Court auction not in his capacity as the agent of the Company but on his own behalf, the sale certificate having been issued in his name. The Company in the lower Court raised no objection to the 1st respondent being given his share of the lands. The Subordinate Judge found that the appellant was merely a *benamidar* for the Company and that 1st respondent was accordingly entitled to get his share of the lands and directed that symbolical possession should be given to him, and that a separate application should be made for the ascertainment of mesne profits.

The learned Vakil for the appellant contends that the Subordinate Judge erred in holding that the purchase was made for the Company and that in law the purchase could not be consequently adopted as their own by the Company. Certain letters which had passed between the South Indian Export Company and their agent, the appellant, were filed. The oral evidence consists of the deposition of the appellant, who was called as a witness curiously enough for the claimant (1st respondent). No evidence was offered on behalf of the South Indian Export Company. Why Mr. Simpson who was at the time Manager of the Company was not examined is not clear. We are certainly not prepared to accede to Mr. Devadoss's request that the case should be sent back to enable the Company to adduce evidence. It will be convenient to deal with the correspondence between the Company and their agent prior to the auction sale. On 18th April 1909 the appellant wrote to the Company informing them of the date fixed for the sale and asking for permission to purchase the properties in Court sale if necessary, and mentioned that bidders were not likely to buy at the auction for fear of the *Muhammadans*. In his reply, Exhibit E, Mr. Simpson wrote that the Company objected very much to buying properties like this in public auction and pointed out that the appellant had not explained why it was necessary for the Company to bid. He

RAGHAVACHARI V. PAKKIRI MAHOMMED.

also asked him for a detailed statement of the values of the properties which the Company should bid for and what outside offers he had received. In his letter, Exhibit D1, the appellant replied that the lands were worth about Rs. 8,000 and that as there were two mortgages amounting to Rs. 12,000 on the property, nobody was likely to buy them in Court auction and it was not worth while for the Company to take them in their own name. The concluding portion of the letter is as follows: "But I am making arrangements subject to your sanction, that is, let any one take this in Court auction for a low amount and conduct the suit on the first mortgage. If he succeeds in the case let him pay us Rs. 4,000 or Rs. 5,000 for our decree-debt. Until then we have our decree in force. In case of failure, it does not matter much for us as the first mortgage amount and costs will come to more than the value of the property." In his reply, Exhibit E1, Mr. Simpson wrote that he agreed to what the appellant had suggested, and that "with regard to the *nanja* lands" the appellant might "arrange with a third party to purchase them and conduct the suit of the first mortgagee."

It is, we think, clear from the correspondence that the Company expressly forbade their agent to purchase the *theerali* lands for the Company and that there can be no doubt from the evidence that the purchase was made by the appellant on his own behalf. It is significant that in the sale account it is stated that Raghavachari, the appellant, purchased lot No. 1 for himself and that he has signed in his own name, whereas in the case of the other lands which he purchased on behalf of the Company he added the words "plaintiff's agent" below his signature. If the purchase had been made on behalf of the decree-holder who had obtained permission to bid, no deposit would be necessary. The appellant explains that, as he could not find any third person to purchase the lands, he purchased them himself, and that there were no other bidders. He says that he had enough money with him to pay the deposit of 25 per cent. and that he borrowed the balance from his brother-in-law, but we agree with the Subordinate Judge that this statement is untrue; and that it is more probable that the appellant paid Rs. 525 out

of the Company's funds in his hands. In Exhibit A, the account furnished by the appellant to the Company, Rs. 525 is not, however, shown as having been expended on 8th October 1909. The last item in the account is "amount to be recovered from Court Rs. 525."

As to what transpired subsequently the evidence is not so clear. The appellant states that after the sale he went to Madras and orally reported that he had purchased the lands himself and had an interview with his master (presumably Mr. Simpson), who said that the lands might be transferred to a third person who would fight it out with the first mortgagee. The appellant further states that there was an application to set aside the sale, and that the Manager of the Company said that the Company had a mortgage of the lands and would arrange with others for the purchase of the lands from him, and that, as he was the servant of the Company, he agreed to this. It is pointed out that no mention is made of this agreement or arrangement in the appellant's counter-petition in the lower Court, that the date of the agreement is not stated, that the appellant wrote the letters, Exhibit F series, to the Company asking them to arrange for the payment of the *kist* on the lands, that in Exhibit B he debited the Company on 12th January 1910 with Rs. 525, the sale price of the lands, which had been deposited in Court, and that he admits in his evidence that he got back the price which he paid from the Company and that the Company had the right to sell the lands. All this is, however, we think, perfectly consistent with the appellant's statement, which we accept, that between the date of the sale and January 1910 he agreed that the Company should arrange for the purchase of the lands from him, the appellant receiving as his commission the surplus, if any, should the lands be sold for more than the decree amount of Rs. 9,000. It is clear that not only did the Company not authorize the appellant as their agent to purchase the lands at the auction but expressly forbade him to do so. Mr. Devadoss argues that even if there was no express authorisation, the Company are entitled to the benefit of the purchase and that a principal can ratify an unauthorised act of an agent. Reliance

RAGHAVACHARI v. PAKKIRI MAHOMMED.

is placed on section 216 of the Contract Act. That section, however, deals with the principal's right to the benefit gained by an agent dealing on his own account in the business of the agency as, for instance, the case of an agent, employed to sell, selling and securing the secret profit for himself which he must account for. *Andrews v. Ramsay and Co.* (1). Section 196 of the Contract Act is in these terms: "Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority." *Keighley Maxsted and Co. v. Durant* (2) which was cited by the appellant's Vakil is against the respondent. In that case it was held by the House of Lords, reversing the decision of a majority of the Court of Appeal, that a contract made by a person intending to contract on behalf of a third party but without his authority cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract. Where the person who made the contract did not profess at the time of making it to be acting on behalf of the principal, there must be on the part of the person acting without authority the express intention to contract on behalf of the other and in the absence of it there can be no ratification. No ratification is possible where the agent does not purport to act, though without authority, on behalf of his principal. *Kandasami Asari v. Somaskanta Ela Nidhi* (3). Here the appellant purchased the property on his own behalf and did not profess to act on behalf of his principal. Following the rulings in *Keighley Maxsted and Co. v. Durant* (2) and *Kandasami Asari v. Somaskanta Ela Nidhi* (3), we hold that the Company cannot ratify the unauthorised act of the appellant so as to enable it to have the benefit of the purchase. We are unable to agree with the Subordinate Judge that the appellant was a mere *benamidar* for the

Company. There is no evidence to support his finding on this point. Whatever the appellant's secret or undisclosed intention may have been, when he purchased the property, he purchased it on his own behalf. The appellant was a stranger and the purchase was not made on behalf of the decree-holder. Where a sale has really taken place in execution of the decree in force at the time, it cannot afterwards be set aside as against a *bona fide* purchaser not a party to the decree, on the ground that on further proceedings a decree has been, subsequently to the sale, reversed by an Appellate Court. *Zain-ul-abdin Khan v. Muhammad Asghar Alikhan* (4). Their Lordships point out the distinction between *bona fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. If the appellant was a *bona fide* purchaser, restitution cannot be demanded from him, and the modification of the decree in appeal cannot affect its validity so far as the auction-purchaser, who was not a party to the decree, is concerned. The circumstance that the sale took place during the pendency of the appeal of which the appellant was presumably aware is not, we think, material. Mr. Ananthakrishna Aiyar, for the 1st respondent, argues that the appellant was a speculative purchaser. However this may be, the appellant was none the less a *bona fide* purchaser. The first respondent's claim for restitution must be disallowed.

We accordingly allow the appeal and set aside the order of the Subordinate Judge directing that symbolical possession should be given to the first respondent. Second respondent must pay the appellant's costs in both Courts. The respondents will bear their own costs.

Mr. Ananthakrishna Aiyar contends that the 1st respondent is at any rate entitled to his share of the sale-proceeds which were paid to the decree-holder. We think he is entitled to such an order. Section 144 of the Civil Procedure Code makes it imperative on the Court of first instance to 'cause restitution as far as may be' and for the purpose of restitution it is empowered to make any necessary order. Though the

(4) 10 A. 166 at p. 172; 15 I. A. 12; 5 Sar. P. C. J. 129.

(1) (1903) 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 19 T. L. R. 620; 52 W. R. 126.

(2) (1901) A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527.

(3) 5 Ind. Cas. 922; 20 M. L. J. 371; 35 M. 177; (1910) M. W. N. 580; 7 M. L. T. 165.

RAJPAL KUAR v. RUDRA PRATAB NARAIN SINGH.

petitioner (1st respondent) has now been found not entitled as against the Court auction-purchaser (appellant) to get back petitioner's share of the lands purchased by the appellant, he can in partial restitution be given his $10\frac{1}{4}/60$ th of the sale-proceeds of that property, Rs. 525, which the decree-holder has received. As the Appellate Court has got all the powers of the Court of first instance, we shall direct the South Indian Export Company to pay that amount with interest at 6 per cent. per annum to the 1st respondent.

SADASIVA AIYAR, J.—I entirely agree. I wish to add only a few words in regard to the contention of Mr. Ananthakrishna Aiyar that a purchaser in a Court auction-sale cannot be a *bona fide* purchaser if he was aware that an appeal is pending against the decree under execution.

Order XLI, rule 5, clause (1), of the Civil Procedure Code states. "An appeal shall not operate * * * *, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree." Clause 3 of the same Order and rule says "no order for stay of execution shall be made" "unless the Court making it is satisfied" in respect of certain matters. In the present case, the Appellate Court refused stay of execution of the decree and then the sale was held. If everybody who knows of an appeal and who comes to bid at the execution sale ceases to be a bidder in good faith, and when his bid is accepted, he cannot claim the position of a *bona fide* purchaser, it will practically nullify the provisions of Order XLI, rule 5. Not only can execution seldom take place under those conditions (as the judgment-debtor might be expected to warn off all bidders by giving them notice of the appeal) but the judgment-debtor himself will, in many cases, sustain substantial loss and injury by the scaring away of honest bidders and by a few litigious persons alone remaining as bidders.

Reliance was placed by Mr. Ananthakrishna Aiyar on the case of *Arthanari Chettiar v. Nagoji Rao* (5) for his above contention. There, Sir Arnold White, C. J., and

Sankaran Nair, J., sent down the case to the District Judge to submit a finding on the question whether the appellant was a *bona fide* purchaser in good faith at the auction sale. The District Judge seems to have thought that "good faith" implied also ignorance of the pendency of an appeal against the decree which was being executed and hence in his finding he stated that the property was purchased by the purchaser for fair value, that he purchased it for his own benefit and also that he did not know of the pendency of the appeal. On the return of that finding, the learned Judges accepted it and allowed the appeal dismissing the application of the defendant for restitution. I cannot treat the above case as embodying a decision by the learned Judges that ignorance of the pendency of an appeal is necessarily a constituent element of the good faith of the Court auction-purchaser. I think that the words "good faith" merely indicate such things as absence of participation in the frauds or irregularities, if any, committed by the decree-holder, absence of the relation of agent or *benamidar* to the decree-holder, absence of any conduct such as scaring away other bidders by false statements and so on.

Appeal allowed.

V.R.P.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 12 OF 1915-16 OF
BAHRAICH DISTRICT.

February 28, 1916.

Present:—Mr. Holms, S. M.

Musammatt RAJPAL KUAR AND OTHERS—
OBJECTORS—APPELLANTS

versus

Thakur RUDRA PRATAB NARAIN
SINGH—APPLICANT—RESPONDENT.

Estoppel—Lands not transferable mortgaged—Rent, receipt of, from mortgagees, effect of—Mortgage, validity of, whether can be questioned—Landlord, position of—Relinquishment by mortgagor in favour of landlord—Mortgagees, position of—Ejectment.

Where in respect of lands mortgaged by a person who holds them with a heritable but non-transferable rights, the landlord receives rent either

RAJPAL KUAR v. RUDRA PRATAB NARAIN SINGH.

from the mortgagees really on behalf of the mortgagor or jointly from the mortgagor and the mortgagees, he is not estopped by reason of merely such receipt of rent from subsequently questioning the validity of the mortgage; and once the mortgagor has relinquished his right to hold the lands in favour of the landlord, the mortgagees have no rights left and can be ejected. [p. 765, col. 2.]

Jagraj Kunwar v. Ganga Din, 18 Ind. Cas. 383, dissented from.

Appeal against the order of the Commissioner, Fyzabad, dated the 23rd November 1915, upholding that of the Deputy Commissioner, Bahraich, dated the 23rd August 1915, upholding that of the Assistant Collector, Bahraich, dated the 29th June 1915.

FACTS.—Bhaiya Narendra Bahadur Singh and his ancestors occupied certain villages and some specific plots of land situate in the respondent's *taluka* as *guzaradars* with heritable but non-transferable rights, under a decree of the Anjuman-i-Hind, dated 7th July 1869, and the Financial Commissioner's order, dated 12th August 1869. Their names appeared thereafter in the under-proprietary *khewat* as lessees with heritable but non-transferable rights. Subsequently, Narendra Bahadur Singh mortgaged with possession the said villages and plots to several persons, whose names were then recorded in the under-proprietary *khewat* as mortgagees. After these mortgage transactions the *talukdar* began to receive rents from the mortgagees and to give them receipts for the same. In some of them the rent was shown as due from the mortgagor and paid by the mortgagees, and in others it was shown as paid by the mortgagor and the mortgagees. In some cases the *talukdar* sued the mortgagees jointly with the mortgagor for arrears of rent, and obtained decrees. On 22nd August 1913 Narendra Bahadur Singh executed in favour of the *talukdar* a deed of relinquishment in respect of the above-mentioned villages and plots of land. The *talukdar* then applied for mutation of his name in place of that of Narendra Bahadur Singh by expunction of his name as well as those of his mortgagees from the *khewat*. At the same time he issued notices of ejectment against the latter. They objected to both these proceedings taken against them by the *talukdar*, on the

ground that having acquiesced in their being rightful transferees from Narendra Bahadur Singh by accepting rents from them, he was now estopped from questioning the validity of the transfers and ignoring their existence as mortgagees.

Rai Bahadur Babu Gokul Prasad and Mr. Mohammad Wasim, for the Appellants.

Babu Ishuri Prasad, for the Respondent.

JUDGMENT.—There are seven connected mutation appeals which may be taken together. The facts are slightly different in Appeals Nos. 12, 13, 14 and 15 from the other three appeals. The mortgagees who are the present appellants are recorded, in the under-proprietary *khewat* in which the name of Narendra Bahadur Singh is recorded as ■ lessee with heritable but non-transferable rights, as his mortgagees. There is nothing to show since when their names have been so recorded. As regards the four appeals I have mentioned, there is evidence that the *talukdar* has given receipts for rent which was paid by the mortgagees. In some of the receipts the rent is shown as due from the mortgagor and paid by the mortgagees, and in others it is shown as paid by the mortgagor and the mortgagees. The mere fact of receipt of rent from the mortgagees really on behalf of the mortgagor certainly constitutes no estoppel, and I agree with the lower Courts that once the mortgagor's right ceased the mortgagees had no rights left and could be ejected.

In Appeals Nos. 16, 17 and 18, the case of the appellants is somewhat stronger, for we find that the respondent *talukdar* sued the mortgagees jointly with the mortgagor for rent and obtained a decree, though the judgment is not on record. A copy of ■ plaint in a similar suit in 1904 is put in, and it is noticeable that there is not a word in the plaint to show why the mortgagees were liable for rent except their description as mortgagees. I am referred to a decision of the Judicial Commissioner reported as *Jagraj Kunwar v. Ganga Din* (1), in which, a somewhat similar case, it was held that the acquiescence of the landlord acknowledging the mortgagee

(1) 18 Ind. Cas. 383.

ALAGAPPA IYENGAR v. MANGATHAI AMMANGAR.

as rightful transferee by accepting rent from him estopped him from thereafter setting up the invalidity of the mortgage. In the present case, however, at the time of the suit for arrears of rent, the respondent was a minor who sued through his guardian, his mother, and the circumstances of the case are, therefore, different. In any case, I am inclined to think that the decision I have referred to goes rather further than the Board have done in similar cases.

The appeal is dismissed with costs and Rs. 48, Pleader's fees.

There are seven connected ejectment appeals which are also dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 363 OF 1914.

February 29, 1916.

Present:—Mr. Justice Sadasiva Aiyar and

Mr. Justice Moore.

K. P. ALAGAPPA IYENGAR—PETITIONER

—APPELLANT

versus

MANGATHAI AMMANGAR AND OTHERS—

RESPONDENTS.

Will—Burden of proof—Hindu Law—Minor—Testamentary appointment of guardian by father—Joint and trust properties, right of appointing guardian to—Will, genuineness of—Burden of proof—Thirumaligai, whether private property.

Whoever puts forward a Will as genuine ought to prove it and cannot throw the burden of proving the negative on the opposite party. [p. 766, col. 2; p. 767, col. 1.]

Kurum Krishnama Chariar v. Veeravelli Krishnama Chariar, 19 Ind. Cas. 452; 38 M. 166; 24 M. L. J. 517; (1913) M. W. N. 355; 13 M. L. T. 385, followed.

A Hindu father has the power to appoint by Will a guardian of the person of his minor child. [p. 767, col. 2.]

Dr. George Albrecht v. Bathee Jellamma, 13 Ind. Cas. 453; 22 M. L. J. 247; (1912) M. W. N. 53; 11 M. L. T. 53, followed.

As regards properties, however, which survive to the minor son as ancestral family properties or properties dedicated to a trust, the father has no power to appoint a guardian. [p. 768, col. 1.]

Kanakasabai Mudaliar v. Ponnusami Mudaliar, 21 Ind. Cas. 848, followed.

Tirumaligais are private and not trust properties. [p. 768, col. 1.]

Appeal against the order of the District Court of Tinnevely, dated the 15th

September 1914, in Original Petition No. 513 of 1913.

Mr. T. Rangachariar, for the Appellant.

Mr. S. Srinivasa Aiyangar (Acting Advocate-General) with him Mr. N. S. Rangaswami Aiyangar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This appeal has arisen out of an application filed in the District Court of Tinnevely under sections 39, 10 and 7 of the Guardians and Wards Act of 1890. The petitioner in the District Court is the appellant before us. The prayers in the petition are (a) that the 1st respondent, namely the mother of the minor boy, may be declared the sole guardian of the minor and his estate, removing respondents Nos. 6, 7 and 8 if they should be deemed to have been appointed by the minor's father; (b) if necessary, the petitioner or the 4th respondent or any other fit and proper person may be appointed by the Court as guardian solely or with the 1st respondent for the minor's estate for both his person and estate, and (c) other fit and necessary orders be made.

Now the minor's father died on the 13th December 1911 and the respondents Nos. 6, 7 and 8 set up that themselves and the 1st respondent have been appointed by a Will executed by the minor's father on the 11th December 1911 as the guardians of the person and properties of the minor. That Will is Exhibit I in the case. As section 7, clause 3, of the Guardians and Wards Act enacts that where a guardian has been appointed by Will, an order under that section declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed and declared by the Will have ceased under the provisions of the Act, the learned District Judge first considered the question of fact whether the Will was genuine or not. I think that on that question the District Judge came to a correct conclusion, though I do not agree with some of his observations which seem to imply that the burden of proving that the Will was not genuine lay in the first instance on the petitioner-appellant. Whoever puts forward a Will as genuine or supporting his contentions ought to prove it and cannot throw

ALAGAPPA IYENGAR v. MANGATHAI AMMANGAR.

the burden of proving the negative on the opposite party. See *Kuram Krishnama Chariar v. Veeravelli Krishnama Chariar* (1). On the evidence however, as I said, I agree with the learned District Judge that the Will is genuine. It is attested (among several others) by the testator's sister's husband and his son-in-law. It was produced by the widow (1st respondent) for registration to the Sub-Registrar and till the 28th June 1913 (see Exhibit VII) she admitted that it was a genuine and valid Will. The evidence of the contesting respondents' witnesses Nos. 1 to 4 satisfactorily establishes the genuineness of the Will and that it was read out to the testator while he was of sound mind before he signed it. From the papers Exhibit F series, it, no doubt, appears that the testator signed some blank papers with a view to having his testamentary intentions written over those signatures. But it is proved that a draft Will had already been prepared under the instructions of the testator and even if the first five sheets of the Will, Exhibit I, had been signed in blank by the testator for the purpose of the fair Will being written above those signatures and (if necessary) above the signatures in the Exhibit F series sheets, I am clearly satisfied that the Will as a whole, after it had been faircopied, was submitted to the testator and was signed by him in at least the 6th and 7th sheets, after it had been completed. And that is sufficient to make the Will legally valid. See *Namburnmal Chetty v. Pasumarty Kannia Chetty* (2). The evidence of the petitioner's witnesses that the testator was too ill on the date of the Will to understand its contents is absolutely worthless. The reason why the widow (1st respondent) and the petitioner (who had himself admitted the validity of the Will by his attestation of Exhibits VIII and IX and under whose advice Exhibits VIII and IX were presented to the Police according to the evidence of the 1st respondent) now deny the validity of the Will is clear from the statements in paragraphs 5 to 8 of Exhibit VII. The

way in which the petitioner's 1st witness (a petty clerk of the testator and his widow) contradicted his own statements in Exhibits X and XI is also significant. I do not think it necessary to go into further details in respect of the evidence in regard to the genuineness of Exhibit I. The explanation for not having it registered during the testator's lifetime seems to me to be not at all unreasonable or suspicious and might be accepted under the circumstances.

The next question is whether Exhibit I is a Will that has to be set aside under section 39 of the Guardians and Wards Act. It need not and could not be set aside if the testator had no legal power to appoint a guardian for the property by Will. Before going into that question there is a preliminary point for decision, namely, whether the Will did appoint guardians (a) for the minor's person, and (b) for the minor's properties. After some hesitation, I have come to the conclusion that it does appoint the widow and the respondents Nos. 6, 7 and 8 as guardians for both the person and property of the minor. The testator calls them "guardians" in the Will and as he directs them to maintain the boy, perform his *upanayanam* to instal him in the Acharya's throne and so on, I do not think he meant to make any distinction between the guardians of the person and the guardians of the properties by the terms of his Will. Then comes the question as to whether the appointment is valid, first ■■ regards the person and then as regards the properties. I think I ought to follow the case in *Dr. George Albrecht v. Bathee Jellamma* (3), where it was decided that a Hindu father has got the power to appoint by Will a guardian of the person of his minor child. Next as regards the properties there are two branches of the question to be considered. The first branch relates to the case where the properties disposed of by the Will are alleged to be the ordinary private ancestral properties of a Hindu father; and the second branch relates to the case where (as is alleged in the present Will) the properties belong to a *mutt* or a religious institution. On the first branch of

(1) 19 Ind. Cas. 452; 38 M. 166; 24 M. L. J. 517; (1913) M. W. N. 355; 13 M. L. T. 385.

(2) 28 Ind. Cas. 959.

(3) 13 Ind. Cas. 453; 22 M. L. J. 247; (1912) M. W. N. 53; 11 M. L. T. 53.

BISHESHAR SINGH v. TIRBHAWAN BAHADUR SINGH.

the question, there is a decision of this Court reported as *Kanakasabai Mudaliar v. Ponnusami Mudaliar* (4), which clearly lays down that as regards properties which survive to the minor son of a Hindu testator as ancestral family property on the death of the father, the father has no power to appoint a guardian. That case has been followed by a single Judge of this Court in *Krishna Aiyar v. Chakrapani* (5), though the case of *Soobah Pirthee Lal Jha v. Soobah Doorgah Lal Jha* (6) which was followed in *Dr. George Albrecht v. Bathee Jellamma* (3) seems to hold a different view. The actual decision in *Dr. George Albrecht v. Bathee Jellamma* (3) established the validity of the appointment by the father of the guardian only of the person of his minor child. One of the learned Judges who was a party to the decision in *Dr. George Albrecht v. Bathee Jellamma* (3) was also one of the Judges who remanded the case reported as *Kanakasabai Mudaliar v. Ponnusami Mudaliar* (4) for a finding to the lower Court on the issue as to self-acquisition, which finding would be required only on the view that as regards joint family properties, a Hindu father has no right to appoint a person by Will to be the guardian of such properties on behalf of the minor son. I would, therefore, follow the decision in *Kanakasabai Mudaliar v. Ponnusami Mudaliar* (4) and hold that if these properties were the ancestral private properties of the testator, appointment by Will of a guardian of such properties was invalid. If they were, however, properties dedicated to a religious trust then no question of guardianship at all arises and no question, therefore, of removing a testamentary guardian. I might, however, state that I am strongly of opinion that the properties belonging to this *thirumaligai* and the similar three other *athan thirumaligais* are private properties and not trust properties and I prefer to follow the decision of Sir Subramania Iyer and Davies, JJ., in Appeal Suit No. 12 of 1903 (filed as Exhibit L in this case) in preference to the decision (filed as Exhibit XVIII) in Appeal Suit No. 101 of 1873.

Finally, there is the question whether "it is for the welfare of the minor" (see

section 7 of the Act) that a guardian of the person or property or both should be appointed; and whether the guardian of the person appointed by the Will (if such appointment is held valid) should be removed for the purpose of the appointment by the Court of a guardian according to section 7 of the Act. If the appointment of the guardian of the property by the Will is invalid, as I have held, the mother becomes guardian of the properties and I see no necessity why the mother should be appointed again by the Court. The petitioner is clearly not a person fit to be the guardian both by reason of his character as appears from his evidence and the reason of his position in life as mentioned by the District Judge. Similar remarks apply to the suggested appointment of the 4th respondent. As the boy, I believe, is almost sure to become an Achariar Preceptor as soon as he gets his *upanayanam* performed, I do not think it necessary in his interests to appoint a guardian for his person or property so as to advance the age of majority of the boy from 18 to 21. I would, in the result, dismiss the appeal with costs of the respondents Nos. 6, 7 and 8, the charges advanced against whose management of the estate were withdrawn in the lower Court.

MOORE, J.—I agree.

Appeal dismissed.

— ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 307 OF 1915.

March 8, 1916.

Present:—Mr. Stuart, A. J. C.

BISHESHAR SINGH—DEFENDANT—
APPELLANT

versus

Thakur TIRBHAWAN BAHADUR SINGH
— PLAINTIFF—RESPONDENT.

Proprietary right, proof of—Settlement, summary, first.

In Oudh, no inference as to a person's proprietary right can be drawn from the mere fact that the first Summary Settlement was made with him. [p. 769, col. 1.]

Maharaja Jagatjit Singh Bahadur v. Suraj Bakhsh Singh, 8 O. C. 145 at p. 148, referred to.

(4) 21 Ind. Cas. 848.

(5) 29 Ind. Cas. 475.

(6) 7 W. R. 73.

GANGADARA MUDALI v. SAMBASIVA MUDALI.

Appeal from the decrees of the District Judge, Rae Bareilly, dated the 22nd May 1915, upholding the order of the Subordinate Judge, Rae Bareilly, dated the 15th February 1915.

Syed Zahur Ahmad, for the Appellant.

Mr. Mohammad Wasim holding brief of Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—In this case it was open to the defendant to establish his title as under-proprietor by proving that his predecessors-in-interest had formerly been proprietors, that the land in suit had been held by his predecessors-in-interest at sometime since the 13th February 1844, and that it had been held by such persons as *sir* or *nankar* when they were in proprietary possession, or by proving that there had been a specific grant of under-proprietary right or an acknowledgment by the *talukdar*. There has been no attempt to establish a specific grant or an acknowledgment, but he has based his claim upon the fact that his predecessors-in-interest were put in possession by Government as proprietors during the Summary Settlement of 1856. This circumstance does not help him in any way. As is observed by Wells, A. J. C., in *Maharaja Jagatjit Singh Bahadur v. Suraj Bakhsh Singh* (1), "Now it is also a matter of general history that one of the causes which led up to the Mutiny in Oudh was the wholesale disregard of the rights of the *talukdars* and the making of the Summary Settlement with any persons of a somewhat superior status who were found in the villages. No inference, therefore, as to the proprietary right can be drawn from the mere fact that the Summary Settlement was made with defendant's family." The circumstance that the first Summary Settlement was made with his family can, therefore, be overlooked. What else remains? At the time of the second Summary Settlement the defendant's family claimed proprietary rights in the village on the ground that they were the old *zamindars* who had been forcibly dispossessed by the *talukdar*. Their case was that the *talukdar* had dispossessed them about 1838 by

compelling them to execute a fictitious deed of mortgage in his favour. This view found acceptance with Captain Orr, Deputy Commissioner, but it was overruled by the Commissioner who found that the village should be given to the *talukdar*. He stated, "Sufficient grounds are not, in my opinion, recorded for depriving the *talukdar* of this village, of which he holds possession from eighteen years previous to annexation. Compulsory or not, the possession is undisputed and we cannot enter into rights and wrongs of a period prior to annexation." The Chief Commissioner upheld this view. There had been a previous arbitration of some kind with respect to the mortgage. But it is not clear that the award of the arbitrators could have had any legal effect, and it cannot be stated that there was any finding to the effect that a valid mortgage existed. The defendant's family did not choose to dispute the decision of the Settlement Court and did not establish their title as mortgagors anywhere. We thus have it that, on the findings of the Chief Commissioner of Oudh, the defendant's family had been out of possession ever since 1838, although they recovered possession in 1856 under the first Summary Settlement.

In these circumstances I agree with the lower Courts that the defendant-appellant has failed to establish any under-proprietary right. I dismiss his appeal. He will pay his own costs and those of the respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2348 OF 1914.

April 6, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

GANGADARA MUDALI—DEFENDANT—
APPELLANT

versus

SAMBASIVA MUDALI—PLAINTIFF—
RESPONDENT.

Registration Act (XVI of 1903), ss. 25, 34, 72, 73, 77—Delay in presentation of document—Application to correct delay—Conveyance by Sub-Registrar to

(1) ■ O. C. 145 at p. 143.

GANGADABA MUDALI v. SAMBASIVA MUDALI.

party of Registrar's order refusing to excuse delay—Appeal to Registrar—Order of refusal, whether amounts to refusal to register—Suit in Civil Court, maintainability of—Jurisdiction.

Per Seshagiri Aiyar, J.—An order refusing to excuse delay in the presentation of a document for registration under section 25 (1) of the Registration Act is an order refusing to register the document, which furnishes ground for a civil suit under section 77 of the Act. And it makes no difference whether the order was passed on an application direct to the Registrar under section 76 or on a reference by the Sub-Registrar with whom it was, in the first instance, lodged. [p. 771, col. 2.]

Where a Sub-Registrar simply communicates to the party the Registrar's order refusing to excuse the delay with his own endorsement that 'registration is refused,' the order of the Sub-Registrar is practically one refusing to admit a document to registration, from which an appeal lies to the Registrar. [p. 771, col. 2.]

The appeal to the Registrar may also be regarded as an original application to him under section 76, and his dismissal of the appeal is, in effect, a refusal to direct the Sub-Registrar to register the document, which will furnish a cause of action under section 77. [p. 771, col. 2.]

Narasimha Nayanavaru v. Ramalingama Rao, 10 M. L. J. 104; *Sivarama Pattar Kariakar v. Edathil Mudhathil V. Krishna Iyer*, 23 Ind. Cas. 23; 26 M. L. J. 307; 15 M. L. T. 233; *Kanhaya Lal v. Sardar Singh*, 29 A. 284; 4 A. L. J. 171; A. W. N. (1907) 46; *Kudarathi Begum v. Najibunnesa*, 25 C. 13 and *Udit Upadhia v. Imam Bandi Bibi*, 24 A. 402; A. W. N. (1907) 99, followed.

Gangara v. Soyara, 21 B. 699, dissented from.

Per Bakewell, J., dissenting.—A refusal to excuse delay in the presentation of a document is not a refusal to register it. [p. 772, col. 2.]

There is no remedy given by the Registration Act in cases where a Registrar refuses to enlarge the time for presentation or enquiry under section 25 or section 34. The discretion is expressly conferred on the Registrar and the Act gives no jurisdiction to the Civil Court to control or revise it. [p. 772, col. 2.]

Section 77 of the Registration Act is expressly limited to orders of refusal under section 72 or section 76 and when there is no such order, a suit will not lie thereunder. [p. 773, col. 1.]

Section 77 provides, in effect, for a new trial of the question of admissibility of a document to registration after the inquiry directed by sections 34 and 35. [p. 771, col. 2.]

Narasimha Nayanavaru v. Ramalingama Rao, 10 M. L. J. 104, dissented from.

Gangara v. Soyara, 21 B. 699, approved.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 113 of 1914, preferred against that of the Court of the District Munsif, Tiruturaipundi, in Original Suit No. 71 of 1913.

Mr. Viswanatha Sastri for Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. K. S. Ramabhadra Aiyar, *Amicus Curie*.

JUDGMENT.

SESHAGIRI AIYAR, J.—The facts are not in dispute in this case. The defendant executed a sale-deed to the plaintiff on the 3rd of September 1912. Owing to the non-payment of the consideration in full, the defendant refused to get the document registered. The plaintiff presented it to the Sub-Registrar for compulsory registration on the 3rd of January 1913. On that day according to the evidence of the Sub-Registrar, he was so busy that he was not able to find time to receive the document and to issue summons to the defendant. The Sub-Registrar, therefore, suggested that the document should be presented the next day with an application for excusing the delay in not having presented it earlier. This was done. The application for excusing the delay was lodged with the Sub-Registrar under section 25, clause (2), of the Registration Act to be forwarded to the Registrar. The Registrar did not excuse the delay. His order has not been put on the record. The Sub-Registrar passed final orders on the 14th January 1913 in these words: "Inasmuch as no permission has been given for accepting the said document for registration under section 25 of the Registration Act, in Current Memo. No. 79, General, dated 11th January, current year, issued by the Registrar the registration of this document is refused under subsection 5 of section 24 of the Registration Rules." (Exhibit E.) Thereupon an appeal was preferred to the Registrar. This was dismissed on 1st February 1913. The present plaint was presented under section 77 of the Registration Act on the 3rd of March 1913. It was conceded before us that the suit was within thirty days of the order of the Registrar. The Subordinate Judge differing from the District Munsif gave a decree to the plaintiff.

In this second appeal as the respondent was not represented, we requested Mr. Ramabhadra Iyer to assist as *amicus curie*. We are indebted to him for his clear and able argument. The appellant's case was presented to us with equal ability and clearness by Mr. Viswanatha Sastri.

GANGADARA MUDALI v. SAMBASIVA MUDALI.

The main contention for the appellant was that this suit is not within the purview of section 77 of the Registration Act. Mr. Viswanatha Sastri argued that the order of the Sub-Registrar communicating the opinion of the Registrar that the delay in presentation will not be excused is not an order "*refusing to admit a document to registration*," as contemplated by section 72, clause (1), of the Act and that no appeal lay to the Registrar against that communication. Therefore the appeal to the Registrar and the order thereon (Exhibit F) were both incompetent and furnished no ground for a suit under section 77. Before dealing with the few cases cited in argument, I shall examine the sections. It is true that under section 25, the power to excuse the delay in presentation is vested solely in the Registrar. What the Sub-Registrar has to do is simply to send up the papers to the Registrar. The party is still before the Sub-Registrar; the final word has to be said by him although he is bound by the opinion of his superior. The next question is, did the Sub-Registrar "refuse to admit the document to registration"? The fact that he has no option in the matter does not affect the solution of the question. In his order, Exhibit E, he says that "the registration of this document is refused." Of course, if he had no power to pass the order, the words used by him will not avail the plaintiff. In my opinion, he has the power to pass an order whether he would register the document or not and that order would be strictly within his rights. The Registration Act uses two or three expressions which have caused some confusion of thought. *Refusal to register, refusal to accept for registration, refusal to admit for registration* are used in the body of the Act without indicating the difference in the meaning to be attributed to these expressions. In my view, the order of the Sub-Registrar is "a refusal to admit the document to registration" and ■ such is appealable. Mr. Viswanatha Sastri pointed out an anomaly which this interpretation would involve. By the appeal to the Registrar in such cases that officer is asked to review his own opinion given on the *ex parte* representation of the Sub-Registrar. There is force in this argument.

The only answer is that on the previous occasion when he passed orders on the papers sent to him by the Sub-Registrar, the Registrar was acting in his advisory capacity. My attention has not been drawn to any provision which enables ■ party who has lodged his application for excusing the delay before the Sub-Registrar to be heard in support of his application. But when he hears an appeal, he is performing ■ judicial act and the parties have ■ right of audience. It may be that the Legislature intended that he should reconsider his decision for good cause shown. However that may be, I am unable to say that the order of the Sub-Registrar is not one refusing to admit the document to registration. An argument was founded on the use of a similar expression in section 58, and it was said that admitting to registration is a technical language which contemplates some preliminary steps. I am not convinced by this argument.

There is one other aspect of the question. Section 76, clause (1) (b), contemplates an original application to the Registrar to direct the registration of ■ document by ■ Sub-Registrar. No doubt such an application *may be* lodged with the Sub-Registrar for its being forwarded to the Registrar. But the language is not mandatory. Under clause 1 of section 25 it is competent to the Registrar, if the delay does not exceed 4 months, to excuse it on certain conditions and direct the registration of the document. There is nothing in the Act to prevent a party from applying to the Registrar to excuse the delay. Section 76, clause (1) (b), implies that such a direct application is competent. If this is correct, the appeal preferred by the plaintiff against the order of the Sub-Registrar may be regarded as an original application to the Registrar to excuse the delay. The fact that he expressed an unfavourable opinion when the papers were forwarded to him would not prevent his entertaining an original application. His dismissal of the appeal would be in effect refusing to direct the Sub-Registrar to register the document. Such ■ refusal would furnish a cause of action for a suit under section 77.

I have thus far avoided discussing the case-law on the point. The decision strongly relied upon is that reported ■ *Gangava v.*

GANGADARA MUDALI v. SAMBASIVA MUDALI.

Sayara (1). In this case immediately on the receipt of the order refusing to excuse the delay, the suit under section 77 was filed. With all respect I am unable to concur in the view that the refusal to excuse the delay is not a refusal to register. I am fortified, in my opinion, by the view taken in Madras in *Narasimha Nayaneraru v. Ramalingama Rao* (2) and *Sivarama Pattar Kariakar v. Edathil Madiathil V. Krishna Iyer* (3), which seem to disapprove of the Bombay decision. The decision in *Kanhaya Lal v. Sardar Singh* (4) is in conflict with the Bombay decision although it is not referred to in the judgment. The reasoning in *Kudrathi Begum v. Najibunnessa* (5) is also in favour of the view I have taken. *Udit Upadhia v. Imam Bandi Bibi* (6) does not really touch this case.

For the reasons above given, I am of opinion that the suit was properly laid under section 77 of the Registration Act.

I would, therefore, dismiss the second appeal.

BAKEWELL, J.—For the purposes of this appeal it is necessary to examine the procedure prescribed by the Indian Registration Act, 1908, for the registration of documents. A party claiming under a document must present it at the proper registration office (section 32) and in certain cases the registering officer is forbidden to accept it for registration [see sections 20 (1), 21 (1), (4), 23, 71 (2)]. Sections 34 and 35 and Part VII prescribe the procedure to be followed upon the inquiry held by the registering officer when he has accepted a document for registration, and Part XI (B) deals with the procedure after this inquiry when he has decided to admit it to registration.

There are, therefore, three principal stages in the registration of a document, *first*, its acceptance by the officer, *secondly*, his inquiry as to its admissibility to the register and *thirdly*, his placing it upon the register.

(1) 21 B. 699.

(2) 10 M. L. J. 104.

(3) 23 Ind. Cas. 23; 15 M. L. T. 233; 26 M. L. J. 307.

(4) 29 A. 284; 4 A. L. J. 171; A. W. N. (1907); 46.

(5) 25 C. 93.

(6) 24 A. 402; A. W. N. (1902) 99.

The Act is silent as to the effect of a refusal by the officer to accept a document for registration except where the time limited for presentation has expired, in which case the principal registering officer has a discretion to enlarge the time (section 25), but possibly the Registrar might act under section 68 (2).

Section 73 provides for an application to the Registrar where in the inquiry before a Sub-Registrar a party has denied execution, and section 72 provides an appeal to the Registrar where a Sub-Registrar has in other cases refused to admit a document to registration. Section 75 deals with the order of the Registrar in an inquiry by him as to the execution of a document by a party.

Section 76 prescribes the procedure to be followed by the Registrar when he refuses to register a document or to direct its registration under section 72 or 75. Section 77 provides a remedy by suit in a Civil Court in cases where the Registrar has refused to order a document to be registered under either of the last mentioned sections. This section, therefore, provides in effect for a new trial of the question of admissibility of a document to registration after the inquiry directed by sections 34 and 35.

Section 34 prohibits the officer from registering a document unless the executants appear within the period limited by section 23 for the presentation of the document, and provides that in such a case an application may be made to the Registrar to enlarge the time.

There appears to be no remedy given by the Act in cases where the Registrar refuses to enlarge the time for presentation or inquiry under section 25 or section 34.

In the present case, the respondent presented a document to a Sub-Registrar on the last day of the period fixed by section 23 and was advised by him to present a petition to the Registrar for further time and the respondent accepted his advice and applied accordingly under section 25. It is clear that the Sub-Registrar should have accepted the document for registration, and that the party should then have applied to the Registrar under section 34. I think that it is equally clear that the Sub-Registrar did not refuse to accept the document for registration, and did not consider whether it was admissible

RAM SAMAJH PANDE v. RAMJAS.

to the register, and, therefore, did not refuse to admit it to registration, but merely offered advice. There was, therefore, no order refusing to admit the document to registration from which ■ appeal would lie under section 72, and no order of the Registrar refusing to direct registration under that section. Section 77 is expressly limited to orders of refusal under section 72 or 76, and when there is no such order a suit will not lie thereunder.

The subsequent proceedings by the respondent were taken after the expiration of the period limited by section 23 and after the order of the Registrar refusing to enlarge the time and the Sub-Registrar and Registrar were prohibited by that section from accepting the document for registration, and the orders passed by them were, therefore, not orders refusing to admit ■ document to registration within the meaning of the Act.

If the respondent had followed the procedure prescribed by section 34 it would still have been within the discretion of the Registrar to refuse an enlargement of the time, and I do not think that the Act provides any means of revising such an order. If the action of the Sub-Registrar be taken as equivalent to an acceptance of ■ document for registration and a refusal to admit it to registration under section 34, it would seem that the respondent has not adopted the remedy prescribed by that section. If, however, the application for enlargement of time be regarded as made under section 34 and not under section 25, the Registrar has exercised his discretion by refusing further time.

If, under the circumstances of this case, the Court passed a decree directing the document to be registered it would, in my opinion, be either exercising a discretion expressly conferred upon the Registrar or revising his order refusing to enlarge the time for acceptance of a document; and the Act gives no such jurisdiction to the Court.

It is regrettable that the Sub-Registrar should have tendered, and the respondent have accepted, advice which was not in accordance with the provisions of the Act, but the Act does not appear to afford any remedy unless the action of the Sub-Registrar be held not to fall within section 86.

I respectfully dissent from the dictum contained in *Narasimha Nayanevaru v.*

Ramalingama Rao (2) which is not binding on this Court, and accept the ruling in *Gangava v. Sayava* (1) which draws ■ distinction between a refusal to accept and a refusal to register ■ document.

There has been no argument before ■ ■ to whether proceedings could be taken otherwise than under the Act against a Registrar or Sub-Registrar who has refused to accept a document for registration, but in the ■ of a Sub-Registrar I ■ inclined to the opinion that section 68 provides ■ remedy. I would allow this appeal and restore the decree of the District Munsif with costs throughout.

SESHAGIRI AIYAR, J. — As my learned brother has taken ■ different view, my judgment which confirms that of the lower Appellate Court prevails. In the result the second appeal is dismissed. As the respondent does not appear there will be no order ■ to costs.

Appeal dismissed.

V.R.P.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 274 OF 1915.

April 10, 1916

Present:—Mr. Kendall, A. J. C.

RAM SAMAJH PANDE—PLAINTIFF—

APPELLANT

versus

RAMJAS AND OTHERS—DEFENDANTS—

RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—
Ostensible owner, transfer by—Transfer, when good—
Reasonable care by transferee.

The provisions of section 41 of the Transfer of Property Act apply to a case where a transfer is made by a person whose name appears in the *khevat* and the real owner not only expressly consents to allow that person to become an ostensible owner of the property transferred but also takes an active part in settling the terms of the transfer, inasmuch as in such a case the transferee must be regarded to have taken reasonable care. [p. 774, col. 1.]

Partap Chand v. Saiyida Bibi, 23 A. 442, A. W. N. (1901) 137, distinguished from.

Appeal from the decree of the Additional Judge, Fyzabad, dated the 17th May 1915, reversing the order of the Munsif, Fyzabad, dated the 3rd February 1914,

GOPISETTI NARAYANASWAMY NAIDU GARU v. KUNAPARAJU CHINA VENKATARAJU.

Babu Basdeo Lal holding brief of Mr. A. P. Sen, for the Appellant.

Pandit Gokaran Nath Misra and Babu Sundar Lal, for Respondents Nos. 2 and 3.

JUDGMENT.—The only question for decision in this appeal is whether the provisions of section 41 of the Transfer of Property Act apply to a certain transaction. It is not necessary for the purposes of this Court to do more than to set out that the appellant claimed through one Sheo Sahai, while the defendants-respondents defended the suit relying on their title through one Nackchhed. The respondents were in possession of certain property by transfer from Nackchhed, from which it was sought to oust them by means of this suit. On the death of Bisheshar the name of Nackchhed was recorded in the revenue papers in 1907. It has been found by the Courts below, ■ a matter of fact, that Sheo Sahai, rather than Nackchhed, was heir to Bisheshar. It is proved that at the time of the transfer the respondents' father ascertained that the property stood in the name of Nackchhed in the *khewat*. It is further proved that he made inquiries at the time and learnt from one Ram Lakhan that Nackchhed's name had been so entered in succession to Bisheshar with the actual consent of Sheo Sahai as Bisheshar's lawful heir. It has further been found that Sheo Sahai was himself taking an active part in settling the terms of the transfer by Nackchhed in favour of the respondents' father, and that Sheo Sahai's pretending entire ignorance of this transfer was palpably false. That being so, it is clear not only that Sheo Sahai expressly consented to allow Nackchhed to become ostensible owner of the property, but that he took an active part in the transfer by that ostensible owner in favour of the respondents' father. In these circumstances the learned District Judge was right in holding that the transferee took reasonable care. He was not called upon to go to the length of consulting the mutation record. For the appellant the attention of this Court has been directed to *Partap Chand v. Saiyida Bibi* (1); but the facts of that case can be entirely differentiated. In that case reasonable care

was not taken. There was in that case reliance on the entries in the *khewat* and no more; and the circumstances of that case were such that ■ mere entry in the *khewat* ought not to have satisfied a transferee acting with reasonable care. The present case is different. To begin with, circumstances did not exist which should have excited the suspicion of the transferee as to the accuracy of the *khewat*: and again, there was also the direct intervention of the real owner both at the time of the entry in the *khewat* and at the time of the transfer. The appeal is, therefore, dismissed. The respondents may have their costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 193 OF 1915.

February 17, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

GOPISETTI NARAYANASWAMY
NAIDU GARU, RECEIVER, NIDADAVOLE
AND MEDUR ESTATES—DEFENDANT NO. 1
—APPELLANT

versus

KUNAPARAJU CHINA VENKATA
RAJU AND OTHERS—PLAINTIFFS AND
DEFENDANTS NOS. 2 TO 4 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 144, 151—Restitution, suit for—Conversion of suit into application under s. 47—Application barred at date of suit, effect of—Limitation Act (IX of 1908), Sch. I, Art. 166.

The discretionary power given to a Court by section 151, Civil Procedure Code, cannot enlarge the scope of section 144, Civil Procedure Code, and cannot convert an application for a relief which has nothing to do with restitution into an application for restitution. [p. 775, col. 1.]

A suit can be converted into an application under section 47 of the Code of Civil Procedure only if the application under section 47 of the Code of Civil Procedure would not be barred by limitation on the date of the suit. [p. 775, col. 1.]

Appeal against the order of the Court of the Temporary Subordinate Judge of Bezvada, in Appeal Suit No. 99 of 1913, (Sub-Court Ellore, transferred for disposal), preferred against the decree of the Court of the District Munsif, Bhimavaram, in Original Suit No. 4 of 1912 (Original

(1) 23 A. 442; A. W. N. (1901) 137.

ALI HUSAIN KHAN v. BANDI BIBI.

Suit No. 459 of 1909 on the file of the Court of the Additional District Munsif of Narsapur).

FACTS.—A decree was passed against plaintiff who had been substituted as the representative of his deceased brother in a suit against the assets of plaintiff's brother in plaintiff's hands. Plaintiff's separate property was attached in execution of that decree and sold in 1907. Plaintiff objected to the attachment and sale, but his objection was disallowed and no appeal was preferred against the Court's order. Subsequently, another judgment-creditor of the plaintiff's brother attached the same property and brought it to sale. The plaintiff intervened by petition, claiming the property as his. The District Munsif dismissed the application, which was, however, reversed on appeal. Plaintiff then instituted the present suit to recover the property from the auction-purchaser on the ground that he was entitled to restitution. The District Munsif dismissed the suit. On appeal, the Subordinate Judge reversed the Munsif's decree and remanded the case for a fresh enquiry. The defendant appealed to the High Court against the order of remand.

Mr. M. Purushothama Naidu, for the Appellant.

Mr. V. Ramesam, for the Respondent.

JUDGMENT.—The learned Subordinate Judge, while admitting that section 144 cannot help the plaintiff (1st respondent) as the order of attachment and sale of plaintiff's properties in execution in the former suit was never varied or reversed, has nevertheless allowed the suit to be treated as an application for restitution and he invokes section 151 of the Civil Procedure Code in his support. We do not think that section 151 can enlarge the scope of section 144 or can convert an application for a relief which has nothing to do with restitution into an application for restitution.

Mr. V. Ramesam, however, for the respondent, argues that the suit can be converted into an application under section 47 of the Civil Procedure Code. No doubt it can be, if the application under section 47 would not be barred by limitation

on the date of the suit. The lower Courts have held that it would be so barred, but Mr. Ramesam contends that their view is erroneous.

The respondent was added on the record as judgment-debtor in the former suit though in a representative capacity. His property was attached and sold in 1907, and he knew of it at least in March 1908. The present suit was brought on 12th August 1909. So long as a sale in execution confirmed by the Court subsists, the judgment-debtor cannot be heard to state that he is still the owner of the property so sold till he sets aside the sale by appropriate proceedings. Article 166 of the Limitation Act is quite clear and he ought to file his petition to set aside the sale within 30 days of the sale.

The lower Court's view is, therefore, right, namely, that this is not a fit case for exercising the discretion given under section 47, clause (2), to convert a suit into an application under that section, as the application would be barred under Article 166.

The appeal is allowed, the Subordinate Judge's order is set aside and the District Munsif's decree is restored with costs in this and in the Sub-Court payable to the appellant by the plaintiff.

Appeal allowed.

V.R.P.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 282 of 1913.

May 20, 1915.

Present:—Mr. Lindsay, J. C.

ALI HUSAIN KHAN, DECEASED, AND
AFTER HIS DEATH TAJUDDIN KHAN AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BANDI BIBI—DEFENDANT—
RESPONDENT.

Declaratory suit—Revenue registers, entry in, adverse to plaintiff's title—Limitation

Where a plaintiff's case is that a cloud is thrown upon his title by reason of an entry in the revenue registers, and he seeks by a declaratory suit to

ALI HUSAIN KHAN v. BANDI BIBI.

the removal of that cloud, the limitation for such a suit runs from the date on which the entry in the revenue registers was first made. [p. 777, col. 1.]

Appeal from the decree of the Subordinate Judge, Tahsil Biswan, District Sitapur, dated the 28th August 1913.

Syed Nabi Ullah and Babu Puttoo Lal, for the Appellant.

Babu Ram Chandra, for Respondents Nos. 1, 3 and 4.

JUDGMENT.—This appeal has arisen out of a suit which was brought by Ali Husain Khan against his daughter Musammât Bandi Bibi. Ali Husain has died since the institution of this suit and his representatives' names have been brought on the record. The case made out in the plaint was to the following effect. The plaintiff alleged that at the time of the last Settlement of the Gonda district he was contemplating going on a pilgrimage to the *Kaba* and he, therefore, applied to the Settlement Authorities to have his underproprietary share of 5 annas 4 pies situated in the village of Fakeri Bankat recorded in equal shares in the names of his three daughters, one of whom was the defendant Musammât Bandi Bibi. This mutation was effected. It was alleged in the plaint that notwithstanding the order for mutation the plaintiff remained all along in possession of the property. He was unable to carry out his intention to go on the pilgrimage and, therefore, never gave up possession over his share. The plaintiff further went on to say that afterwards he made applications to the Revenue Courts to have the *khewat* corrected by removal of the name of Bandi Bibi from the record. The Revenue Courts refused to amend the *khewat* and he, therefore, brought this suit, which was framed as a suit for possession of a 1-anna 9-pies 18-*krants* odd share. In the 6th paragraph of the plaint it was stated that the cause of action had accrued on the 3rd of August 1907 and the 14th of July 1909, these apparently being the dates on which the Revenue Courts had refused to amend the *khewat*. In the fourth paragraph of the plaint it was stated that the plaintiff treated the refusal of the Court to amend the *khewat* as amounting to a dispossession of him from his property, and so the suit was brought as one for possession. The defendant set up that there

had been an oral gift of the property to her and that she had all along been in possession. The Court of first instance came to the conclusion that actual possession had all along remained with the plaintiff and that there had, in matter of fact, been no oral gift in favour of the defendant. The Munsif gave the plaintiff a decree for possession, relying upon the case reported as *Raj Narain Das v. Shama Nando Das Chowdhry* (1), in which it was held that where an entry had been made adversely to the plaintiff in a revenue register in circumstances such as appear in the present case, the plaintiff was entitled to bring a suit for recovery of legal possession. The case went in appeal to the Subordinate Judge of Gonda, who pointed out that the Calcutta ruling which had been relied on by the Court of first instance had been overruled by the decision of *Raj Narain Das v. Shamananda Das Chowdhry* (2) and he further referred to a ruling of this Court, *Khurshaid Ali v. Mahbub Ali* (3) (Munshi Jwala Prasad, Selected Cases, p. 270), in which it was held that there was no distinction to be drawn between legal possession and actual possession. The Subordinate Judge came to the conclusion that the decree of the first Court could not be supported, for the plaintiff had alleged in his plaint that he was actually in possession and had sought no other relief than a decree for possession. He dismissed the suit, therefore, on the ground that it was not maintainable.

It has been argued here in appeal that no issue as to the maintainability of the suit was raised in the Court of first instance, and that no doubt is correct. The lower Appellate Court is wrong, I think, in saying that a defence of this kind was disclosed in the 7th paragraph of the defendant's written statement. Again, the learned Subordinate Judge remarks that although no issue was framed the Munsif seems to have had the point before his mind. This again does not appear to me to be correct. However, the question which I have now to deal with is what relief, if any, can be given to the

(1) 26 C. 845; 4 C. W. N. 162.

(2) 33 C. 1362.

(3) Select Cases No. 226.

MONMOHAN ROY v. HEMANTA KUMAR.

appellant in second appeal. The learned Counsel for the appellant has argued that amendment of the plaint ought to be allowed at this stage and that the plaint having been amended, the plaintiff should be given a declaration to the effect that he is entitled to possession of the property in suit. He claims that notwithstanding the omission to ask for a declaratory relief in the Court of first instance this relief can be given now. On the other hand, the argument is that no declaratory relief can be given in the present case because the suit for declaration is barred by limitation. It seems to me that this latter contention must be accepted. If the plaintiff's case is, as it now appears to be, that a cloud is thrown upon his title by reason of an entry in the revenue registers—a cloud which he wishes to have removed—then it seems to necessarily follow that limitation for a declaratory suit must run from the date on which this entry in the revenue papers was first made. The order by which mutation was effected was made on the 1st of September 1900 and this being so, a declaratory suit for which the period of limitation is six years is now barred by time. I find myself, therefore, unable to accede to the application of the plaintiff to be allowed to amend his plaint at this stage as to make out a case for the grant of a declaratory relief. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 274 OF 1915.

July 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Richardson.

MONMOHAN ROY—PLAINTIFF—
APPELLANT

versus

HEMANTA KUMAR MOOKERJEE—
DEFENDANT—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 43, sub-s. (2) and s. 46, sub-ss. (2), (3)—Appeal against an interlocutory order—Receiver, power of, to make inquiry.

An order calling upon a person who has already

been adjudicated an insolvent to show cause why an order should not be made against him under sub-section (2) of section 43 of the Provincial Insolvency Act, is not appealable under sub-section (2) of section 46 of the Act. [p. 777, col. 2.]

Quære.—Whether such an order could be appealed from by obtaining leave under sub-section ■ of section 46? [p. 777, col. 2.]

A Receiver under the Insolvency Act is an officer of the Court and can be authorised by the Court to ascertain facts and report them to it with a view to the adoption of such steps as may be deemed necessary in the interests of justice, such as paying a surprise visit to the insolvent's house to see if he has concealed properties. [p. 778, col. 1.]

Appeal against the order of the District Judge, Faridpore, dated the 22nd and 26th May 1915.

Babus Satis Chunder Ghose and Bhupendra Chandra Guha, for the Appellant.

Babus Joges Chunder Roy and Hem Chander Majumdar, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against an order calling upon the appellant, who has already been adjudicated an insolvent, to show cause why an order should not be made against him under sub-section (2) of section 43 of the Provincial Insolvency Act. That section authorises the Court to sentence an insolvent to simple imprisonment for a term which may extend to one year, when it is established that he has fraudulently concealed property. In this case, some of the creditors reported to the Receiver that the insolvent had fraudulently concealed property at his residence. The Receiver obtained the permission of the Court to pay a surprise visit. But the visit was of no use, because, although the insolvent was shown the order of the Court, he closed the doors and declined to admit the Receiver into the house. This was reported to the Court, and the Judge thereupon made an order on the insolvent to show cause in the terms stated. This order is clearly not appealable under sub-section 2 of section 46 of the Provincial Insolvency Act, which allows an appeal against an order, under sub-section 2 of section 43, for imprisonment of the insolvent, and has no reference to an interlocutory order of the description now before us. The appellant, however, obtained leave of this Court under sub-section 3 of section 46 to prefer this appeal. Whether sub-section 3 of section 46 was even intended to be applied to a case of this description may be a matter for controversy; but it is plain that there are

PALANIANDI CHETTIAR v. APPAVU CHETTIAR.

no merits whatsoever in the appeal. The insolvent has merely been called upon to show cause why an order should not be made against him under sub-section 3 of section 43; that does not in any way prejudice his position. But, on his behalf, it has been argued, *first*, that the Court should not have authorised the Receiver to pay a surprise visit, and, *secondly*, that the Court had no material for any order. These contentions are groundless. The Receiver is an officer of the Court and when he had good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court could authorise him to ascertain the facts and to report them to the Court, with a view to the adoption of such steps as might be deemed necessary in the interests of justice. Thus, if we assume that the appeal is competent, it is clearly groundless, and must be dismissed with costs, three gold mohurs.

Let the record be sent down as soon as possible.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 24 OF 1915.

March 21, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

PALANIANDI CHETTI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

M. V. APPAVU CHETTIAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. XXI, r. 63—Claim by purchaser from judgment-debtor, rejection of—Suit by unsuccessful claimant—Sale in fraud of creditors, plea of, in defence, whether lies—Attachment after sale—Avoidance of sale necessary before proceeding in execution—Suit to set aside sale, whether should be representative—Transfer of Property Act (IV of 1882), s. 53—English and Indian Law.

In a declaratory suit under Order XXI, rule 63, Civil Procedure Code, by a vendee from the judgment-debtor, the decree-holder cannot plead in defence that the sale was in fraud of creditors and could not prevail over his decree. If the sale was prior to the attachment, the decree-holder must first set aside the sale by a separate suit. [p. 780, col. 1; p. 782, col. 2.]

Iswar Timappa v. Devar Venkappa, 27 B. 146, 5 Bom. L. R. 19, followed.

Rajah of Ramnad v. Arunachellam Chettiar, 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; *Mahamad Haji Zakeria v. Ahmadbhai Habibbhai*, 25 B. 327; 3 Bom. L. R. 368; *Phul Kumari v. Ghanshyam Misra*, 35 C. 202; 7 C. L. J. 36 (P. O.); 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22; *Narayana Pattar v. Viraraghavan Pattar*, 23 M. 184; *Chidambaram Chettiar v. Sami Aiyar*, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351, referred to.

Vasudev Raghunath v. Janardan Sadashiv, 29 Ind. Cas. 497; 17 Bom. L. R. 522; 39 B. 507, distinguished.

Per Coutts Trotter, J.—The mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and, therefore, he must follow up his judgment by attaching the properties in order to enable him to utilize section 53 of the Transfer of Property Act in answer to a claim founded on the impeached deed of transfer. [p. 780, col. 1.]

Per Seshagiri Aiyar, J.—A suit to set aside a sale as voidable under section 53 of the Transfer of Property Act need not be a representative one by all the creditors in a body. Any person deeming himself to be defrauded, defeated or delayed may sue to impeach the transaction, provided he alleges in his plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff but would enure for the benefit of all creditors like himself. [p. 781, cols. 1 & 2; p. 782, col. 1.]

Reese River Silver Mining Co., v. Atwell, 7 Eq. 347; 20 L. T. 163; 17 W. R. 601; *Hakim Lal v. Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889; *Burjorji Durabji Tatel v. Dhunbai*, 16 B. 1, referred to.

Such suit, however, is not necessary either by the creditor individually or conjointly with the other creditors where the transfer is void or has been found to be a sham transaction. [p. 782, col. 2.]

In England, if a judgment was obtained at Common Law, and a further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in the matter until all the Common Law remedies had been exhausted. A judgment-creditor in England is in a very favourable position as compared with the judgment-creditor in India. He becomes practically the owner of the property which he seizes either under a writ of *eligit* or *ji fa*. The judgment-creditor in India is, for all practical purposes, in the same position as any ordinary creditor and there is nothing in the words of section 53 of the Transfer of Property Act to differentiate between the position of the decree-holder and that of an ordinary creditor. [p. 782, cols. 1 & 2.]

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 865 of 1912, preferred against that

PALANIANDI CHETTIAR v. M. V. APPAVU CHETTIAR.

of the Court of the Subordinate Judge of Mayavaram, in Original Suit No. 47 of 1910.

Mr. A. Krishnaswami Aiyar, for the Appellant.

Mr. O. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—Although this appeal raises questions of difficulty and importance, the facts material to it can be stated very shortly. The plaintiff sued for a declaration that he was the absolute owner by purchase of the suit properties as against the defendants who were holders of decrees against his vendor. The plaintiff's title was based on a sale-deed, dated the 5th of September 1903, from Velayudham Chetty to himself for a consideration of Rs. 14,250. It has been found that this deed and the transaction which is carried out were brought into existence with intent to defraud and defeat the creditors of the transferor, and that finding is not and cannot be challenged, but the appellant contends that it is not competent to the defendants to invoke that finding in aid in the present proceedings. For the moment, I am assuming that the transaction in question was in this sense a real one, that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say, it was not a merely colourable paper transaction, leaving the real beneficial enjoyment of the property with him who purported to transfer it. Had the transaction been a merely colourable one, it would, no doubt, have been void and the plaintiff could not have succeeded in his action. His contention is that if it is only voidable, it stands good until set aside in proceedings appropriate for the purpose, such proceedings being a suit brought for the express purpose by or on behalf of all the creditors of the transferor.

The material section is section 53 of the Transfer of Property Act which is as follows: "Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed."

The section broadly reproduces the

effect of the famous Statute of Elizabeth 13 Eliz., C. 5, and the English decisions on that Statute are always referred to in India as authorities for the construction of the Indian section. In England it has been held that a suit to avoid settlement must be brought on behalf of all creditors [*Reese River Silver Mining Company v. Atwell* (1)], and that decision has been followed in India in *Hakim Lal v. Mooshahar Sahu* (2) and *Burjorji Dorabji Patel v. Dhunbai* (3). But it has been held by the English Courts that where the plaintiff is a judgment-creditor who has sued out a writ of *elegit* he may sue on his own behalf without reference to the general body of creditors and impeach the transfer as having been executed with intent to defraud his particular claim. *Blenkinsopp v. Blenkinsopp* (4). That case expressly left open the question as to whether the deed could be set aside by a person who had signed the judgment but not sued out the writ. We are asked to say that in India the section may be called in aid by a creditor who has obtained a decree but has not attached the properties, it being conceded that a creditor who had attached the properties can use the section as a weapon of defence as well as of offence in a case like the present. See *Rajani Kumar Dass v. Gaur Kishore Shaha* (5); *Chidambaram Chettiar v. Sami Aiyar* (6). The matter has been definitely decided by the High Court of Bombay in *Ishwar Timappa v. Devar Venkappa* (7), a decision to which Jenkins, C. J., was a party. In the absence of a decision of this Court I propose to consider the matter on principle.

The remedy sought may be treated as the equivalent of a remedy by way of equitable execution, in aid of the legal right given by the judgment. The English authorities subsequent to *Blenkinsopp v. Blenkinsopp* (4) seem clearly to show that such equitable execution will not be granted until the title

(1) (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.

(2) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.

(3) 16 B. 1.

(4) (1852) 1 De G. M. & G. 495; 42 E. R. 644; 21 L. J. Ch. 401; 16 Jur. 787; 12 Beav. 568.

(5) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.

(6) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(7) 27 B. 146; Bom. L. R. 19.

PALANIANDI CHETTIAR v. APPAVU CHETTIAR.

of him who seeks it has been completed, that is to say, accordingly to the technical language of the English Law, a judgment-creditor cannot invoke the equitable relief until he has followed up his judgment by suing out a writ of *fi fa* or *elegit*, as the case may be. This was expressly decided by Turner, V. C. (as he then was), in *Smith v. Hurst* (8) and he cites in his judgment an interesting passage from Lord Reddesdale's Treatise on Pleading. An authoritative and clear exposition of the principle on which Turner, V. C., founded his decision is contained in Lord Cottenham's opinion in *Neate v. Duke of Marlborough* (9). Applying that principle, I think it must be held that the mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor; and, therefore, he must follow up his judgment by attaching the properties in order to enable him to utilize section 53 in answer to a claim founded on the impeached deed of transfer. The inconvenience of allowing each and every creditor in turn to attack the deed independently is obvious and is amply illustrated by the history of the present plaintiff, who has been compelled to buy off a series of creditors one after the other. Accordingly, I am of opinion that *Ishwar Timappa v. Devur Venkappa* (7) was correctly decided and is in accordance with principle and I respectfully follow it. I, therefore, hold that the fact that the deed was executed with intent to defraud the creditors of the transferor affords the defendants no answer to the plaintiff's claim.

As the learned Judge has not decided the question as to whether the transaction is merely colourable, the case must go back to him for a finding on the point.

Six weeks are allowed for submission of finding and seven days are allowed for filing objections.

SESHAGIRI AIYAR, J.—The property in this suit belonged to one Velayudham Chetty. He executed a sale-deed to the plaintiff in respect of it on the 5th September 1903. It is not disputed that at the time of the sale, Velayudham Chetty was heavily involved in debt. The defendants in this suit had a

number of decrees against him for sums of money due to them before the date of the sale to the plaintiff. They attached the properties in execution of their decrees. The plaintiff filed a claim petition which was rejected in September 1910. Thereupon he filed the present suit for a declaration that the property belonged to him by virtue of the sale and Velayudham Chetty had no interest left in the property for the defendants to attach and sell. The Subordinate Judge who tried the original suit held that the sale was binding to the extent of Rs. 9,946 odd, that sum was applied towards discharging certain mortgages upon the property created by Velayudham Chetty. He dismissed the suit as regards the rest of the claim put forward by the plaintiff. On appeal to the District Judge, the Subordinate Judge's decree was confirmed. In this second appeal a point was raised for the first time by Mr. A. Krishnaswami Aiyar, to the effect that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution of their decrees, they were not entitled to resist the claim of the plaintiff in this suit. Mr. Ananthakrishna Aiyar objected to this contention being heard for the first time in second appeal, that he might have rectified the defect if the objection had been raised before the Trial Court. It is difficult to see what new evidence could have been let in by the defendants in answer to the abstract legal position argued in this Court. The plaintiff's case is that, at the time of the attachment, Velayudham Chetty had no interest in the property because at that time no suit had been brought to set aside the sale in plaintiff's favour. To such a contention, if it is sound, the only answer will be that the sale had been set aside in a properly framed suit. That is not the answer. The decision in *Hakim Lal v. Mooshahar Sahu* (2), where it was pointed out that an objection like this should not be entertained in second appeal, does not help the respondents. In that case the suit was brought by some of the creditors, and when objection was taken in second appeal that the suit should have been brought in a representative character, it was met by the plea that if the objection had been taken in time, this defect could have been cured. That is not the present case. Although it is unfortunate

(8) (1855) 10 Hare 30; 68 E. R. 826; 22 L. J. Ch. 289; 17 Jur. 30; 20 L. T. (o. s.) 303; 90 R. R. 263.

(9) (1838) 3 Myl. & Cr. 407 at p. 421; 40 E. R. 983; 2 Jur. 76; 45 R. R. 304.

PALANIANDI CHETTIAR v. APPAVU CHETTIAR.

that this question was not raised in the earlier stages, I do not see my way to refusing to hear the question argued.

On the merits the *first* contention of Mr. Krishnaswami Aiyar was that under section 53 of the Transfer of Property Act it is not open to any one of the creditors of the transferor to challenge the validity of the conveyance. He relied on the observations of Mookerjee and Holmwood, JJ., in *Hakim Lal v. Mooshahar Sahu* (2). In the first place, it should be pointed out that section 53 does not in terms apply to the present case, as it is in Chapter II which preserves to Hindus, Muhammadans and Buddhists their own law on the question covered by its provisions. This will not, however, materially affect the decision, as there is nothing in the Hindu Law which is inconsistent with section 53 of the Transfer of Property Act. See *Rangilbhai Kalyandas v. Vinayak Vishnu* (10). At any rate section 53 may be taken as indicating the principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions. The decision in *Hakim Lal v. Mooshahar Sahu* (2), no doubt, lays down that it is settled law in England that if the debtor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13 Eliz., C. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the debtor. The learned Judges say that the rule appears to be based upon a perfectly sound and intelligible principle and point out the difficulties which the contrary conclusion may lead to. Speaking for myself, there are many difficulties in demanding that all the creditors should join in a representative action as there are in permitting a number of actions being brought against the same purchaser. However that may be, the language of section 53 of the Transfer of Property Act, to my mind, is clear that any person who was defrauded, defeated or delayed can impeach the transaction.

Before dealing with the English cases quoted by the learned Vakil for the appellant I wish to draw attention to section 11, Explanation 6, of the Code of Civil

(10) 11 B. 666.

Procedure. That will apply to actions which may be brought by one of the defeated or delayed creditors if he claims a right which is common to himself and to other creditors similarly situated. It may be that section 53 has been so worded having regard to the language of this explanation to section 11 of the Code of Civil Procedure. The case in *Hakim Lal v. Mooshahar Sahu* (2) went up on appeal to the Judicial Committee but their Lordships did not decide the ~~■~~ on this point. See *Musahar Sahu v. Hakim Lal* (11). The only other Indian cases bearing on the question are *Burjorji Dorabji Patel v. Dhunbai* (3) and *Ishwar Timappa v. Devar Venkappa* (7). Among a number of points decided by Mr. Justice Telang in *Burjorji Dorabji Patel v. Dhunbai* (3), the learned Judge points out that the plaintiffs in that suit were only some of the creditors and they were not entitled to succeed inasmuch as the suit was not filed by them on behalf of and for the benefit of all the creditors. When this decision was passed the Transfer of Property Act did not apply to the Bombay Presidency and the decision proceeded solely upon English authorities. *Ishwar Timappa v. Devar Venkappa* (7) was after the Transfer of Property Act was applied to Bombay. It does not appear from the judgment that the learned Judges required that the other creditors should *eo nomine* be parties to the suit. Some observations of the Judicial Committee in *Chatterput Singh v. Maharaj Bahadur* (12) were relied upon by the appellant. The observation that "such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose," do not necessarily imply that a representative action is the only mode of setting aside a fraudulent sale. Therefore I am of opinion on the language of section 53 of the Transfer of Property Act that it is open to any creditor to impeach a conveyance made by his debtor provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights

(11) 32 Ind. Cas. 343; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 496; 18 Bom. L. R. 378; 43 C. 521; 30 M. L. J. 116.

(12) 32 C. 198 at p. 217; 9 C. W. N. 225; ■ A. L. J. 190; 32 I. A. 1 (P. C.).

PALANIANDI CHETTIAR v. APPAYU CHETTIAR.

to the litigating plaintiff but would enure for the benefit of all creditors like himself.

The English cases to which our attention was drawn do not in unmistakable terms lay down that all the creditors should join in a representative action before a fraudulent sale can be set aside. All that Justice Williams in *Vyse v. Brown* (13) held was that the settlement should not be treated as void but it was liable to impeachment in a proper action. *Glegg v. Bromley* (14) does not take the matter any further. But both these cases are authorities for the position that the assignment by the debtor will be good and valid until it is set aside in a proper proceeding. There are certain observations in *May on Fraudulent Conveyances* which on their face appear to lay down that a judgment-creditor was in a different position from an ordinary creditor and that it was open to the former by virtue of his judgment to levy execution without having the assignment set aside in a suit for that purpose. The proposition is thus stated:—"Where a creditor has a judgment or order of Court, or process of execution in respect of his claim, and might obtain relief in equity thereunder against property held by, or in trust for, his debtor and the debtor is living, a Court of Equity can declare a settlement by the debtor which is fraudulent within 13 Eliz., C. 5, to be void against the plaintiff without also declaring it to be void against the creditors generally, and may direct the settled property, or a sufficient part of it, to be applied in satisfaction of the plaintiff's claim." When the cases cited for this proposition are examined they show that if a judgment was obtained at Common Law, and a further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in the matter until all the Common Law remedies had been exhausted. See *Smith v. Hurst* (8), *Neate v. Duke of Marlborough* (9) and *Reese River Silver Mining Co. v. Atwell* (1). But

since the Judicature Act and since the Act of Edward I which define the rights of judgment-creditors, these decisions have no practical value. A judgment-creditor in England is in a very favourable position as compared with a judgment-creditor in this country. He becomes practically the owner of the property which he seizes either under a writ of *elegit* or of *fi fa*. I do not think the English decisions which differentiate between the position of the judgment-creditor and that of an ordinary creditor are of much use in deciding Indian cases. The judgment-creditor in India, for all practical purposes, is in the same position as any ordinary creditor. If he attaches the property it would give him no lien; if he realises moneys they would be subject to participation by those who may be entitled to rateable distribution. But the position in England is altogether different. Therefore the passage in *May* relating to the judgment-creditor has no relevancy in this country. Nor is there anything in the words of section 53 to differentiate between the position of the decree-holder and that of an ordinary creditor.

The next question is whether the judgment-creditor can protect his rights to proceed against the property of the judgment-debtor by pleading in defence that the sale which the plaintiff seeks to establish in the suit should be set aside. There is no question that if the sale is void or is found to be a sham transaction, it will not be necessary either for the creditor individually or conjointly with others to sue to set aside the sale. But if it is only voidable, it seems to me that the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that in cases of voidable transactions until the transaction is avoided, it continues in force. See *Rajah of Ramnad v. Arunachellam Chettiar* (15) and *Mahamad Haji Zakeria v. Ahmadbhai Habibbhai* (16). Therefore at the time that the creditor attached the property the sale was effective to confer title upon the plaintiff.

(13) (1884) 13 Q. B. D. 109; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151.

(14) (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 826.

(15) 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321.

(16) 25 B. 327; 3 Bom. L. R. 368.

GANES DUTT SINGH v. LACHMI NARAIN SINGH.

It was held by the Judicial Committee in *Phul Kumari v. Ghanshyam Misra* (17) that the effect of a decree in a suit brought by a defeated claimant is to place the parties in the position they occupied at the time the claim was put in. Consequently if the defendant succeeds in his defence, the result of it will be to allow him to attach the property as if it were the property of the judgment-debtor. This, as I already pointed out, can do him no good as long as the sale is not set aside. Therefore I am of opinion that the defendant is not entitled to avoid the sale by his defence. Mr. Ananthakrishna Aiyar drew our attention to *Vasudev Raghunath v. Janardan Sadashiv* (18). All that was decided in that case was that a subsequent transferee was not entitled to impeach a completed sale. It is true that another answer to the defence could have been that the sale was subsisting at the time of the transfer. However, this is no authority for the position that without setting aside the sale a judgment-creditor can impeach the transaction as a defence to the action commenced by the purchaser. The point we have to decide was not considered in *Narayana Pattar v. Viraraghavan Pattar* (19), *Chidambaram Chettiar v. Sami Aiyar* (6) and *Ishan Chunder Das Sarkar v. Bishu Sirdar* (20), to which the learned Vakil for the respondents invited our attention. I have, therefore, reluctantly come to the conclusion that the objection raised by Mr. A. Krishnaswami Aiyar should be allowed.

Appeal allowed; Case remitted.

V.R.P.

(17) 35 C. 202; 7 C. L. J. 36 (P. C.); 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 35 I. A. 22; 14 Bur. L. R. 41.

(18) 29 Ind. Cas. 497; 17 Bom. L. R. 522; 39 B. 507.

(19) 23 M. 184.

(20) 24 C. 825; 1 C. W. N. 665.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3629
TO 3635 OF 1912, 580 OF 1913 AND
3595 TO 3598, 3600, 3601 AND 3603 OF 1912.
August 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice N. R. Chatterjea.

GANES DUTT SINGH AND OTHERS—

APPELLANTS

versus

LACHMI NARAIN SINGH AND OTHERS—

RESPONDENTS.

Evidence Act (I of 1872), s. 3—*Test of proof*—*Bengal Tenancy Act* (VIII B. C. of 1885), ss. 29, 30 (c)—*Enhancement of rent, validity of.*

Where the District Judge in appeal held that in all human probability the tenant defendants had paid an enhanced rent but he declined to draw the inference that this rent paid was at the enhanced rate contracted for by the tenants as in his opinion it was absolutely impossible to determine what the sum paid was:

Held, that the treatment of the case by the District Judge involved an error of law, as he had applied a test of proof other than that embodied in section 3 of the Indian Evidence Act. [p. 785, col. 1.]

Boisogomoff v. Nahapiet Jute Co., 29 C. 323; 6 C. W. N. 495; *Jarat Kumari Dassi v. Bissessur Dutt*, 13 Ind. Cas. 577; 39 C. 245; 16 C. W. N. 265, referred to.

If two elements are proved, namely, *first*, that there was an agreement to pay rent at a rate higher than the previous rate; and *secondly*, that rent has been paid at a higher rate, the inference follows that the requirements of proviso (1) of section 29, Bengal Tenancy Act, have been fulfilled, although it is not proved that the whole of the amount payable at the stipulated enhanced rate has been actually realised by the landlord from the tenant. [p. 785, col. 2.]

Obiter.—The enhancement under section 30 (c) of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent by the landlord for the improvement, and the enhancement agreed to by the tenant may be taken *prima facie* as his own estimate of what would be fair rent under section 30 (c) till, at any rate, the tenant shows that his estimate was erroneous. [p. 786, col. 1.]

Where in consequence of a long standing dispute between the landlord and the tenant regarding enhanced rent payable by the tenant under section 30 (c) the tenant did not pay the rent:

Held, that in decreeing the landlord's suit for arrears of rent damages should not be awarded against the tenant. [p. 786, col. 2.]

Appeals against the decrees of the District Judge, Bankipore, dated the 18th May 1912, modifying those of the Munsif, Patna, dated the 12 March 1910.

Sir Rash Behary Ghose, and Babus Umakali Mukherjee, Kulwant Sahay and Sivanandan Roy, for the Appellant.

GANES DUTT SINGH v. LACHMI NARAIN SINGH.

Babus Nogendra Nath Mitter and Abani Bhusan Mukherjee, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent due for the years 1313 to 1316 (*Fasli*). The case for the plaintiffs is that the holding in question was originally *bhowli*, that about the year 1889, the rent was commuted into *nagdi* at the rate of Rs. 5 a year and that rent was realised at that rate up to the year 1897, when the tenants agreed to pay rent at the enhanced rate of Rs. 6-8 in consideration of an improvement to be effected by the landlords. The improvement in question was a channel through which surplus water might flow out of the land. The plaintiffs assert that the improvement was effected at their expense and that the tenants have enjoyed the benefit thereof. The plaintiffs further allege that rent was paid by the tenants at the rate of Rs. 6-8 per *bigha* till quite recently, when there was a fresh agreement to pay rent at the enhanced rate of Rs. 9 per *bigha* in consideration of an improvement in the channel. The defendants deny all the allegations of the plaintiffs. They also deny the character of the tenancy and contend that rent was never paid even at the rate of Rs. 5 per *bigha*. They allege further that there was no agreement to pay rent at the rate of Rs. 6-8 on account of the improvement mentioned, much less was there a subsequent agreement to enhance the rent to Rs. 9. They finally contend that if there was an agreement for enhancement of rent, it was illegal as made in contravention of section 29 of the Bengal Tenancy Act. The Court of first instance gave the plaintiffs a modified decree, which was confirmed on appeal by the District Judge. The case was then brought in second appeal to this Court and was remanded. This Court directed the District Judge to find whether the contract for enhancement of rent was valid and operative under section 29 of the Bengal Tenancy Act, and, if it was not so operative, to determine, to what extent the rent should be enhanced under section 30 (c) of the Bengal Tenancy Act. This remand was based on two findings contained in the judgment of the District Judge; namely, first, that there was an agreement to pay rent at the rate of Rs. 6-8 in consideration of the improvement to be effected by the landlords; and secondly, that the im-

provement in question had been made at the cost of the landlords and the benefit thereof had been enjoyed by the tenants. After remand, the District Judge has held, first, that the contract for enhancement of rent was invalid under section 29 of the Bengal Tenancy Act. Secondly, that the plaintiffs were entitled to rent at the rate of Rs. 5-10 per *bigha* under section 30 (c) of the Bengal Tenancy Act. He has accordingly modified the decree by the Primary Court and has also allowed the plaintiffs damages upon the sum decreed in their favour. The plaintiffs have appealed against this decree. The defendants also have appealed on the ground that no enhancement should have been allowed and that no decree for damages should have been made. The appeals by the plaintiffs raise two substantial questions; first, is the contract for enhancement of rent valid under section 29 of the Bengal Tenancy Act; and, secondly, if it is not valid, what is the enhanced rent which should be decreed to the plaintiffs under section 30 (c) of the Bengal Tenancy Act.

As regards the first question, there is now no controversy that the tenants did agree to pay enhanced rent in consideration of improvements to be effected by the landlords at their expense, that the improvements have been made and that the tenants have enjoyed the benefit thereof. But this agreement for enhancement was not in writing and registered, as required by clause (a) of section 29, the question arises, whether the plaintiffs have brought themselves within clause (1) of the proviso to that section. Clause (1) of section 29 provides that the money rent of an occupancy *raiyyat* may be enhanced by contract, subject to the condition that the contract must be in writing and registered. To this is added the proviso that nothing in the section shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed. Before the District Judge, it was argued that in all human probability the tenants paid rent at the enhanced rate of Rs. 6-8 a *bigha*, as contemplated by the first clause of the proviso. The considerations urged in support of the argument are set out in the judgment of the District Judge and may be recapitulated here. If there was an agreement to pay

GANES DUTT SINGH v. LACHMI NARAIN SINGH.

rent at the rate of Rs. 6-3 and if the improvements in question were effected by the landlords at their expense and enjoyed by the tenants, is it at all probable that the landlords should have from 1304 to 1312 accepted rent at the lower rate? No suit for rent was previously brought; rent had been amicably settled and it was difficult to understand why the landlords should have, during all these years, contented themselves with the smaller rent after they had invested capital on the works of improvement, in consideration of which the tenants agreed to pay a higher rent. The District Judge concedes that these considerations show that in all human probability the defendants had paid a sum higher than Rs. 5 per *bigha* from 1304 to 1312. But he declined to draw the inference that the rent had been paid at the enhanced contract rate, because, in his opinion, it was absolutely impossible to say what the sum paid was. In another passage in his judgment, he states that although the tenants agreed to pay Rs. 6-8 per *bigha*, if the landlords would improve the irrigation in the village, they did not in fact pay the whole of that amount, and the landlords, rather than fight the whole body of tenants, were glad to accept any addition to the previous rent which they were willing to give. In our opinion, the treatment of the case by the District Judge involves two errors of law, namely, *first*, he has applied a test of proof other than that embodied in section 3 of the Indian Evidence Act; and *sec n dly*, he has not correctly appreciated the requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act.

As regards the first point, we must bear in mind that section 3 of the Indian Evidence Act lays down that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The effect of this section has been considered in two recent cases; namely, *Bois-gomoff v. Nahapiet Jute Company* (1) and *Jarat Kumari Dassi v. Bissessur Dutt* (2).

(1) 29 C. 323; 6 C. W. N. 475.

(2) 13 Ind. Cas. 577; 39 C. 245; 16 C. W. N. 265.

In the second of these cases, Jenkins, C. J., pointed out that the materials on which Courts have to pronounce are necessarily imperfect; for apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred sometimes by the intervention of interpretation. Demonstration or a conclusion at all points logical cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. The Evidence Act, consequently, expresses the rule in terms which allow full effect to be given to circumstances or conditions of probability or improbability. To the same effect is the observation of Banerjee, J., in the case first mentioned; that section 3 only lays down a rule of common sense. The judgment of the District Judge in this case shows that he has tested the evidence as if the Indian Evidence Act only provided that a fact is said to be proved when after considering the matter before it the Court believes it to exist. It has been overlooked that a fact is also said to be proved when the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The District Judge has very forcibly set out the circumstances which, in his opinion, show that, in all human probability, the tenants paid rent at a rate higher than Rs. 5. He should consequently have held that the fact in question has been proved.

As regards the second point, the District Judge has apparently held that the case cannot be brought within the first clause of the proviso to section 29, unless it is proved that the whole of the amount payable at the enhanced rate has been actually realised by the landlords from the tenants. That clearly is not the intention of the Act. If two elements are proved, namely, *first*, that there was an agreement to pay rent at Rs. 6-8, which is higher than the previous rate of Rs. 5 a *bigha*, and *sec n dly*, that rent has been paid at a higher rate than Rs. 5, the inference follows that the requirements of the section have been fulfilled. In these circum-

GANES DUTT SINGH v. LACHMI NARAIN SINGH.

stances, we must hold, upon the facts found in the judgment of the District Judge, that the contract for enhancement of rent from Rs. 5 to Rs. 6-8 is operative between the parties.

As regards the second question, namely, the enhancement of rent under section 30 (c), we may state that in the view we take of the first question, it is not necessary for us to deal with it in detail. But we may add that the judgment of the District Judge is assailable in second appeal even in respect of that matter. The District Judge has held that the cost of the improvement by the landlord was Rs. 5 per *bigha*, and has, on this ground, allowed the plaintiffs a decree at the enhanced rate of Rs. 5-10 per *bigha*. He has not stated explicitly the process of reasoning which led him to this conclusion. But it has been suggested—and the suggestion seems plausible—that he has added the 10 annas as fair interest on the sum spent by the landlord to carry out the improvement. This ignores the fact that the landlord would be entitled to rent at the enhanced rate only so long as the improvement might last, and that a time must come when the rent would have to be reduced to the original rate. The consequence would be that if the landlord were allowed nothing beyond fair interest on the capital invested for the purpose of the improvement, his capital would be lost to him after the lapse of a few years. Consequently, the enhancement should include a sum in addition to the interest payable upon the capital spent. Then, again, as the tenants agreed to pay Rs. 6-8 per *bigha*, in consideration of the improvement, that may be taken, *prima facie*, as their own estimate of what would be fair rent under section 30 (c); and the Court might well adopt this as the basis for a decree till, at any rate, the tenants showed that their estimate was erroneous. But, as we have said, it is not necessary for us to develop this aspect of the case, because the plaintiffs are entitled to rent at the contract rate of Rs. 6-8 per *bigha* for the years mentioned.

Attention may here be drawn to the effect of the second clause of the proviso to section 21, which makes clause (b) (whereby the amount of enhancement is

limited to two annas in the rupee on the rent previously payable) applicable only to cases where no improvement has been effected by the landlord at his expense. Where, as here, such improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding. Thus, although we allow the plaintiffs to realise rent from the defendants at the enhanced rate for the years in suit, in any subsequent suit for rent, it would be open to the tenants to establish, if possible, that rent should not be decreed at the enhanced rate, because the improvement either no longer exists or does not substantially produce the estimated effect in respect of the holding. It is obviously just that if the improvement has ceased to exist in part only, there should be a corresponding reduction in the enhanced rent.

As regards the appeals by the tenants we are of opinion that this is a case where damages should not be decreed. There has obviously been a long standing dispute between the parties, and if the tenants have failed to pay rent regularly, they alone cannot be held responsible; the landlords, on their part, put forward a claim for enhanced rent at the rate of Rs. 9 and that case has completely broken down.

The result is that this appeal is allowed and the decree of the District Judge varied. There will be a decree in favour of the plaintiffs for rent, in respect of the years in suit, at the rate of Rs. 6-8 per *bigha*. The rent in arrears will carry interest at Rs. 12-8 per cent. per annum up to the date of the institution of the suit. The amount decreed will carry interest at 6 per cent. per annum. The parties will pay their own costs throughout the litigation.

This judgment will govern Second Appeals Nos. 3630, 3631, 3632, 3633, 3634, 3635 of 1912 and 580 of 1913 preferred by the landlords, as also Second Appeals Nos. 3595, 3596, 3597, 3598, 3600, 3601 and 3603 of 1912 preferred by the tenants. In each case, the appeal will be

PITCHAYYA v. SUBBA RAO.

allowed and a modified decree drawn up as above.

Appeals allowed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 11 TO 14
OF 1915.

March 14, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

TADEPALLI PITCHAYYA AND OTHERS—
DECREE-HOLDERS—PETITIONERS—
APPELLANTS

versus

TADEPALLI SUBBA RAO AND OTHERS—
COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 151 to 153, O. XX, r. 6, O. XLVII, r. 1—Execution proceedings—Right of Court to review or vary decree—Decree on award—Decree at variance with award as to payment of costs—Jurisdiction of Court—Amendment of decree—Remedy of party.

A party to a suit, who has not appealed against the decree or applied for review of the judgment passed therein, cannot be allowed to contend in execution proceedings that the judgment and decree are erroneous and to ask that they should be amended or corrected. [p. 788, col. 2.]

Where a decree passed on an award, by mistake or inadvertence, embodied a relief ■ to payment of costs not mentioned in the award, the defect can be remedied only by an appeal or by an application for review under Order XLVII, r. 1, Civil Procedure Code, and not by amendment of the decree. [p. 788, col. 2.]

Sections 151 to 153, Civil Procedure Code, do not apply to an erroneous judgment or decree. [p. 788, cols. 1 & 2.]

Parameshwara v. Seshagiriappa, 22 M. 364 and *Lakho Bibi v. Salamat Ali*, 20 A. 337; A. W. N. (1898) 59, referred to.

Appeal against the order of the Court of the Temporary Subordinate Judge, Masulipatam, in Execution Petition No. 17 of 1914 in Original Suit No. 21 of 1907; and

Appeals against the orders of the Court of the Temporary Subordinate Judge of Masulipatam, in Miscellaneous Petitions Nos. 212 to 214 of 1914, in Execution Petition No. 17 of 1914, in Original Suit No. 21 of 1907.

Mr. V. Ramadoss, for the Appellants.

Messrs. V. Ramesam and T. Ramachandra Rao, for the Respondents.

JUDGMENT.—These are appeals by the sons of the deceased 1st plaintiff in Original Suit No. 21 of 1907 in the Subordinate

Court of Masulipatam, against the order passed in Execution Petition No. 17 of 1914 and in Miscellaneous Petitions Nos. 212 to 214 of 1914.

The facts are somewhat complicated, but we will endeavour to state them as shortly ■ possible. One Tadepalli Garudachalam and his minor sons, the present appellants, brought ■ suit, Original Suit No. 10 of 1899, in the Masulipatam Sub-Court for partition. The parties to the suit referred the matters in dispute to arbitrators and presented ■ petition, Exhibit G, to the Court under section 506, Civil Procedure Code, on 11th April 1900. The only fact, which it is necessary to state in regard to this reference to arbitration, is that it provided that the costs—presumably the Court costs—of the plaintiffs and the defendants should be deducted and paid from the “*rasi* amount” (joint family funds). On 24th September 1903 an *interim* decree, embodying the terms of the award of the arbitrators, was passed. It may be mentioned that the *interim* decree, while it provided “that the plaintiffs were entitled to get for their share Rs. 40,251 odd and one-fifteenth of the property as per Schedule B attached to the decree, subject to the variations that might have to be made in the final decree upon settlement of accounts left for disposal, and that a Commissioner should be appointed to settle the accounts,” is silent as to costs. A Commissioner was appointed to take accounts, his remuneration being fixed at Rs. 350, which was apparently paid in the first instance by the plaintiffs. The parties having raised objections to the Commissioner’s report, ■ second reference to arbitrators was made on 14th August 1911. Objections were taken by certain of the defendants to the award, which was, however, accepted by the Court and on 5th August 1912 ■ final decree was passed. The decree directed *inter alia* that defendants should pay plaintiffs Nos. 2 to 4 their costs amounting to Rs. 2,087. The costs included Rs. 1,225 stamp for the plaint, Pleader’s fee Rs. 240, general stamp Rs. 242-8-0 and Commissioner’s fee Rs. 350. No appeal having been preferred against the decree, the plaintiffs put in an Execution Petition No. 17 of 1914 to recover the costs Rs. 2,087, after deducting Rs. 278-4-0 paid by the defendants Nos. 11 and

PITCHAYYA T. SUBBA RAO.

12, and also for possession of item 6 decreed to them. On 1st July 1914, the 2nd defendant and defendants Nos. 14 to 16 presented petitions, Miscellaneous Petitions Nos. 212 to 214 of 1914, under sections 151, 152 and 153, Civil Procedure Code, and Order XX, rule 6, Civil Procedure Code, asking that the relief embodied in the decree as regards costs payable to the plaintiff should be expunged, as it was not found in the award submitted by the arbitrators. These petitions and Execution Petition No. 17 of 1914 were heard together and the Subordinate Judge, after taking evidence, ordered that the direction in the decree and judgment about the defendants' payment of the plaintiff's costs of the suit should be struck out, that the execution application should be disallowed in respect of its prayer for recovery of costs and that it might be renewed as regards the prayer for delivery of item 6. After a careful consideration of the evidence, the Subordinate Judge found that the whole of the plaintiff's costs in the suit were fully paid to him by two payments of Rs. 1,000 and Rs. 2,000 and odd made to him before the passing of the *interim* decree, and that the only item of costs subsequently incurred, namely the Commissioner's fee, had been paid out of the joint funds of the family of the parties.

Mr. Ramadoss for the appellants did not attack this finding, or attempt to show that it was wrong, and we must, therefore, accept it. The argument advanced for the appellants was that the Subordinate Judge had no jurisdiction to expunge the provision as to costs from the judgment and decree. We think that the contention is correct. Order XX, rule 6, Civil Procedure Code, which declares what a decree should contain and that it should agree with the judgment, has clearly no application. Nor are the respondents entitled to invoke the aid of sections 152 and 153, Civil Procedure Code. Section 152, Civil Procedure Code, gives a Court the power to amend judgments, decrees or orders, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission. In the present case the decree is not at variance with the judgment, and the Court has no power to vary or amend a decree when it is in conformity with the judgment, not even if the judgment is erroneous in law and even if the

error be apparent on the face of the judgment. See *Parameshraya v. Seshagiriappa* (1) and *Lakho Bibi v. Salamat Ali* (2). Section 153, which confers a general power on the Court to amend defects and errors in any proceeding in a suit and make all necessary amendments for the purpose of determining the real question at issue between the parties, has obviously no application.

Mr. Ramesam relies on section 151, Civil Procedure Code, and contends that, when the ends of justice require it, the Court has an inherent power to make such orders as it may deem proper in order to prevent an abuse of the process of the Court. It is suggested that the direction in the judgment as to the payment of costs, which was embodied in the decree, was made under a misapprehension by the Subordinate Judge, and that it only referred to the costs incurred at the final hearing on 3rd May 1912 and 5th August 1912, when the objections raised by defendants Nos. 18 and 19 to the arbitrator's award were dealt with and that the attention of the Sub-Judge was not drawn to the provision in Exhibit G ■ to costs. It is not, however, permissible to speculate as to what the Subordinate Judge meant by his order that the defendants should pay plaintiffs' costs, which must be taken to refer to the costs in the suit. We do not think that the lower Court had power under section 151, Civil Procedure Code, to expunge the order as to costs from the judgment and decree. A party to a suit, who has not appealed against the decree or applied for review of judgment, cannot be allowed in execution proceedings to contend that the judgment and decree are erroneous and to ask that they should be amended or corrected. This is in fact what has happened in this case. The Subordinate Judge was really reviewing his predecessor's judgment, which he had clearly no power to do. We consider that the only course open to the respondents, when they discovered the erroneous direction ■ to costs in the final decree, was to apply under Order XLVII, rule 1, Civil Procedure Code, to the lower Court for review of judgment, or to appeal against the decree. In view, however, of the Subordinate Judge's finding

(1) 22 M. 364.

(2) 20 A. 337; A. W. N. (1898) 59.

EASTERN MORTGAGE AGENCY CO. LD. v. PREMANANDA SAHA.

that the plaintiffs have already recovered their costs in the suit it would be an abuse of the process of the Court to allow the plaintiffs to recover them again in execution. We, accordingly, intimated at the hearing that the petitions might be amended and treated as applications for review, provided the necessary Court-fee was paid.

We, therefore, subject to such payment within one week in this Court of the necessary Court-fees, treat the Miscellaneous Petitions Nos. 212 to 214 of 1914, filed in the lower Court, as a consolidated petition for review, excuse the delay in the presentation of the review, and grant the same. The result is that the final decree in the suit is modified by substituting the words "all costs incurred by both parties to come out of the estate" for the words "the defendants do pay plaintiffs Nos. 2 to 4 their costs amounting to Rs. 2,087-0-0."

It is conceded that the plaintiffs are entitled to recover their share of the general stamp paid, Rs. 242-8-0, and can execute the decree as to costs to this extent.

We, accordingly, modify the Subordinate Judge's order on Execution Petition No. 17 of 1914, which disallowed entirely the plaintiffs' claim for recovery of costs, by allowing it to the extent of plaintiffs' proportionate share of the above amount of Rs. 242-8-0 and permitting the plaintiffs to renew the execution application both for that amount and for the recovery of possession of item 6. There will be no order as to costs in the appeals.

Mr. Ramesam requests us to include the stamp duty (which we have asked him to pay on the consolidated petitions treating them as a review petition) in the costs directed to come out of the estate, but seeing that his clients greatly delayed the filing of the petitions and were, therefore, guilty of laches, and that the petitions are, as a matter of grace, treated as a review petition, we decline to do so and direct his clients themselves to bear the duty. If the stamp duty is not paid, the appeals will be decreed, the Execution Petition No. 17 of 1914 being wholly allowed and the Petitions Nos. 212 to 214 being dismissed.

Order varied.

V.R.P.

CALCUTTA HIGH COURT.
APPEALS FROM ORIGINAL ORDERS NOS. 314 AND 315 OF 1914.

CIVIL RULES NOS. 702 AND 703 OF 1914.
August 6, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

THE EASTERN MORTGAGE AND AGENCY COMPANY, LTD.—PLAINTIFFS—
APPELLANTS

versus

PREMANANDA SAHA AND OTHERS —
RESPONDENTS.

Appeal—Order refusing to remove Receiver, if appealable—Receivers appointed to act jointly—Retirement of one, effect of.

An order refusing an application for the removal of a Receiver is not appealable. [p. 789, col. 2.]

Where two persons are appointed Receivers by the Court, one for the mortgagors and the other for the mortgagees, by the retirement of one of them the order appointing the Receivers does not come to an end. [p. 790, col. 1.]

Appeals against the orders of the Subordinate Judge, 1st Court, Dacca, dated the 6th of June 1914.

Mr. C. R. Das and Babus Provas Chandra Mitra and Ambica Pada Chaudhuri, for the Appellants.

Mr. Langford James and Babus Gopal Chandra Das and Satis Chandra Chowdhury, for the Respondents.

JUDGMENT.

WOODROFFE, J.—I am of opinion that the preliminary objection that no appeal lies in this matter succeeds. This is not a case of an application for appointment of a Receiver or of a refusal to appoint a Receiver. In substance it is one for the removal of a Receiver who has already been appointed. Therefore, I think that no appeal lies. But as the case has been argued at some length I shall deal with some other points which have been raised.

The Court was of opinion that in the interest of the estate two Receivers should be appointed so that the interest of both the mortgagor and the mortgagee might be represented. Each of the parties was allowed to nominate. The plaintiffs nominated Mr. Tweedie and the defendants nominated Premananda Saha who is a Court officer, a *sheristadar*. Our attention has been drawn to the decision in *Mohini Mohan Patra v. Ram Narain Patra* (1), in which

(1) 12 Ind. Cas. 780; 14 C. L. J. 445,

an opinion was expressed that it was not expedient to appoint ■ Court officer as a Receiver. But we are not concerned here with that question for we have not to consider an application for the appointment of any Court officer as a Receiver, but we have to determine whether any appeal lies upon an application to remove ■ person who is ■ Court officer from being a Receiver.

It appears clearly that the order for appointment of the Receiver was not by consent. It also appears that for some time the joint Receivers worked together without any (at any rate overt) quarrel. Later disputes arose between them which appear to have been due to several causes, some of which have been drawn to our attention by Mr. James. One cause of ill-feeling appears to have arisen out of the question as to whether or not Mr. Tweedie should retain for himself what is described as ■ personal *nazar* or whether it should be credited to the estate. Babu Premananda Saha very properly thought that this *nazar* should be credited to the estate.

Another point to be noted in this connection is that Mr. Tweedie while leaving India had purported to appoint a substitute to act for him and the Judge did not, and I think rightly, accept Mr. Tweedie's substitute. On Mr. Tweedie's return he found that his substitute had not been appointed and that his co-Receiver had received the commissions for the work done, as was right seeing that the work had been done by Babu Premananda Saha alone. Following on these disputes in which the right appears to have been with Babu Premananda Saha, an application was made by Mr. Tweedie with a view to get his co-Receiver removed on the ground, amongst others, that he was ignorant of *zemindari* business. Mr. Tweedie also stated that if his wishes were not given effect to he would himself retire. This he subsequently did.

It has been contended before us by learned Counsel on behalf of the appellant that on the retirement of Mr. Tweedie, the order appointing the Receivers came to an end. For such ■ proposition no authority of any kind has been cited. It would be indeed dangerous to hold that if two persons are appointed as Receivers and one were (to give an example) to suddenly die that then

the estate would be without ■ Receiver and without the protection for which ■ Receiver is in fact appointed.

Moreover, our attention has been drawn to an order passed by the Subordinate Judge on the 4th July 1914, which states that Mr. Tweedie was ■ Receiver until the date when his resignation was accepted. It further directs that the sole Receiver Premananda should submit accounts for the period subsequent to that and until the appointment of another joint Receiver. The appellants appear to have refused to nominate any person to represent them as a Receiver in the place of Mr. Tweedie who had retired.

It has also been objected that even if these contentions with which we have dealt, are not made out, the objection which has been raised against the continuance of the *sheristadar* as Receiver has not been investigated. These objections appear to me rather to have come from Mr. Tweedie for the personal reasons stated than from the company in whose name he purports to act. But it is quite clear, and this is made cut in the 19th paragraph of the affidavit of Premananda, that the objection which was put forward in the name of the company was fully considered by the Court as also was the written answer of Premananda which was put up before the Judge.

On these grounds I hold that there is no appeal or a case before us for revision. The appeals, therefore, fail and are dismissed with costs. We assess the hearing fee at five gold *mohurs* in each case.

The Rules are discharged.

Appeals dismissed; Rules discharged.

ARI CHETTY v. THEERTHAMALAI CHETTY.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 69
OF 1915.

March 16, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.T. S. ARI CHETTY—DECREE-HOLDER—
PETITIONER—APPELLANT

versus

THEERTHAMALAI CHETTY AND ANOTHER
LEGAL REPRESENTATIVES OF THE DECEASED
JUDGMENT-DEBTOR—RESPONDENTS.*Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), s. 37—Execution of decree—Decree passed against two defendants and affirmed in appeal preferred by only one defendant—Execution against non-appealing defendant—Limitation—Transfer of decree, non-recognition of, by Court—Right of decree-holder to execute.*

Where a single decree is passed against two defendants, and is affirmed on appeal by one of them, time commences to run, even as against the non-appealing defendant, from the date of the appellate decree. [p. 791, col. 2.]

Kristnama Chariar v. Mangammal, 26 M. 91 at p. 94; *Loke Nath Singh v. Gaju Singh*, 31 Ind. Cas. 426; 22 C. L. J. 33; 20 C. W. N. 178, referred to.*Quere.*—Whether, when the decree of the first Court consists of two definitely independent decrees, an appeal against one of them would prevent time from running as against the other? [p. 791, col. 2.]*Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury*, 22 Ind. Cas. 685; 19 C. W. N. 287, doubted.

Till the transfer of a decree is recognized by Court, the decree-holder on record has the right to apply for its execution [p. 792, col. 1.]

Silu Peda Yelligadu v. Raja Ravi Venkata Kumara Mahipati Surya Rao, 31 Ind. Cas. 542; 2 L. W. 1122; 18 M. L. T. 494; (19 6) M. W. N. 119; 29 M. L. J. 693, followed.

Appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 320 of 1914, preferred against the order of the Court of the District Munsif of Tirupatur, in Revision Execution Petition No. 497 of 1913, in Original Suit No. 342 of 1905.

FACTS.—The appellant obtained a simple money-decree against two persons R and K. On appeal this decree was confirmed as against K but was reversed as regards R. There was a second appeal to the High Court and the appellant succeeded therein, K, however, was not made a party to the second appeal. More than three years after the decree in first appeal and less than three years of the decree in second appeal, the appellant filed an application to execute

the decree against K. The latter having died, the proceedings were continued against respondents Nos. 2 and 3, his legal representatives. The Courts below, following *Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury* (1), dismissed this application on the grounds that it was barred by limitation, inasmuch as, so far as K was concerned, limitation began to run from the date of the decree of the first Appellate Court and that the appellant had ceased to be entitled to execute the decree, in a family partition it had been assigned to the share of a different member of the family of the appellant. The decree-holder then preferred this civil miscellaneous second appeal.

Mr. A. Krishnaswami Aiyar, for the Appellant.

Mr. A. S. Viswanatha Aiyar, for the Respondents.

JUDGMENT.—We are unable to agree with the lower Courts on the question of limitation. As Benson, J., said in *Kristnama Chariar v. Mangammal* (2): "All periods of limitation are more or less arbitrary, and it is of the highest importance that they should be laid down with clearness and certainty, and that subtle distinctions not warranted by the language of the Legislature should not be introduced by the Courts."Again, as Sir Bhashyam Aiyangar, J., said in the same case at page 96, "There cannot be two final decrees in such a suit, one by the Court of first instance and the other by the Court of Appeal." The question of limitation ought not to be made to depend upon the other question (which is almost always a very difficult and doubtful one) whether the appeal by one of the defendants, or as regards a part of the decree of the first Court, imperils the decree passed against the other defendants, or the other portion of the decree. [See also *Loke Nath Singh v. Gaju Singh* (3)]. Whether, when the decree of the first Court itself consists plainly of two definitely independent decrees, the appeal against one of the two decrees would prevent time from running as regards the other decree [see

(1) 22 Ind. Cas. 685; 19 C. W. N. 287.

(2) 26 M. 91 at p. 94.

(3) 31 Ind. Cas. 426; 22 C. L. J. 33; 20 C. W. N. 178.

MOTILAL RADHAKISSEN v. GANPATRAM.

Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury (1)], need not be considered for the decision of this appeal, though it should not be supposed that we agree with the decision in *Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury* (1). In the present case, the decree of the Court of first instance was a single decree against both defendants.

As regards the right of the decree-holder on record to execute a decree, notwithstanding transfers to others who have not been recognized as decree-holders, we shall follow the decision in *Silu Peda Yelligadu v. Raja Ruru Venkata Kumara Mahipati Surya Rao* (4), which is in favour of the right of the decree-holder on record. The lower Court's orders are set aside and execution is ordered as prayed for. Costs of the appellant in all Courts should be paid by the respondents.

Order set aside

V. R. P.

(4) 31 Ind. Cas. 542; 29 M. L. J. 693; 2 L. W. 1122; 18 M. L. T. 494; (1916) M. W. N. 119.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 224 OF 1915.

August 5, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

MOTILAL RADHAKISSEN—CREDITOR—
APPELLANT

versus

GANPATRAM AND OTHERS—INSOLVENTS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 27, 42—Adjudication, annulment of—Circumstances justifying.

An adjudication under section 16 of the Provincial Insolvency Act can be annulled only upon proof by the applicant under section 42 of the existence of one or more of the circumstances specified in sub-section 1 of that section. [p. 793, col. 1.]

In re Gyll, Ex parte Board of Trade, (1888) 5 Mor. 272; 58 L. J. Q. B. 8; 59 L. T. 778; 37 W. R. 164; *Ex parte Hester, In re Hester*, (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 Mor. 85; *In re Painter, Ex parte Painter*, (1885) 1 Q. B. D. 85; 64 L. J. Q. B. 22; 71 L. T. 581; 1 Manson 499; 15 R. 16; 43 W. R. 144; *Ex parte Ashworth, In re Hoare*, (1874) 18 Eq. 705; 43 L. J. Bk. 142; 30 L. T. 906; 22 W. R. 925, referred to.

The consent of all the creditors is not by itself necessarily sufficient to justify an order for annulment of adjudication. [p. 793, col. 2.]

Quere—Whether under the Indian Law the Court could refuse to make an order of annulment, where one or more of the circumstances specified in sub-section (1) of section 42 of the Provincial Insolvency Act were proved to exist. [p. 793, cols. 1 & 2.]

Appeal against the order of the District Judge, Monghyr, dated the 1st May 1915.

Messrs. C. C. Ghose and K. P. Khaitan and Babu Jogendra Narain Mojumdar, for the Appellant.

Babu Surendra Nath Ghosal, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against what purports to be an order under sub-section (1) of section 42 of the Provincial Insolvency Act, whereby an order of adjudication has been annulled. The respondents applied on the 24th July 1912 to be adjudicated insolvents under the provisions of the Provincial Insolvency Act. The order of adjudication was made in due course under section 16 on the 12th August 1912. Since then, a Receiver has been appointed and has taken charge of the assets. Proceedings were thereafter instituted under section 43 on the allegation that the insolvents had misconducted themselves in the manner contemplated in that section. Pressed by these proceedings, the insolvents repeatedly applied under section 42 to have the adjudication annulled. The application was refused on more than one occasion, but was ultimately granted on the 1st May 1915. The present appeal by one of the creditors is directed against that order and is supported on the ground that none of the circumstances, enumerated in section 42 essential for an order of annulment, has been established. In our opinion, there is no answer to this objection.

Sub-section (1) of section 42 authorises the Court to annul an adjudication of insolvency when the Court is satisfied that the debtor should not have been adjudged an insolvent or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full or where a composition or a scheme has been approved by the Court under section 27. There is no foundation for any possible suggestion here that the respondents should not have been adjudged insolvents. They were adjudged insolvents on their own application, and they cannot, with any show of reason, now turn round and contend that the order was improperly obtained. It is also clear that the debts of the insolvents have not been paid in full; in fact, in their petition for annulment, the respondents state that they will endeavour here-

MOTILAL RADHAKISSEN V. GANPATRAM.

after to satisfy the claims of their creditors. The only question then is, whether a composition or scheme has been approved by the Court under section 27. There is no trace on the record of ■■ order of the Court which can, by any stretch of language, be deemed to express its approval of ■ composition or ■ scheme. Indeed, ■■ examination of the proceedings shows conclusively that the preliminary steps requisite for an order under section 27 have not yet been initiated. The position, consequently, is that not one of the three circumstances mentioned in section 42, which would justify an exercise of the power vested in the Court to annul an adjudication of insolvency, exists in the present case. An earnest appeal has, however, been made by the respondents to induce us to hold that the failure of the Receiver to satisfy the debts up to the present time justifies the order of the Court below. The obvious answer is that an order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-section (1) of section 42. That section is moulded on section 35 of Statute 45 and 46 Vict., Chap. 52; with reference to the latter provision, it has been ruled that the Court has no power to annul otherwise than in exercise of the authority vested in it by Statute: *In re Gyll, Ex parte Board of Trade* (1); *In re Hester, Ex parte Hester* (2) and *In re Painter, Ex parte Painter* (3). It may be incidentally noted that ■ contrary view had been taken and wider powers claimed for the Court under the Statute of 1869 by Bacon, C. J., in the case of *Ex parte Ashworth, In re Hoare* (4). We have then the fundamental position that it is obligatory upon an applicant under section 42 to establish the existence of one or more of the circumstances mentioned therein; this has not been done here. It may be a matter for consideration whether, if one or more of these circumstances were proved to exist, the Court could, under the Indian Law, as

(1) (1888) 5 Mor. 272; 58 L. J. Q. B. 8; 59 L. T. 778; 37 W. R. 164.

(2) (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 Mor. 85.

(3) (1895) 1 Q. B. D. 85; 64 L. J. Q. B. 22; 71 L. T. 581; 1 Manson 490; 15 R. 16; 43 W. R. 144.

(4) (1874) 18 Eq. 705; 43 L. J. Bk. 142; 30 L. T. 906; 22 W. R. 925.

under the English Law, refuse to make an order of annulment; there is apparently an important variation here from English Law, for whereas section 42 of the Provincial Insolvency Act uses the word "shall", section 35 of the Bankruptcy Act, 1883, uses the word "may", and it was with reference to the latter phraseology that Stirling, L. J., said *In re Keet, Ex parte Official Receiver* (5), that the jurisdiction is discretionary, and that it would not, in the absence of special circumstances, be ■ good exercise of discretion to make an order of annulment, where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted: *In re Taylor, Ex parte Taylor* (6); *In re Beer, Ex parte Beer* (7). But it is perfectly plain that, even under section 27 of the Provincial Insolvency Act, the consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment. In the case of *In re Hester, Ex parte Hester* (2), Lord Esher, M. R. said: "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as ■ whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and it will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in ■ position of imminent danger." Bowen, L. J., was equally emphatic and observed: "When the creditors have not been paid in full, and there are no objections to the original validity of the receiving order, it is not enough for the debtor to collect the assents of his creditors, and come to the

(5) (1900) 2 K. B. 666; 74 L. J. K. B. 694; 54 W. R. 20; 93 L. T. 259; 21 T. L. R. 615; 12 Manson 235.

(6) (1901) 1 K. B. 744; 70 L. J. K. ■ 531; 49 W. R. 510; 84 L. T. 426; 8 Manson 230.

(7) (1903) 1 K. B. 626; 72 L. J. K. B. 366; 51 W. R. 422; 88 L. T. 334; 19 T. L. R. 319; 10 Manson 136.

SOUNDARARAJAN v. SARAVANA PILLAI.

Court and say, rescind the receiving order. He ought, if he wishes to move the Court to interfere in ■ matter which, to a certain extent, is one of discretion, to bring before it some clear grounds for thinking that what is proposed is a *bona fide* proposal, which it will be in the interest of the creditors to uphold. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said, that the proposal ought to be also one which is not detrimental to the interests of the public. Those interests are part of what the Court has to consider upon such applications under the present Bankruptcy Act." Fry, L. J., added: "It is an idle notion that the Court is bound by the consents of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound in the exercise of our jurisdiction in such a matter, and I think I might almost say in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country." To the same effect are the decisions in *In re Gyll, Ex parte Board of Trade* (1) and *In re Platan, Ex parte Official Receiver* (8). It is consequently fruitless for the respondents to rely, as they have done, upon the fact that the appellant, at one stage, was willing to accept a composition, and to have the matter settled out of Court.

The result is that this appeal is allowed, and the order of the Court below set aside. The appellants are entitled to their costs in both the Courts out of the estate of the insolvents. We assess the hearing fee in this Court at five gold mohurs.

Appeal allowed.

(8) (1893) 2 Q. B. 219; 62 L. J. Q. B. 569; 4 R. 411; 68 L. T. 740; 41 W. R. 529; 10 Mor. 151.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 90 of 1915.

March 6, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

SOUNDARARAJAN, MINOR, BY NEXT FRIEND
KRISHNA PILLAI *alias* KRISHNA-
SWAMI PILLAI—PLAINTIFF—
APPELLANT

versus

SARAVANA PILLAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family of father and son—Alienation by father of all family property—After-born son, right of, to set aside alienation—Alienation, whether operates as division in status—Failure of son to impeach alienation on behalf of his after-born brother also, effect of—Suit by after-born son to recover his share—Limitation—Limitation Act (IX of 1908), Sch. I, Art 126.

Where a Hindu father alienates the whole of the family property belonging to himself and his son, ■ son born subsequently acquires no right to ■ share in the property and cannot sue to set aside the alienation and recover his share, as there is no property held jointly. [p. 796, col. 2; p. 799, col. 1.]

Ramkishore Kedarnath v. Jainarayan Ramrachpal, 20 Ind. Cas. 958; 40 C. 966; 25 M. L. J. 512; (1913) M. W. N. 661; 15 Bom. L. R. 867; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213; *Ganesh Row v. Tuljaram Row*, 24 Ind. Cas. 696; 26 M. L. J. 460 and *Tulshi Ram v. Babu Lal*, 10 Ind. Cas. 908; 33 A. 654; ■ A. L. J. 733, distinguished.

Such a claim, assuming it to be tenable, is governed by Article 126, Schedule I, of the Limitation Act. [p. 797, col. 1; p. 798, col. 1.]

Per Sadasiva Aiyar, J.—The alienation by a coparcener of his interest in all the family properties without exception operates as a division in status and the alienor ceases to be a member of the joint Hindu family. If there is only one other coparcener at the time, the family ceases to exist. [p. 797, col. 1.]

Sundararajan v. Arunachallam Chetty, 33 Ind. Cas. 858; 2 L. W. 1247 and 1266; 18 M. L. T. 552 and 668; (1916) M. W. N. 31; 39 M. 136 and 159; 29 M. L. J. 793 and 816, applied.

Ganesh Row v. Tuljaram Row, 24 Ind. Cas. 696; 26 M. L. J. 460, *Maharaja of Bobbili v. Venkatramanjulu Naidu*, 25 Ind. Cas. 585; 27 M. L. J. 409; 16 M. L. T. 181, dissented from.

Per Moore, J. (contra)—Where a father alienates his share in the whole of the family properties he continues to be a member of the joint family even with sons subsequently born, but the latter can claim no share, no property being in existence at the dates of their birth. [p. 799, col. 1.]

Nanjaya Mudali v. Shanmuga Mudali, 22 Ind. Cas. 555; 26 M. L. J. 576; 15 M. L. T. 186; (1914) M. W. N. 356; 38 M. 684; *Maharaja of Bobbili v. Venkatramanjulu Naidu*, 25 Ind. Cas. 585; 27 M. L. J. 409; 16 M. L. T. 181 and *Bhulanath Khettry v. Kartick Kissen Das Khettry*, 34 C. 372; 11 C. W. N. 462, approved.

SOUNDARARAJAN v. SARAVANA PILLAI.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, in Second Appeal No. 1191 of 1914, preferred against the decree of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit No. 434 of 1912, (Original Suit No. 249 of 1910, on the file of the Court of the District Munsif of Shiyali.)

Mr. T. R. Venkatarama Sastri, for the Appellant.

Mr. T. Narasimha Aiyangar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This is a Letters Patent appeal against the judgment of Ayling, J., who dismissed Second Appeal No. 1191 of 1914, filed by the plaintiff in a suit brought by him for recovery of $\frac{2}{3}$ rd share in certain properties, the remaining $\frac{1}{3}$ rd share having already been recovered by the plaintiff's elder brother in Suit No. 241 of 1906, on the file of the Court of the District Munsif of Shiyali.

The facts are a little complicated but the material ones might be shortly stated thus:—

(a) The plaintiff's father sold away all his then remaining properties to one Sawmi Aiyangar for Rs. 4,000, under a sale-deed dated the 6th February 1885.

(b) Sawmi Aiyangar brought Original Suit No. 221 of 1887 for possession of the properties so sold. A *razinamah* decree was passed that on payment of a certain amount, within a certain date, Sawmi Aiyangar should give up his claims over the lands. But if the plaintiff's father failed to make the payment Sawmi Aiyangar was to get possession of the properties through the Court, his purchase being upheld. Plaintiff's father failed to make the payment and so Sawmi Aiyangar got possession in 1899.

(c) In 1906 the plaintiff's elder brother (who was in his mother's womb in 1885, the date of the sale by the plaintiff's father) brought the Suit No. 241 of 1906 making the plaintiff and the plaintiff's father and the purchasers from Sawmi Aiyangar parties to the suit. The plaintiff's brother ultimately succeeded in getting his alleged $\frac{1}{3}$ rd share decreed to him on payment of $\frac{1}{3}$ rd of the amount of Rs. 3,706, to which extent the consideration for the sale-deed to Sawmi

Aiyangar was held binding on the entirety of the properties sold. The second appeal to the High Court in the plaintiff's brother's suit was decided on the 4th February 1910.

(d) The present suit was brought very soon afterwards by the plaintiff who was born on the 20th December 1901. I must add here that the plaintiff's father died in 1908 during the pendency of the appeal in the plaintiff's brother's suit of 1906.

The above being the facts, the questions for decision are: (1) Was the compromise decree in Original Suit No. 221 of 1887 obtained by fraud and collusion as alleged in the plaint? (2) The plaintiff not having been in existence in the year 1885 when the plaintiff's father sold the plaint property to Sawmi Aiyangar or in 1887 when the decree was passed in Sawmi Aiyangar's favour or in 1889 when Sawmi Aiyangar got possession under the *razinamah* decree in 1887, is the plaintiff entitled to question the said alienation? (3) Is the suit barred by limitation? (4) To what share is the plaintiff entitled to recover and on what terms, if the other questions are decided in his favour?

I might at once state on the 4th question that as the plaintiff's father was entitled to half share on the date of the alienation, the plaintiff's elder brother who was in his mother's womb being then entitled to the other half share, and as the alienation is binding on the plaintiff's father's half share under the Full Bench decision in *Chinnu Pillai v. Kalimuthu Chetti* (1), the plaintiff's elder brother in the suit of 1906 could have sued for the recovery of the other half share either on his own account or on behalf of himself and his younger brother, the plaintiff. But he chose to sue only for $\frac{1}{3}$ rd as belonging to himself and he has succeeded in getting a decree for that $\frac{1}{3}$ rd share in that suit to which the plaintiff was a party. So there remains only $\frac{1}{6}$ th share available to the plaintiff. The present suit for $\frac{2}{3}$ rd share is, therefore, clearly an exaggerated claim. Even as regards the $\frac{1}{6}$ th share, if he is entitled to recover it at all, he can recover it only on payment of $\frac{1}{6}$ th of the Rs. 3,000 odd which was found in the former suit (to which he was a party) to be binding on the entire properties.

(1) 9 Ind. Cas. 596; 35 M. 47; 21 M. L. J. 246 (1911) 1 M. W. N. 238; 9 M. L. T. 389.

SOUNDARAJAN V. SARAVANA PILLAI.

The question relating to the alleged fraudulent and collusive nature of the compromise decree in Original Suit No. 221 of 1887 was not decided by the lower Appellate Court and if the plaintiff succeeds on the other two questions, the case will have to go back to that Court for a decision on that question.

As regards the second question, the plaintiff who was born in 1901 had no interest whatever in the properties when they were alienated in 1885 by his father. It is, therefore, *prima facie* a startling proposition to be told that he has a cause of action to set aside an alienation which took place 16 years before he was born and when he had no interest in the properties. But Mr. Venkatarama Sastriar relied upon the observations found in the Privy Council case of *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (2), and the judgment of the present learned Chief Justice sitting on the Original Side reported as *Ganesh Row v. Tulja Ram Row* (3). In *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (2), the following passage occurs at page 979: "On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the 1st plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled" (the suit having been brought to set aside an alleged alienation without consideration made by the father) "to the benefit of section 7 of the Limitation Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of the adverse possession of the defendant Jainarayan. It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the 1st plaintiff succeeds in the suit, his younger brothers born before a partition of the estate will be entitled to share in the relief." Now, in that case, when the suit was brought the plaintiffs (if I have understood the facts aright) were members of a joint Hindu family owning and possessed of properties other than those alienated by their father. In the present case, the father

had no other property in 1885 except the property alienated to Sawmi Aiyangar and he is not alleged to have acquired any other property afterwards. His half share having vested in Sawmi Aiyangar, he and his elder son never formed a joint Hindu family as there was no property to be held jointly. When the plaintiff was born in 1901, then also there was no joint property and hence no joint Hindu family. It seems to me, therefore, that the reasoning of their Lordships' decision in *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (2) does not apply to the facts of this case. If I am wrong in the above view, then it can only be on the ground that though the plaintiff's brother alone was entitled to the remaining half share till the plaintiff was born, the plaintiff by his birth got an interest in that half share which till then belonged to the plaintiff's brother alone. That is, we must take it that though under the Mitakshara Hindu Law, the plaintiff gets by birth a right only in the ancestral property, and the property belonging solely to the elder brother cannot be called ancestral property in his hands when a question arises between him and his younger brother, the plaintiff somehow obtained a right by birth to share in that property also. Speaking for myself, I am against any such extension of the (in my opinion unprogressive and unshastraic) medieval doctrine of right by birth.

In *Ganesh Row v. Tulja Ram Row* (3) it was no doubt held that after-born sons are entitled to share with the sons born before the alienation, but in that case also it did not appear that the father and the prior born sons were not possessed of other family properties which remained a joint family properties, owned by the father and the prior born sons when a son was born subsequent to the alienation in dispute.

I am further of opinion that when the father and the elder son held no property in common after the father had alienated the whole of his interest in the joint family property, they became divided members. In *Soundararajam v. Arunachalam Chetty* (4) I have respectfully dissented from the observations found in *Ganesh Row v. Tulja Ram Row* (3) and *Maharaja of Bobbili*.

(2) 20 Ind. Cas. 958; 40 C. 966; 25 M. L. J. 512; (1913) M. W. N. 661; 15 Bom. L. R. 867; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213.

(3) 24 Ind. Cas. 696; 26 M. L. J. 460.

(4) 33 Ind. Cas. 858; 2 L. W. 1247 and 1266; 18 M. L. T. 552 and 568; (1916) M. W. N. 31; 39 M. 136 and 159; 29 M. L. J. 793 and 816.

SOUNDARARAJAN v. SARAVANA PILLAI.

v. *Venkataramanjulu Naidu* (5), which held that a division into shares of the alienated properties does not take place on the alienation of his share by a co-parcener. At least, in ■ case where he sells away his share in all the co-parcenary properties without exception, I am clear that ■ division in status takes place and he ceases to be ■ member of the joint Hindu family and if there is only one other co-parcener at the time of the alienation, the joint family ceases to exist. If, as was recently held by ■ Full Bench of this Court in *Soundararajam v. Arunachalam Chetty* (4), an unequivocally expressed intention to create a divided status effects division, the alienation of his interest by a co-parcener in all the joint family property in favour of ■ stranger seems to ■ to be almost conclusive evidence of such an intention to break himself off from the joint status completely.

Further, the plaintiff's brother, when he brought his suit for his alleged $\frac{1}{3}$ rd share, did not seek to set aside the alienation of 1885 in respect of the plaintiff's share, whatever it may have been. As I said before, the only arguable position is (and even that position is, in my opinion, untenable) that the plaintiff's brother could have sued for the setting aside of the alienation of the half share other than the father's half share on behalf of himself and of the plaintiff. If he had done so and if the arguable position was also tenable, the alienation would have been set aside as regards half the property for the benefit of the plaintiff's brother and the plaintiff, and the plaintiff would have been entitled to an one-fourth share. But as the plaintiff's brother sued for recovery of his alleged $\frac{1}{3}$ rd share in his own individual interest, that suit cannot be said to have been brought in the interests of the plaintiff and it cannot be held that the alienation was set aside in that former suit of 1900 as regards the interests of the plaintiff also in the plaintiff's properties. The plaintiff, therefore, was bound in his own suit (that is, the present suit) by the terms of Article 126 of the Limitation Act, which

gives a period of 12 years, from the date when the alienee takes possession of the property, for ■ suit by a Hindu son to set aside his father's alienation. As the plaintiff's brother could have brought such ■ suit as regards the plaintiff's share also (assuming that plaintiff had a share) and did not do so, the plaintiff is now barred, more than three years having elapsed from the date of the plaintiff's brother's attainment of majority when this suit was brought. See the Full Bench decision in *Doraisami Sirumadan v. Nondisami Saluvan* (6).

Mr. Venkatarama Sastriar's arguments, strenuously and (as usual) ably advanced, involved two propositions; (a) that the plaintiff's brother's cause of action to set aside the father's alienation (in respect of ■ half-share) which accrued on the date of alienation in 1885 became vested in the plaintiff jointly with the plaintiff's brother as soon as the plaintiff was born even in 1901; (or, perhaps conceived in 1900 or 1901); (b) that when the plaintiff's brother sued for his one-third share, the plaintiff got an independent cause of action for suing to set aside the alienation as regards the remaining $\frac{1}{6}$ th share and hence the plaintiff has got three years after he himself attains majority to bring a suit to set aside the alienation of that $\frac{1}{6}$ th share. I am unable to agree to either proposition and if either is negatived the plaintiff's suit fails. I would, therefore, dismiss the Letters Patent Appeal with costs.

MOORE, J.—I agree.

The facts are fully stated in my learned brother's judgment which I have had the advantage of reading.

The suit was brought in 1910 by the appellant, a minor, for a declaration that a sale made by his father in February 1885 was invalid, and for the recovery of such share of the properties as he might be found entitled to. The alienee took possession of the property in 1889. The appellant was born in December 1901, i.e., 16 years after the property was sold by his father, and more than 12 years from the date when the alienee took possession. The respondents are subsequent

(5) 25 Ind. Cas. 585; 27 M. L. J. 409; 16 M. L. T. 181.

(6) 21 Ind. Cas. 410; 14 M. L. T. 401; 38 M. 118; 25 M. L. J. 405.

SOUNDARARAJAN v. SARAVANA PILLAI.

alienees who have purchased the properties.

Mr. Justice Ayling held that the suit must be treated as falling under Article 126 of the Limitation Act. In my opinion the learned Judge was right. In the case of suits governed by Article 126 the plaintiff's cause of action is the taking possession by the defendant of what was the son's joint share of the property. *Prima facie*, therefore, the suit was clearly barred by limitation. In order to entitle the appellant to succeed, it is necessary for him to set aside the alienation which stands in the way of his recovering his share of the property. It was not contended before us that any Article other than Article 121 was applicable.

In support of his argument that the appellant, a subsequently born son, is entitled to sue to set aside the alienation made by his father, Mr. Venkatarama Sastri relied on the following passage in Mayne's Hindu Law, 8th Edition, at pages 460 and 461: "If the alienation was made by the father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him;" and he cited the decisions reported as *Ganesh Row v. Tulja Ram Row* (3), *Tulshiram v. Babu Lal* (7) and *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (2).

None of these decisions are, I think, in point.

In the case of *Ganesh Row v. Tulja Ram Row* (3) the question for decision was: "Where a father and son constitute a joint family, and a father alienates to a third party his share in a certain portion of the joint family property, and subsequently to the alienation but before partition of the joint family property another son is born to the father, is such son entitled by birth to share to any, and if so, what extent in the unalienated moiety which did not pass to the alienee by virtue of the alienation, or is the eldest son entitled to the whole unalienated moiety to the exclusion of his younger

brother?" The learned Chief Justice held that subsequently born sons were entitled to participate in the remaining half of the property which remained joint family property.

As pointed out by my learned brother, the property which was alienated by the appellant's father was the only property which the family possessed and it is not alleged that the father subsequently acquired any other property.

Ganesh Row v. Tulja Ram Row (3) is distinguishable as the family seems to have possessed other joint family properties.

Tulshi Ram v. Babu Lal (7) merely decided that where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the co-parcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto.

In *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (2) the facts shortly were, that the plaintiffs and their father were owners of a joint undivided estate and the father improperly made a disposition of a portion of it. The Additional Judicial Commissioner held that the suit which was brought by 1st plaintiff, the eldest brother, within three years of his attaining majority was not barred as against him, but was barred as against his younger brothers who were born after the possession of the defendant became adverse. Their Lordships of the Privy Council observe to this: "It was, however, conceded before this Board, and as their Lordships think, rightly conceded, that if the 1st plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief." In that case, however, the plaintiff formed a member of a joint family, and possessed joint family properties other than those alienated.

Coming now to the facts of the present case, speaking for myself, it must, I think, be held, having regard to the decision in *Nanjaya Mudali v. Shanmuga Mudali* (8) and *Maharaja of Bobbili v. Venkataramanjulu Naidu* (5), that even after alienating his

(7) 10 Ind. Cas. 908; 33 A. 654; A. L. J. 733.

(8) 22 Ind. Cas. 555; 26 M. L. J. 576; 15 M. L. T. 186; (1914) M. W. N. 356; 38 M. 684.

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

share the appellant's father continued to be a member of the joint family at the time of the appellant's birth; the family did not, however, possess any joint family property, the father having alienated his share, and it appears to me that by his birth the appellant did not obtain any interest in the property, there being no joint family property then in existence. [*Bholanath Khettry v. Kartick Kissen Das Khettry* (9).] On his birth a son gets an interest in what is left of the ancestral property. If, however, I am wrong on this point, I agree with my learned brother that, assuming that the appellant's brother Govindasami instead of suing merely for the recovery of his $\frac{1}{3}$ rd share of the property could have sued for the recovery of the half share inclusive of his minor brother's share, as he did not do so, the appellant's suit was barred by limitation. See *Draisami Sirumadan v. Nondisami Saluran* (6).

Appeal dismissed.

(9) 34 C. 372; 11 C. W. N. 462.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 17
OF 1915.

November 25, 1915.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

KASSIM EBRAHIM SALEJI—DEFENDANT
—APPELLANT

versus

JOHURMULL KHEMKA—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, rr. 12, 17, O. IX, r. 13—Summons, service of—Substituted service by affixure, when to be effected—Ex parte decree, defendant's right to set aside, when not personally served after due diligence of serving officer.

Where a bailiff for the purpose of serving summons upon the defendant went on three separate days to the place where the defendant carried on business with his partners and tried to find him there and on somebody in the place telling the bailiff on each of the occasions that the defendant was not at that time at the place, the bailiff eventually posted the writ of summons upon the premises after having cried aloud the name of the defendant three times:

Held, that there was no sufficient service according

to law, even if the defendant might know of the issue of the writ. [p. 800, col. 2; p. 802, col. 1; p. 803, col. 1.]

Per Sanderson, C. J.—Where it is a question of substituted service, and the defendant has not been served personally, it is most essential that the requirements of the rules (of the Civil Procedure Code) should be strictly observed in all respects. [p. 800, col. 2.]

For serving summons upon the defendant proper enquiries and real and substantial effort, and not perfunctory, should be made to find out when and where the defendant is likely to be found. [p. 801, col. 2.]

Cohen v. Nursing Doss Auddy, 19 C. 201, approved.

Per Mookerjee, J.—The fundamental rule for service of summons upon a defendant is that wherever practicable service shall be made upon him personally, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. [p. 802, cols. 1 & 2.]

A defendant is entitled under Order IX, rule 13, Civil Procedure Code, to have the *ex parte* decree set aside as against him if the summons was not duly served, even when the defendant was aware of the institution of the suit against him. [p. 803, col. 1.]

Appeal against the following order of Mr. Justice Imam, passed on the 3rd March 1915, sitting on the Original Side of the High Court:—

"This application is for setting aside an *ex parte* decree passed in a suit that was undefended. The defendant in his sworn petition has stated that the service of summons on him had not been effected and in consequence of the deficiency of service he could not be present at the trial of the suit. The affidavits of Sitaram, a servant of the plaintiff, and the bailiff are positive in their statements that the summons had been taken by the bailiff in the company of the plaintiff's servant to premises No. 1, Amratola Street, where the defendant carries on his business and on the defendant not being found in spite of search made on three consecutive days, service was effected by affixing the summons at the outer door of the house. It appears that soon after the institution of the suit the plaintiff's Attorney Babu Debi Prosad Khaitan communicated the fact of the institution of the suit to Mr. J. C. Dutt, the Attorney on behalf of the defendant in the present matter, enquiring of him if he would accept service of summons on behalf of the defendant who had been his client in the matter out of which the suit had arisen. To that letter Babu Debi Prosad Khaitan received no reply, but it has been acknowledged by the assistant of Mr. J. C. Dutt that the letter was received and copy of it was forwarded to the defendant. In the

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

petition no reference to the receipt of the letter has been made and no admission to the knowledge of the defendant concerning the institution of the suit has been made. The petition merely refers to the fact of the passing of the decree and reading it carefully one comes to the conclusion that all reference to any knowledge concerning the institution of the suit has been advisedly avoided. On behalf of the petitioner only one ground for setting aside this *ex parte* decree has been urged, and that is that the summons had not been duly served. The question resolves itself into one consideration only, namely, whether the summons had been served or not, and for this the affidavits of Sitaram and Ishak come to furnish sufficient answer. I see no reason to disbelieve the statement these two persons have made in their affidavits, in fact there is every indication of their truthfulness. The application is dismissed with costs."

Messrs. B. C. Mitter, S. C. Roy and C. C. Ghose, for the Appellant.

Messrs. H. D. Bose and K. P. Khaitan, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This appeal is from an order made by Mr. Justice Hasan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the plaintiff and defendant. The decree was made on the 9th of December 1914, and it was made *ex parte*, the defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd of January 1915 and written by the plaintiff's Solicitor to the defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form, which is to be found at page 15 of the paper-book, in which one Sitaram, who was employed by the plaintiff, and another Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the defendant's house where he ordinarily

lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there, that they could not see any adult male member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises, which are mentioned in the affidavit, namely, No. 1, Amratola Lane, in Calcutta. What took place was that these two men whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal, because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If we were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of *substituted service*, and the defendant has not been served personally, it is most essential that the requirements of the rules should be strictly observed in all respects.

Now, the rules which are material to this matter have already been referred to, and I only intend to refer to them quite shortly. The first is Order V, rule 12, which says,

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMA.

"Wherever it is practicable, service shall be made on the defendant in person, unless he has ■ agent empowered to accept service, in which ■ service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the defendant ■ not made personally, nor was it made upon an agent empowered to accept service. It is quite true that ■ letter was written by the plaintiff's Attorney to ■ gentleman who was acting in respect of the dispute about these premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service, and does accept service, the mere fact that the plaintiff's Attorney writes to the defendant's Attorney saying 'will you accept service,' and he receives no reply, in my opinion, speaking for myself, is not sufficient. Therefore, it does not come within rule 12.

The next rule which is really material is Order V, rule 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says, "—where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix ■ copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court...."

Now, the question in this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose show that the serving officer used all due and reasonable diligence. In my opinion, it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit represented that the serving officer had gone to the defendant's dwelling-house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out, outside the house, the name of defendant and then posted ■ copy of the writ upon the premises of the defendant. This

is one thing. But it turns out that a very different matter occurred. The serving officer went to the defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the defendant resides there. In fact the defendant swears that he does not ordinarily reside there; and I am not prepared to hold that merely going to ■ man's place of business on three separate days, a place of business where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day, and merely asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this. He says: "It is true that you may go to ■ man's house, and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found not, ■ seems to be done in this country, to go to his house in a *perfunctory* way....." I lay stress upon the words "*perfunctory* way." [See *Cohen v. Nursing Dass Auddy* (1).] Now, those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling-house. I think that remark will apply *a fortiori* to this case where service was effected in a *perfunctory* manner, by going to ■ man's place of business where he carries on business with a partner, and where he may be or may not be on those days. As has been said, it is a very good rule to follow that proper enquiries, and real and substantial effort, and not *perfunctory*, should be made to find out when and where the defendant is likely to be found.

Under these circumstances I think that, although as I have said before I have no

IMAM EBRAHIM SALEJI v. JOHURMULL KHEMA.

sympathy with the defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which, in my opinion, should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

(After discussion.) We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr. Mitter that no further service of the writ will be necessary. The suit will, of course, be restored. The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause, and each party will bear the costs of this appeal. Any costs, if already paid by the appellant, will be refunded.

WOODROFFE, J.—I agree that the appeal should be decreed. As there is no question in this case that the respondent did not go to the house of residence it cannot be said that all due and reasonable diligence was used to find the defendant. The fact that the plaintiff went to the house where summons was posted under the impression that it was the defendant's place of residence which it was not, indicates an intent and knowledge that the defendant was likely to be found at his place of residence, though in fact no search was made there. That the defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient if the service is not formally proved.

I would like to add that the decision referred to by the Chief Justice [*Cohen v. Nursing Dass Auddy* (1)] was followed by Sir Lawrence Jenkins, C. J., and myself in an unreported decision in Appeal from Order No. 75 of 1912, dated the 28th November 1913.

MOOKERJEE, J.—I am of opinion that the order of Mr. Justice Imam cannot be supported. The question for determination is, whether the appellant, as an applicant who seeks to set aside a decree made *ex parte* against him, has satisfied the Court, within the meaning of rule 13, Order IX, of the Code, that the summons in the suit was not duly served upon him. The answer depends upon the true construction of rules 12 and 17 of Order V. Rule 12 recognizes the funda-

mental proposition that, wherever practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had acted as his Attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question, consequently, arises, whether service was made in fulfilment of the requirements of rule 17. That rule—I quote only so much of it as is relevant for our present purpose—provides that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Here the plaintiff caused the notice to be affixed on the house at 1, Amratola Lane. The plaintiff erroneously assumed that the defendant ordinarily resided there; as a matter of fact, it was not his residence; but in that house, business was carried on by a firm whereof the defendant was a partner. In these circumstances, can we say that the plaintiff used all due and reasonable diligence to find defendant; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the plaintiff makes no effort whatever to find the defendant in the place where he ordinarily resides, and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied: *Cohen v. Nursing Dass Auddy* (1). Indeed, the plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and

SAM V. RAMALINGA MUDALIAR.

is consequently driven to maintain a position which is absolutely unsustainable. There is thus no escape from the conclusion that the summons were not duly served. It has finally been argued that there are ample indications that the defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the respondent; for, if the summons was not duly served, I hold it was not, the defendant is entitled, under Order IX, rule 13, to have the *ex parte* decree set aside against him. Consequently, this appeal must be allowed and the application to set aside the *ex parte* decree granted.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NO. 2037 AND 2038
OF 1914.

February 18, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Srinivasa Aiyangar.

MR. G. SAM, BY HIS AGENT B. BALKRISHNA
RAJA—PLAINTIFF—APPELLANT

versus

T. RAMALINGA MUDALIAR AND OTHERS
— DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (Mad. I of 1908), s. 3, sub-s. (2), cls. (c), (d)—'Jagir' and 'inam,' distinction between—Grant of revenue of lands for subsistence by Nawab of Carnatic, whether inam—Kudivaram and melvaram vested in inamdar—Landlord and tenant—Suit in ejectment—Jurisdiction of Civil Court.

Jagirs, unlike inams, were usually granted for life, though, in course of time, they also became permanent and heritable. An inam was a present or gift either to an individual or for a public purpose, while jagirs generally implied conditions of service or a reward for service. [p. 805, col. 1.]

A grant of land revenue made by the Nawab of the Carnatic to a member of his family for subsistence is not a 'jagir,' though termed such in the deed of grant, but is only an inam within the meaning of section 3, sub-section (2), clause (d), of the Madras Estates Land Act. [p. 806, col. 2; p. 807, col. 1.]

Where in such inam, the kudivaram and melvaram interests became subsequently vested in the inamdar and the tenants who were admitted into possession before the passing of the Estates Land Act did not acquire occupancy rights:

Held, in an action to eject the tenants, that the inam fell within the exception to section 8 of the Act and ceased to form part of an 'estate' and the suit was cognisable by a Civil Court. [p. 806, col. 2; p. 807, col. 1.]

Per Srinivasa Aiyangar, J.—The word 'recognised' in section 3 of the Madras Estates Land Act implies something more than mere acquiescence; it means something done by the Government, as, for instance, by acceptance of service, *jodi*, &c. [p. 806, col. 1.]

Second appeals against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 249 and 400 of 1913, preferred against the decrees of the Court of the District Munsif, Poonamallee, in Original Suits Nos. 562 of 1908 and 476 of 1912.

Mr. S. Subramania Aiyar (with him Messrs. P. V. Ramachandra Raju and S. Ramachandra Aiyar), for the Appellant.

Mr. T. R. Venkatarama Sastriar (with him Mr. A. S. Visvanadha Aiyar), for the Respondents.

JUDGMENT.

S. A. No. 2037 of 1914.

SRINIVASA AIYANGAR, J.—This is a suit for ejectment filed in the ordinary Civil Court. Defendants plead that a Civil Court has no jurisdiction, as the village of Puliampattu in which the suit lands lie is an "unsettled jagir," within the meaning of clause (c) of sub-section 2 of section 3 of the Estates Land Act, and that the lands are not the "private lands" of the landholder. The defendants are not mere trespassers. They are said to be tenants from year to year, whose tenancy was put an end to by a notice to quit which expired just before the Estates Land Act came into force. The learned Pleader for the appellant scarcely contended that the suit lands were the "private lands" of the plaintiff, if he was a landholder. But his main contention was that the village of Puliampattu was only an ordinary inam and not an "unsettled jagir". The short question for determination is whether the village of Puliampattu is an "unsettled jagir." For the determination of the question at issue it is necessary, first of all, to know the exact nature of the property, and the terms of the original grant, so far as they are ascertainable. The revenue of this and another village, Numbal, appears to have been granted towards the end of the 18th century by the Nawab of the Carnatic to a lady of his family. The villages were afterwards purchased by the Nawab himself, and were in 1782 assigned

SAM V. RAMALINGA MUDALIAR.

by him to an Armenian gentleman, the predecessor-in-title of the plaintiff (Exhibit V). At the time of the grant the villages appear to have been *mirasi* villages. The *mirasi* rights were from time to time acquired by the predecessors-in-title of the plaintiff, and long before 1843 they had become the owners of both the *kudivaram* and *melvaram* in the village of Puliampattu. It is found by both the lower Courts that no occupancy right had been acquired before the coming into force of the Estates Land Act either by grant, custom, or prescription by the defendant or any of his predecessors who were let in as tenants for the cultivation of the lands. If, of course, the lands are "*ryoti*" lands in an estate, the defendants may have acquired an occupancy right or may be in a position to acquire it under the Estates Land Act. These villages have not been settled under the Permanent Settlement Regulation, nor have they been confirmed or enfranchised under the *inam* rules. If the village is an 'unsettled *jagir*' within the meaning of clause (c), the fact that the *jagirdar* has, subsequent to the grant, acquired the *kudivaram* interest in the whole or any portion of the lands in the *jagir*, cannot take the village out of the category of an estate, nor can by itself convert the ordinary *ryoti* lands in his *jagir* into the private lands of the *jagirdar*, (cf. sections 8, 185 and definitions of '*ryoti*' and 'private lands' in section 3 of the Madras Estates Land Act), for in "private lands" strictly so-called there is no division of interest as *melvaram* and *kudivaram*. It is unnecessary to decide the question (as to which there is some conflict of opinion in this Court) whether land which was once '*ryoti*' can, except under the proviso to section 185, be converted into "private land" [see *Zemindar of Chellapalli v. Rajalapati Somayya* (1)], for the contention raised in the first Court that the suit lands were private lands was abandoned in the first Court and the learned Pleader for the appellant, as I have already said, scarcely argued the point here. His principal contention was that although the plaintiff and his predecessors were called *jagirdars* and the suit village termed *jagir*, it was really an *inam* and

was not an 'unsettled *jagir*'. He contended, if I understood him right, that there were three classes of *jagirs*, one settled, another unsettled, and a third kind which was neither settled nor unsettled, which is a species of *inam*. He says that all *jagirs* which paid or are liable to pay no land revenue to the Government, fall in the third class and its nature, *i. e.*, whether it is an estate or not, can only be determined under clause (d) of sub-section 2 of section 3 of the Estates Land Act, and such lands cannot fall within clause (c). I confess I find some difficulty in understanding this distinction. All lands are liable to pay land revenue, unless they are exempted by Statute or by any binding engagement between the Government and the landowner; the British Government were not bound to recognise the revenue-free grants of the previous Governments, though in practice they did recognise them. [Baden-Powell's Land Revenue in British India, page 54; *Secretary of State for India v. Bai Rajbai* (2).] I do not, therefore, think that the test formulated by the learned Vakil for the appellant affords a correct or satisfactory differentiation between an ordinary *inam* and a *jagir* for the purpose of the Act.

Jagir is a Muhammadan term and *jagir* tenure is described in various places in Baden-Powell's Land Tenures. In Volume I at page 189 he says: "Whether the Muhammadan Government consciously imitated the Hindu system of appointing certain chiefs to manage special territories, especially frontier and mountain tracts, I cannot determine: but at a very early stage they adopted the plan of granting to Court favourites, to ministers of state, and to military officers the right to collect the revenue of a certain area of the country, and to take the amount collected either to support their state and dignity, or in the case of military chiefs to equip a body of troops, to be availed for the royal service"; at page 190 he says: "A great number of assignments of revenue in this way grew into Landlord Tenures, very much as the '*zamindari*' estates did. This was much

(1) 27 Ind. Cas. 77; 27 M. L. J. 718; 16 M. L. T. 573; (1915) M. W. N. 1; 2 L. W. 117; 39 M. 341.

(2) 30 Ind. Cas. 303; 42 I. A. 229; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L.R. 730; 39 B. 625; 23 C. L. J. 1.

SAM V. RAMALINGA MUDALIAR.

facilitated by the fact that the grantees was allowed, and indeed expected, in many cases, to conduct the revenue administration in his own way, and of course he had (or assumed) the full right to all unoccupied or waste land in the *jagir*." Again at page 257 in which he deals with land revenue administration he says thus: "One other feature of the Moghul system should be mentioned. Just as the Hindus divided the whole country into the royal domains and chiefs' domains, so the Moghuls apportioned their territory into '*khal'sa* and *jagir*' lands.....The '*jagir*' lands were divided into blocks or estates which were made over for life (the grants became hereditary at a later stage) to certain military commanders, ministers and courtiers, who took the revenue for their own support or that of a military force which they were bound to maintain. Sometimes waste tracts were granted in *jagir*, and sometimes outlying and troublesome districts. The *jagirdar* managed the whole, increased the cultivation, and applied the revenue to his own support, and to expenses of the administration and the pay of troops." *Jagirs* unlike *inams* were usually for life, though in course of time they also became permanent and heritable. An *inam*, as its name imports, ■ ■ present or gift either to an individual or for a public purpose, while *jagirs* generally implied conditions of service or ■ reward for service, (Baden-Powell's Land Revenue, page 118). The distinction drawn by that learned writer (Land Revenue, page 116) that an *inam* implied grant of land with ■ remission, partial or total, of the revenue, while ■ *jagir* was a grant merely of land revenue is not one which is now accepted in this Presidency, as an *inam* grant is also presumed to be a grant of land revenue only. At the same time it is difficult, if not impossible, to frame a definition or even give a description of a *jagir* so as to distinguish it from an ordinary *inam* as many *jagir* grants were mere presents to individuals, while many service grants are called *inams*. In an appeal from Bombay, the Judicial Committee in discussing the nature of a *jagir* tenure (known as *sar-anjam* in the Mahratta country) say that '*inam*' is a term of more generic significance applicable to a Government grant as

■ whole, *Raghojirao Saheb v. Lakshman-rao Saheb* (3). In fact villages termed *jagirs* and *paliams* were settled by the *Inam* Commissioner under the *inam* rules. See classification of *inams* in the *inam* rules, page 181, Volume II, Board's Standing Orders, 1907; also Chingleput District Manual, page 346, where two *jagir* villages are classed under enfranchised *inams*. The three Karayan *jagirs* in the South Arcot District were settled by the *Inam* Commissioner and are included in the schedule to the Impartible Estates Act.

The word '*jagir*' occurs along with 'unsettled *palam*' in clause (c). There is a definition of an 'Estate' in identical terms in the Proprietary Estates Village Service Act and the Survey and Boundaries Act, and there also the same collocation occurs. Further in giving illustrations of permanently settled estates, ■ *zamindari*, *jagir*, *mitta* and *palam* are mentioned. The *jagirs*, whether settled or unsettled, which are classed as 'estates' are presumably of the same character as *zamindaris*, *paliams* and the like, i.e., they are proprietary estates or as more correctly described by Baden-Powell as "*Zemindari* or Landlord Tenures over Estates." It will be seen, from the description given above of the origin and nature of *jagir* grants and the revenue policy which dictated them, that the *jagirdar* was in a large number of cases exercising control over the tract assigned to him and was administering the same; he in fact was exercising governmental functions in subordination, it may be, to a superior, and was holding his *jagir* on condition of military or political service. There were cases, however, of *jagir* grants where the land revenue was assigned merely for private enjoyment as, for instance, subsistence, and these cases are now indistinguishable from ordinary *inam* grants; and as regards these, I think, the principle applicable to *inams* ought to be applied in determining their character, as estates, for the purpose of the Estates Land Act. It is only the first class of *jagir* grants that came subsequently to be classed along with ordinary *zamin-daris* or

(3) 16 Ind. Cas. 233; 16 C. W. N. 1758; 23 M. L. J. 393; 12 M. L. T. 472; (1912) M. W. N. 1147; 14 B. N. L. R. 1226; 17 C. L. J. 17; 39 I. A. 202; 33 B. 63) at p. 659 (P. C.).

SAM V. RAMALINGA MUDALIAR.

paliams, and I think it is to such estates that clause (c) applies. In fact, it is said 'that a *jagir* differs from ■ *zemindari* in that the revenue or *peshkush* payable by the latter was fixed at some proportion of the receipts about the time of the Settlement, while ■ *jagirdar* pays merely a lump sum not expressly calculated on such ■ basis. In the case of the *jagir* of Arni this payment was called ■ "nuzzur" or gift. See North Arcot District Manual, Volume I, 2nd Edition (1895), page 281.

It is clear in this case that the original grant was only a personal grant for subsistence and in no way differed from an ordinary *inam*. It may be an estate, if it comes under the class described in clause (d) but is not an unsettled *jagir* within the meaning of clause (c). I may mention that in one of the earliest documents on the record the plaint village is described as an *inam* village, Exhibit B. In the Chingleput Manual it is apparently classified under the heading of 'unenfranchised *inams*', though described as a *jagir*. If, therefore, the villages of Numbal and Puliam pattu do not form an unsettled *jagir*, within the meaning of clause (c), it is immaterial to determine whether they fall under clause (d), for if they do, so far as the suit lands are concerned, they ceased to form part of an estate by virtue of the exception to section 8. As I have already said, the land revenue alone was given as *inam* to ■ person not then the *kudivaramdar*. The villages, however, have never been confirmed or enfranchised by the British Government. It is difficult to assign a precise meaning to the word 'recognised'; whether mere acquiescence is enough or whether something more is required is not clear. I should be inclined to think that recognition implies something more than mere acquiescence, something done by the Government, as for instance by acceptance of service, *jodi*, etc., *Secretary of State for India v. Chinnapragada Bhanuamurti* (4). In form the title-deeds issued by the *Inam* Commissioner only recognise the title of the grantee, but the word 'recognise' in the Act is not used in that sense is clear, for no title-deed is issued till after confirmation or enfranchisement. The word 'enfranchised' is not to be found in clause (d), but as before enfranchisement, the

inam is in a sense confirmed, the word 'confirmed' was probably used to cover cases also of enfranchisement after proof of title.

The question whether ordinary Civil Courts have jurisdiction, even if the suit lands were lands in an estate, was not raised or argued. An answer to this question would depend on the precise effect of the exception contained in section 153 taken along with section 157. [See *Ponnuswamy Padayachi v. Karupudayan* (5).] I, therefore, think that the appeal must be allowed and the decree of the Munsif restored with costs here and in the Court below.

Second Appeal No. 2038 of 1914 will follow.

COUTTS TROTTER, J.—The sole question raised before us in this case is as to the jurisdiction of the Civil Courts and the matter arises in this way. The defendants were tenants under the plaintiff and received from him a notice to quit which expired before the Estates Land Act came into force, and on the strength of that notice the plaintiff sued them in ejectment. If the lands in question formed an unsettled *jagir* within the meaning of section 3 of the Madras Estates Land Act, it is admitted that the Civil Court has no jurisdiction. The lands in question were granted by the Nawab of the Carnatic somewhere in the middle of the eighteenth century to a lady of his family for her subsistence. They afterwards reverted to the Nawab, but at a date when he had ceased to be ■ Ruling Prince of the district. In 1782 he assigned them apparently by way of mortgage to ■ predecessor-in-title of the plaintiff. It is not disputed that the plaintiff and his predecessors-in-title have been in possession ever since, and that for a very long time, probably nearly a century, they have been the owners both of the *kudivaram* and of the *melvaram* rights. The plaintiff and his predecessors-in-title have regularly described themselves as *jagirdars*, and the term '*jagir*' has frequently been applied to the suit lands, though they have also been mentioned in official documents under the description of *inam*. '*Inam*' is the more generic term and probably all *jagirs* are a species of *inam*, though there are many kinds of *inam* that are not *jagirs*. The

(4) 17 Ind. Cas. 373; 24 M. L. J. 538.

(5) 24 Ind. Cas. 217; 38 M. 843; 26 M. L. J. 285; 15 M. L. T. 290; 1 L. W. 218.

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

subject is one with which I am unfamiliar and I speak with extreme diffidence, but I have come to the conclusion that these lands, though so described, are not *jagirs* within the meaning of the Estates Land Act but are merely an ordinary *inam*. I am assuming that what has to be looked at is the character imposed upon the land at the time of the original grant by the Nawab as Nawab to the lady; for his resumption and subsequent re-grant later on were not made at a time when he was sovereign authority and could impose a tenure of a new character. The gift was made to the lady for her subsistence as a private person. We have been referred to works of learned writers on land tenures, such as Baden-Powell's Land Systems in British India and Maclean's Manual of Administration of the Madras Presidency, and from their perusal I am led to the conclusion that in its origin a *jagir* was connected with some special public service, such as the maintenance of troops and the like, or at least, if no such condition was imposed, was a reward for some service to the State conferred upon some State official in recognition of his position. I do not think that the mere use of the term *jagir* concludes the matter. The term *jagirdar* is one of some dignity likely to be usurped by the holders of lands which by the original grant were not conferred as *jagirs* but as ordinary *inams*. If these lands, therefore, as I hold, are not *jagir* lands, they are not 'unsettled *jagirs*' within the meaning of section 3 of the Estates Land Act. As *inams* they fall within the exception to section 8, since the *kudivaram* and *melvaram* rights are both vested in the same person. I am, therefore, of opinion that the Act does not apply to these lands and that the ordinary Courts of Law have jurisdiction over the suit.

The appeal must be allowed and the decree of the District Munsif restored with costs here and below.

Second Appeal No. 2038 of 1914 will follow.

Appeals allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 39
OF 1915.

December 14, 1915.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe, Kt.,
and Justice Sir Asutosh Mookerjee, Kt.

LALLJEE MAHOMED—DEFENDANT—

APPELLANT

versus

DADABHAI JIVANJI GUZDAR AND

ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract—Agency for sale on commission—Power limited to a term—Right of agent to brokerage—Appeal—Court of appeal, functions of—Decision on facts—Reversal.

The defendant, an owner of an oil mill, employed the plaintiff to sell his mill on an agreement embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date," and there was added a postscript to the effect that "on the sale-proceeds being received in hand brokerage will be paid."

Held (Woodroffe, J., *dubitante*), on the construction of the agreement, that it was essential for the plaintiff, if he was to earn his commission, that he introduced within fifteen days to the defendant a person who would be ready and willing to purchase for Rs. 40,000, but it was not necessary that the sale should be completed within 15 days. [p. 810, col. 2; p. 814, col. 2.]

Per Sanderson, C. J.—That the postscript did not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; if the defendant chose to agree with the purchaser to receive the purchase-money partly in cash and partly by *hundis*, the plaintiff's right to commission on the stipulated date would not be affected. [p. 811, cols. 1 & 2.]

Where the decision of a question depends to a large extent upon the verbal evidence of witnesses examined before the Trial Court which had the advantage of seeing and hearing the witnesses, the Appellate Court ought not to interfere with the decision of the Trial Court unless it is clear that that Court has come to a wrong decision. [p. 811, col. 2.]

Per Woodroffe, J.—If, after arguments, an Appellate Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed, and this is not the less so because the judgment raised a question of fact. [p. 813, col. 2.]

Per Mookerjee, J.—When the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended. [p. 814, col. 2.]

It is the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. [p. 817, col. 1.]

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

Duty and functions of a Court of Appeal in this country discussed. [pp. 815 to 818.]

Appeal against the following judgment of Mr. Justice Greaves, sitting on the Original Side of the High Court, dated the 24th February 1915:—

"The plaintiff in this case claims as the assignee of one Moses Judah, who was the original plaintiff in this suit but who has died since the suit was instituted, the present plaintiff having been substituted ■ plaintiff in his place, and he claims as assignee of Moses Judah by virtue of an assignment made to him by the widow and executrix of Moses Judah, and this assignment has been duly proved before me. The claim is one for Rs. 2,000 by way of commission in the circumstances hereinafter set forth. In June 1911 the defendant Lallji Mahomed was the owner of certain oil mills known as the Lallji Oil Mills situated at Narealdanga. In May 1911 the defendant was minded to sell those oil mills, which at that time had been mortgaged by him to the Benares Bank to secure a sum of Rs. 35,000. Towards the end of May or at the beginning of June 1911 the oil mills had been advertised for sale by the defendant in the Exchange Gazette. On 13th June 1911 the defendant Lallji Mahomed gave to Moses Judah a letter in the following terms:—

'To

M. JUDAH, Esq.,

Calcutta.

'DEAR SIR,

'I agree to allow you to sell my above oil mills at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date.'

This letter was signed by the defendant and contains certain words written in Guzrati which, it is proved in evidence before me, were added by the defendant at the time the letter was given to Moses Judah. The Guzrati has not been translated by a translator of this Court but the plaintiff has undertaken to have it translated and it was agreed between the parties before me that the words in Guzrati were as follows:—

'On the sale-proceeds being received in hand, brokerage will be paid.'

As before stated, there is ■ dispute with regard to the letter itself or with regard to the words in Guzrati which were written thereon. The whole dispute before ■ really turns upon the construction of this letter. The present plaintiff contends that, provided within the 15 days named in the letter he had secured ■ person who ultimately purchased the property for Rs. 40,000, he had fulfilled his part of the contract and was entitled to receive commission at the rate named in the letter, and that he was entitled to this commission, even if the sale was not actually completed within the 15 days. The defendant, on the other hand, contends that upon the true construction of the letter, the commission therein named was only payable in the event of the whole transaction being carried to completion within the 15 days named in the letter.

The facts with regard to the completion of the purchase are ■ follows:—The purchase was in fact completed on 27th September 1911 and upon completion the purchaser paid to the defendant Rs. 10,000 in cash and gave him *hundis* for Rs. 30,000; subsequently a further payment of Rs. 5,000 on account of the *hundis* ■ received by the defendant from the purchaser, but no further sum was received on account of the *hundis* and the Official Assignee eventually sold the property for Rs. 13,000. This amount was paid to the Benares Bank as mortgagees who also received Rs. 5,000 of the sum originally paid in cash on 27th September, and it appears that there is still due to the defendant in respect of the transactions ■ sum of Rs. 17,000 or Rs. 18,000 including interest. In my opinion, the construction put upon the letter by the plaintiff is the correct one. I think the letter means that provided Moses Judah introduced a purchaser to the defendant within 15 days and that purchaser eventually completed the purchase and paid Rs. 40,000 for the property that the plaintiff as the assignee of Moses Judah was entitled to receive the commission claimed. I have felt some difficulty with regard to the meaning of the words in Guzrati, but I have come to the conclusion that the plaintiff is entitled to receive the sum claimed even although the whole sum

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

of Rs. 40,000 was not received in cash by the defendant. The defendant chose to trust the purchaser introduced by Moses Judah to the extent of the *hundis* given by that purchaser and, in my opinion, that agreement between the purchaser and the defendant cannot affect the rights of the present plaintiff or those through whom he claims, unless the words in Guzrati meant that the commission was only payable if the whole sum of Rs. 40,000 was received in cash, and, in my opinion, the words in Guzrati do not bear that interpretation. Various authorities were quoted to me in the course of the argument and they are summed up in Halsbury's Laws of England, Volume 1, page 194, paragraph 413, and the statement therein contained is borne out by the case upon which the statement is based. That paragraph runs as follow:—

'In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled. He is not, however, deprived of his right to remuneration, where he has done all he undertook to do, by the fact that the transaction is not beneficial to the principal, or that it has subsequently fallen through, whether by some act or default of the principal, or otherwise, unless there is a provision of the contract, express or implied, to that effect, or unless the agent was himself the cause of his services being abortive.'

In my opinion, there is no provision in the contract, express or implied, preventing the agent from receiving his remuneration under the circumstances of this case.

The issues that were raised before me were as follows:—(1) Whether the sale of the defendant's oil mills to Bhatuknath was effected through the instrumentality of Moses Judah. Bhatuknath was called as a witness before me and stated in his evidence that it was through Moses Judah the mills were purchased. He says, 'Moses Judah introduced me to defendant in respect of the purchase. Price, etc., was settled through Judah', and later on in his evidence in answer to questions put in cross-examination he states that Judah was the defendant's broker in the transaction. He says, 'Judah introduced me to

Lallji Mahomed. I am speaking the truth. It was Moses Judah who introduced me to the defendant. It was Judah through whom the price was settled and it was Judah who got me into trouble,' meaning by this that he paid an excessive price. When the purchase was completed commission at the rate of $\frac{1}{2}$ per cent. was paid to Bhatuknath, although he states that he never received this sum, and it was urged before me that this fact shows that Judah could not have acted as broker in the transaction or Bhatuknath would not have claimed this commission. I cannot accept that contention. It very often happens that a purchaser is anxious to get some rebate of the purchase price and I think that is what the transaction amounts to. It was also urged before me that in the letters of the 25th and 26th July and 7th and 8th August which are exhibits in this case, no mention was made of Judah, but in my opinion it was necessary that any mention should be made of him in these letters and that cannot affect my decision in the case. I, therefore, decide the 1st issue in favour of the plaintiff and hold that the sale of the defendant's oil mills to Bhatuknath was effected through the instrumentality of Moses Judah. Issue (2) was as follows:—Whether upon the true construction of the letter of 13th June the plaintiff is entitled to the commission claimed in the plaint. For the reasons above given, I think he was. The 3rd issue dealt with a point of law, namely, whether the executrix of Moses Judah could make a valid transfer under section 130 of the Transfer of Property Act. It was argued before me that inasmuch as the suit was commenced by Moses Judah himself and the assignment was made afterwards, a suit for the commission does not fall within the terms of section 6 (e) of the Transfer of Property Act, and that it was not an actionable claim within the meaning of section 130. In my opinion, it was. It was not a mere claim for damages but a claim for a definite and ascertained sum. I have now dealt with all the matters that were raised before me and I accordingly give judgment for the plaintiff for the payment to him by the defendant of the sum claimed, namely, Rs. 2,000 together with costs of the suit on scale No. 2. Interest on judgment at 6 per cent. per annum."

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

Messrs. *S. Mookerjee* and *S. K. Roy*, for the Appellant.

Messrs. *Langford James* and *S. Ghosh*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the plaintiff, as assignee, claims Rs. 2,000, which is alleged to have been due by way of commission to Moses Judah who has died since the suit was instituted.

The defendant being the owner of certain oil mills was anxious to sell them. They were mortgaged to a Bank for Rs. 35,000, and at the end of May or the beginning of June 1911, the mills were advertised for sale in the *Exchange Gazette*. On the 13th June 1911, the defendant gave Moses Judah a letter in the following terms and signed by the defendant, "I agree to allow you to sell my above oil mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date." Then there were certain words which, it was agreed between the parties, were added at the time that letter was written, in Gujrati, and the correct translation was in these terms, "On the sale-proceeds being received in hand, brokerage will be paid."

The first question is as to the meaning of the letter. To my mind, the meaning is pretty plain. In order to earn his brokerage Moses Judah was to introduce a purchaser who would be willing to give Rs. 40,000. He had the opportunity of introducing such a purchaser and thus qualifying for his brokerage, for 15 days only. I do not think that the letter means that the sale had to be completed within 15 days, but it was essential for Moses Judah, if he was to earn his commission, that he was to introduce within 15 days a person who would be ready and willing to purchase for Rs. 40,000. In other words, if he did so introduce a purchaser, the mere fact that the purchase was not completed until September would not deprive the broker of his commission.

Now, there is no question as to the law which governs such a matter as this. In my judgment, it is correctly stated by Mr. Justice Greaves at the bottom of page 75 of the paper-book. There he says, quoting from

Lord Halsbury's *Laws of England*, "In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled."

The main question, therefore, in this case is whether Moses Judah substantially carried out what he had bargained to do. This is a question of fact mainly dependent upon the evidence of the witnesses. The case was evidently tried with great care, and the learned Judge reserved his judgment. After due consideration he has accepted the evidence of Bhatuknath, the purchaser, and rejected that of the defendant; and, in a case such as this, where the matter depends to a large extent upon the verbal evidence of the witnesses, in my judgment, this Court ought not to interfere with the decision of the learned Judge save on very clear grounds; in other words, unless it is clear that a miscarriage of justice has taken place. The Judge who tried the case has had the advantage, which we have not had, of seeing and hearing the witnesses, an advantage which, in my experience, it is almost impossible to overestimate. In this case I am not prepared to say that the learned Judge has decided wrongly; on the contrary, I think there is sufficient evidence to justify the decision at which he arrived. On the material points he has accepted the evidence of Bhatuknath and rejected that of the defendant; and, in passing, I may say that the comments made upon the evidence of the defendant by the learned Counsel for the plaintiff were not without justification. Bhatuknath's evidence was to the effect that it was Moses Judah who introduced him to the defendant, and his evidence on one point is very significant; he says he did not want to pay more than Rs. 35,000, but he was persuaded by Moses Judah to offer Rs. 40,000, which was the price eventually agreed upon. Some of the passages in his evidence are at pages 36 and 37 of the paper-book, as for instance, where he says in cross-examination.

Q. "Do you say it was Judah who introduced you to Lallji Mahomed?"

A. "Yes, that is true."

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

Q. "You wanted to pay Rs. 35,000 not 40,000."

A. "Yes, that is true, I first offered Rs. 35,000 and Judah used to come and see me often and he got me into this scrape." Then he is asked what is the scrape.

"A. What could I do, I did not. I am telling you the truth, it was Judah who introduced me to the defendant; it was Judah through whom everything was settled in respect of this matter, and it was Judah who got me into this trouble." "The trouble is this:—I was made to agree to pay Rs. 40,000 for the mill, it was not worth Rs. 13,000" * * * "I did not want to buy it, but Judah persuaded me to take it. He introduced me to the defendant, pressed me to take it, and at last got me into this trouble."

That being so, the plaintiff's case is proved on one of the material points, namely, that it was through the instrumentality of Moses Judah that the purchase price, Rs. 40,000, was obtained. But it is said that there is nothing to show that Moses Judah introduced the purchaser and performed his part of the contract within the specified time, 15 days. In my judgment if Bhatuknath's evidence is accepted, as it was by the learned Judge, that it was through Moses Judah that he was persuaded to offer Rs. 40,000, there is evidence that this must have been done within the time limit, because we find that on the 26th June, 13 days from the date of the broker's letter, Bhatuknath wrote to the defendant in the following terms: "As per our conversation with your Mr. Lallji Mahomed we intend to purchase the above mills together with the land connected with it at a cost price of Rs. 35,000 on the following condition." Then he set out the condition. The letter closed as "The alternative arrangement for payment is as follows: Rs. 10,000 in cash at the time of sale. Rs. 30,000 to be paid after one year," containing an offer, though it was an alternative offer, of Rs. 40,000 which, he said, he would never have made but for the instrumentality of Moses Judah. He must have seen the defendant that day, and such letter contains an offer of Rs. 40,000. It is true that the payment of part was to be deferred for one year, but that offer was the one which with a slight variation of the terms was eventually accepted in August. Consequently, Bhatuknath's evi-

dence having been accepted by the learned Judge, the performance of contract by Moses Judah was within the time.

I am aware that the letters in the case provide matter of comment on Bhatuknath's evidence, as, for instance, the letter of the 25th of June refers to his having seen the advertisement in the Exchange Gazette. This is a legitimate comment, but it is not conclusive that Moses Judah did not introduce the purchaser. The matter had been advertised and it was quite possible that it was Moses Judah who brought the advertisement to the attention of the purchaser in the first instance. Again, the receipt for Rs. 200 where the payment is stated to be "brokerage" is a legitimate subject of comment, but I think the learned Judge's remarks on that transaction are not unreasonable, and, in any event, as between vendor and purchaser, the use of the word "brokerage" is quite unsuitable, whatever the nature of the transaction was. The main reason, however, which weighs with me is that the learned Judge has had to deal with conflicting verbal evidence on a question of fact; and after seeing and hearing the witnesses he has come to the conclusion that the truth lies on the side of Bhatuknath and not on the side of the defendant; and, in such a case, in my judgment, this Court should not interfere, unless it is clear that he has come to a wrong conclusion. This I am not prepared to say.

A further point has been raised, namely, that the plaintiff in any event cannot recover more than the commission on the amount actually received by the defendant in cash. In my judgment, this is not correct. The brokerage was to be paid when the "sale-proceeds" were received. The purchase was completed on the 27th of September 1911, when the purchaser paid Rs. 10,000 in cash and gave *hundis* for Rs. 30,000. I agree with the learned Judge that the words in Guzrati added to the letter of the 13th June 1911 do not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; and, if the defendant chose to agree with the purchaser that the "sale-proceeds" should be partly cash and partly *hundis*, I do not think that can affect the plaintiff's right to commission.

In my judgment this appeal should be dismissed.

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

WOODROFFE, J.—The plaintiffs as the assignees of one Judah sue to recover commission alleged to be due to him under a written agreement dated 13th June 1911 for having effected through his agency the sale of certain oil mills. It must be shown that the conditions of the contract have been complied with. The onus of proving this is on the plaintiffs. This is of importance in the present case, for in regard to the particular question on which I mainly rest my judgment, *viz.*, whether it has been shown that Judah obtained the purchaser within 15 days of and in terms of the agreement, it has been argued by Mr. Langford James for the respondent that this was not at issue in the lower Court. There is no finding on this particular point. It was, however, not necessary to put this specifically in issue, since the onus of proving all facts necessary to establish the claim was on the plaintiffs and the defendant put in issue the allegation that the purchase was effected by Judah in terms of the agreement, according to the conditions of which alone he was entitled to a commission.

Several questions arise upon the construction of the agreement. It has been argued for the respondent that it is sufficient if a purchaser was secured within 15 days even if the actual purchase was completed later. This the appellant denies, contending that commission was payable only in the event of the transaction being completed (which it was not) within 15 days: and *nextly* that brokerage was only payable on the sale-proceeds being received in cash (which was not the case) within this period.

The appellant's contention is not without force on both these grounds, but it is not necessary to go into this matter for whatever be the true construction of the document on these points, it is clear and is indeed conceded that whenever or in what way the sale was concluded the purchaser at such sale must have been secured by the broker within 15 days of the agreement. Now the agreement was dated the 13th June 1911 and admittedly the first proved date at which vendor and purchaser were in communication was the 25th June, when 12 days under the agreement had already run by. It must be shown then that within the remaining 3 days Judah found the purchaser. Has this been shown? In cross-examination the purchaser was asked whether his letter of the

25th June was written before or after his introduction to the defendant and whether Judah asked him to write to the defendant or not. He was again asked about this matter in re-examination and he replied that he did not remember the date nor even the month when Judah spoke to him about this letter and that he could not say whether it was before or after this letter that Judah spoke to him. Had it been the fact that it was due to Judah's intervention that the first letter was written, it does not seem to me possible that the witness could have forgotten it. His answer must have been in that case that he must have seen Judah first, for before seeing him he had known nothing of the defendant or of his property. He will not commit himself to this and, I think, for the reason that he had not then seen Judah but had learnt about the property through an advertisement in the Gazette. This is indicated by the words in the letter of the 25th, "I am in the Exchange Gazette that you are going to sell." The purchaser also in his evidence says, "I saw the Exchange Gazette and then I wrote that letter," not that he had seen Judah meanwhile or at all. Though the omission of Judah's name from the letter may not be conclusive, it is certainly evidence against the plaintiffs for a reference to the broker, through whom it is suggested that the purchaser came to know of the property, might have been expected. There is no specific evidence that Judah secured the purchaser between the 26th and 28th or the conclusion of the period allowed to him. There is some general evidence that he introduced the purchaser, which in any case is scarcely accurate if the first communication of the 25th to which I have referred was without his intervention. The evidence, however, is not such as I can accept. Doubtless, in a case of this kind great weight must be attached to the judgment of the learned Judge who heard the case; but, in the present instance, we have no finding on the specific point and the uncorroborated evidence of the purchaser on which the learned Judge has relied is, upon the most favourable view, consistent with the fact of work done after the limited period and is, in my opinion, in conflict with and unsupported by the documentary evidence in the case and the inferences to be derived therefrom. As stated, the first letter of the 25th indicates that it was the advertisement which

LALLJEE MAHOMED v. DADABHAI JIVANJI GUZDAR.

first put the parties in communication. There is no mention of Judah as broker in any of the letters until we get to the letter of 15th November 1911, which is of doubtful admissibility against the appellant. But on the merits the letter comes too late to be of value and is open to the suspicion that evidence was then being made for the claim by Judah, which followed it in January.

It is remarkable also that there is no letter or other document by the broker which establishes his claim. Had he earned his commission in terms of the agreement, I think he would have been careful to put it on record. The Solicitor Mr. E. O. Moses, who acted in the sale as attorney for the vendor, states that he never heard that Judah was the broker in the transaction. The purchaser also in his evidence says he never mentioned the matter to any one. Finally, there is evidence that the purchaser Bhatuknath took a commission of $\frac{1}{2}$ per cent. on the entire sale-proceeds of Rs. 40,000 on the ground that there had been no broker in the sale. He further granted a receipt for the same, on which express reference is made to "amount of brokerage." The purchaser knows some English and though asked to give an explanation of this circumstance was unable to do so. Mr. Justice Greaves has held that this was a rebate, an explanation which the witness himself has not ventured to give. But, assuming that it was, the point is that it was allowed because no broker had been employed. If so, then this directly contradicts the purchaser witness when he says that Judah was to his knowledge the broker. Nor is it likely that the defendant would have agreed to make a further payment for "brokerage" if he was already indebted for considerable brokerage to Judah. For these reasons, I would allow this appeal. It is possible that what may have happened is that the defendant advertised his property and then Judah coming in this way to know of it got the agreement of agency from the defendant. After that, and independently of Judah, the purchaser learnt from the Gazette that the property was for sale and entered into communication with the vendor. Judah, who may have heard of this, may, sometime between June and August (for it is to be observed that the sale was not concluded till the latter date), have pressed the purchaser to

buy in the hopes of putting forward a claim for commission. But this would not be sufficient. It is, however, not necessary for me to hold anything more than that the plaintiffs have not established that Judah earned his commission within the terms of the agreement and I would, therefore, decree this appeal with costs and dismiss this suit with costs. As regards the question whether we should interfere in appeal with questions of fact, I will only say this, that if after argument the Court has a conviction that the judgment under appeal is erroneous it should not be affirmed, and this is not the less so because the judgment raised a question of fact. The mode in which the conviction is brought about in matters of law and fact is a question into which I do not enter, it being sufficient in the present case to say that, in my opinion, the appellant has shown us circumstances under which the judgment under appeal should be reversed.

MOOKERJEE, J.—This is an appeal by the defendant in an action by an agent against his principal for recovery of commission. The defendant employed the plaintiff to sell his oil mill; the agreement was made on the 13th June 1911 and was embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date." There was a postscript to the effect that "on the sale-proceeds being received in hand brokerage will be paid." On the 25th June 1911 one Bhatuknath Boodhnath wrote to the defendant: "I see in the Exchange Gazette that you (are) going to sell your oil mill at Narikeldanga. I went thrice to your office, but unfortunately could not find you there. I shall, however, call at your oil mill tomorrow, with an expert engineer's opinion, and will give you offer for the same. I may buy for myself or sell to my friends." On the next day, the intending purchaser again wrote to the defendant. The letter referred to a conversation which the writer had with the defendant and contained two alternative offers. The first alternative was the purchase of the mill for Rs. 35,000 cash, Rs. 1,000 to be deposited thereon as earnest money, and the balance to be paid

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

after one month, if on trial working meanwhile, the mill turned out to be satisfactory. The second alternative was the purchase of the mill on payment of Rs. 10,000 in cash at the time of sale, and Rs. 30,000 to be paid after one year. It may be observed parenthetically that neither of these offers accorded with what the seller expected, namely, Rs. 40,000 in cash. What followed does not transpire from the correspondence, but we find that on the 8th August 1911 the purchaser wrote to the defendant and confirmed an arrangement made on the day previous for the sale of the mill for Rs. 40,000; Rs. 10,000 to be paid in cash on registration of the conveyance, Rs. 20,000 by a *hundi* payable one year after that date, and the balance of Rs. 10,000 by another *hundi* payable 18 months after the date of the registration of the conveyance. On the 15th November 1911, nearly two months after the sale had been completed on the 27th September, the purchaser is said to have written a letter to the plaintiff and authorised him to negotiate for the appointment of managing agents of the mill, which is described as "purchased through you." On the 26th January 1912, the Solicitors of the plaintiff wrote to the defendant and demanded immediate payment of Rs. 2,000 as brokerage due on the sale of the mill, which was alleged to have been effected through their client. The Solicitor of the defendant promptly replied on the next day. He pointed out that the letter of authority of the 13th June 1911 was limited to 15 days from the date thereof. He asserted that the plaintiff had failed to secure a purchaser within the prescribed time and that the mill had been sold without any concern with him; and he added that the seller had already paid brokerage on the transaction. This referred to a payment of Rs. 200 by the defendant to the purchaser, who had granted a receipt therefor as paid on account of brokerage. The plaintiff thereupon instituted this suit on the 13th June 1912. The defendant asserted that the sale had taken place without the intervention of the plaintiff as broker and repudiated the claim as entirely unfounded. Mr. Justice Greaves has held on the evidence that the sale was effected through the instrumentality of the plaintiff and has decreed the suit.

On the present appeal, the defendant has contended that this finding is not supported by the evidence on the record, and that even if the finding is maintained it is not sufficient to justify the decree.

It is an elementary principle that where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended. It is thus plain that the plaintiff could be entitled to the commission, only if he found a purchaser on or before the 28th June 1911. I do not hold that the plaintiff was bound to complete the transaction within this period; in my view of the contract, the plaintiff would be entitled to the commission, if, within the time prescribed, he produced a person able, ready and willing to enter into the transaction with the defendant on the terms prescribed by the latter, and the plaintiff must within that period notify his principal that he had secured such a person. It is also indisputable, I think, that the burden lies upon the plaintiff to establish that he has earned the commission he claims. If these principles are borne in mind, there is no escape from the conclusion that the plaintiff cannot be awarded a decree, merely on the finding that the sale was effected through his instrumentality. If the case were before a Jury, the Court would have to instruct them that to find a verdict for plaintiff, they must find that plaintiff procured a purchaser able and willing to buy on the terms stated in the writing, that he notified defendant of the fact and that this was done within the 15 days prescribed. The vital question, - consequently, is, did the plaintiff bring the purchaser to the defendant on or before the 28th June 1911. There is no trace in the correspondence already summarised that he had done so. The first letter of the purchaser to the defendant mentions that he had learnt from the Exchange Gazette about the proposed sale of the mill. This, no doubt, is not conclusive proof that he had not met the broker on or before the 25th June; but there is no specific evidence upon which I can act that the two had met before that date. The letter of the 26th

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

June also, taken by itself, does not assist the plaintiff. No doubt, it recites a conversation between the defendant and the purchaser, but it does not show that the plaintiff was present at that interview. I do not overlook that the purchaser asserts that he was introduced to the defendant by the broker, and his version has been accepted as true by Mr. Justice Greaves; but this does not carry matters far enough. The purchaser could not pledge his oath that his first letter was written after the broker had informed him of the proposed sale of the mill. I am not unmindful that the purchaser asserts that he first offered Rs. 35,000 and that the broker Judah used to come and see him often and got him into the scrape, that is, induced him to pay Rs. 40,000. This statement, even if accepted and taken along with the letter of the 26th June, does not conclusively prove that Judah introduced the purchaser to the defendant on or before the 26th. There can be no dispute that if such introduction did not take place on or before the 26th June, the evidence does not show that it was brought about either on the 27th or 28th June; indeed, the evidence is entirely silent with regard to these two dates.

Mr. Langford James, in the course of his able argument for the respondent, properly emphasised the fact that Mr. Justice Greaves, who had the opportunity to see the witnesses, which we have not, has believed the purchaser in preference to the defendant; and he has argued that in a case of this description, where there is a conflict of oral testimony, the Court of Appeal should not reverse the finding of the Primary Court. This contention raises a question of considerable importance as to the duty and functions of a Court of Appeal in this country. As was stated by White, J., in *Protap Chunder Mukerji v. Empress* (1) and by Trevelyan, J., in *Milan Khan v. Sagai Bepari* (2), the sound rule to apply in trying an appeal in a civil case is that the Court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong; in other words, the burden lies upon the appellant to satisfy the Court that the finding he assails is not supported by the

evidence on the record: *Wise v. Sunduloonissa Chowdhranee* (3); *Tahboonissa Bibee v. Koomar Sham Kishore Roy* (4); *Shetabdee Biswas v. Molamdee Mundul* (5); *Gopse Nath Mookerjee v. Boddhumunt Mal* (6); *Anund Chunder Chuckerbutty v. Rutnessur Doss Sen* (7); *Nobin Chunder Pooshalee v. Bungo Chunder Chatterjee* (8); *Musammatt Hoymobutty Dossee v. Sreekishen Nundee* (9); *Munsoob Bibee v. Ali Miah* (10). When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage. Reference may in this connection be made to the observation of Lord Collins in *Shunmugaraya Mudaliar v. Manika Muda'iar* (11): "No doubt it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth." The reasons for this rule of practice are too obvious to require elucidation. But it is worthy of note that Lord Collins refers with approval to the judgment delivered by Lindley, M. R., in the Court of Appeal in the case of *Coghlan v. Cumberland* (12), which sets out the limitations of the rule: "Even where, * * * the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully

(3) 20 E. R. 68; 11 M. I. A. 177 at p. 181; 7 W. R. 13 (P. C.); 1 Suth. P. C. J. 667; 2 Sar. P. C. J. 249.

(4) 15 W. R. 228.

(5) 25 W. R. 30.

(6) 25 W. R. 26.

(7) 25 W. R. 50.

(8) 25 W. R. 363.

(9) 14 W. R. 58.

(10) 17 W. R. 358.

(11) 3 Ind. Cas. 799; 36 I. A. 185; 32 M. 400; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304.

(12) (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540.

(1) 11 C. L. R. 25.

(2) 23 C. 347.

LALLJEE MAHOMED V. DADABHAI JIVANJI GUZDAR.

weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and, when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not: and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." In the case in which these observations were made, the Court of Appeal (Lindley, M. R., Rigby, L. J., and Collins, L. J.), allowed the appeal, although the appeal turned on a question of fact. It is obviously impossible to frame a formula, to define the impression which must be produced on the minds of the Judges of the Court of Appeal, so that they may not shrink, in the words of Lindley, M. R., from overruling the judgment of the Trial Court: and the cases in the books employ various expressions which are really of little assistance, such as that the judgment is 'clearly wrong' [*Khoorshedjee Manikjee v. Mehrwanjee Khoorshedjee* (13)], that the decision is 'irresistibly erroneous' [*Gray v. Turnbull* (14) followed in *Pandurang Vasudeo v. Anant Lakshman* (15) and *Bai Gulabbai v. Shri Datgarji Mahançarii* (16)], that 'a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong' [*Bandon (Earl) v.*

Becher (17) followed in *Yemunabai v. Balshet* (18)], that the Court will not reverse the decision 'except in cases of extreme and overwhelming pressure' [*The Julia, Bland v. Ross* (19), *The Alice and the Princess Alice* (20)], that 'a Court of Appeal will hesitate long before it disturbs the findings of a Trial Judge based on verbal testimony' [*Khoi Sit Hoh v. Lim Thean Tong* (21)], or that the finding 'is clearly against the weight of the testimony to amount to a manifest defeat of justice': [*Aberdeen Glen Line Steamship Co. v. Macken, ss. Gairloch* (22)]. We may also bear in mind the observation of Lord Chelmsford in *Tayammaul v. Sashachalla Naiker* (23), "the advantage the Judge of the Primary Court possesses in forming a correct opinion of the credit due to the witnesses, does not relieve the Court of Appeal from the duty of examining the whole evidence and forming for itself an opinion upon the whole case." To the same effect are the observations of Baggallay, J. A., in *Glannibanta, The* (24). Indeed, if the conclusion of the Trial Court in a case of conflict of oral testimony were held practically unassailable, that Court would in essence be constituted the final Court on questions of fact. But the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, though, as James L. J., said in *Bigsby v. Dickinson* (25), "if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened." The matter is obviously simpler where the conclusion is merely an inference of fact [*Lord Blackburn in Smith v. Chadwich* (26)].

(17) (1853) 3 Cl. & F. 479 at p. 512; 9 Bligh. (n. s.) 532; 6 E. R. 1517.

(18) 5 Bom. L. R. 584.

(19) (1860) 14 Moo. P. C. 210; Lush. 224; 15 E. R. 284; 134 R. R. 43.

(20) (1868) 2 P. C. 245; 19 L. T. 678; 17 W. R. 209; 38 L. J. Adm. 5.

(21) (1912) App. Cas. 323; 81 L. J. P. C. 176; 106 L. T. 470.

(22) (1899) 2 I. R. 1 at p. 18; 32 I. L. T. R. 33; Ir. L. Rep. 630.

(23) 10 M. I. A. 429 at p. 436; 2 Sar. P. C. J. 139; 19 E. R. 1034.

(24) (1876) 1 P. D. 283 at p. 287; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339.

(25) (1876) 4 Ch. D. 24 at p. 29; 25 L. T. 679; 25 W. R. 89; 46 L. J. Ch. 280.

(26) (1884) App. Cas. 187 at p. 194; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687; 58 J. P. 644.

(13) 1 M. I. A. 431 at p. 442; 5 W. R. 57 (P. C.); 1 Suth. P. C. J. 73; 1 Sar. P. C. J. 138; 18 E. R. 173.

(14) (1876) 2 H. L. Sc. 53.

(15) 5 Bom. L. R. 956.

(16) 9 Bom. L. R. 393.

LALJEE MAHOMED v. DADABHAI JIVANJI GUZDAR.

or where the evidence whereon the decision of the Trial Judge is based, has been taken on commission [Lord Collins in *Imdad Ahmad v. Pateshri Partab Narain Singh* (27)]. But, even in other cases, it is undoubtedly the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Cases are by no means rare where an Indian Appellate Court has reversed the decision of the Primary Court based on conflicting oral testimony and the conclusion of the Appellate Court has been ultimately affirmed by the Judicial Committee: *Rash Mohini Dasi v. Umesh Chunder Biswas* (28); *Gangamoyi Devi v. Troiluc hya Nath Chowdhry* (29); *Musammatt Bulli Kunwar v. Musammatt Bhagirathi* (30); *Chotey Narain Singh v. Ratan Koer* (31); *Secretary of State for India v. India General Steam Navigation and Railway Company, Limited* (32); *Jeolal Mahton v. Loke Narayan Mahton* (33) (decided by the Judicial Committee on the 23rd January 1912). I am not unmindful that there are other instances where the Judicial Committee has reversed the decision of the local Appellate Court and restored the decree of the Trial Judge, but that has been done because their Lordships were satisfied, upon scrutiny of the entire evidence, that the view of the latter was more consistent therewith than that of the former, *Romesh Chunder Mukerji v. Rajani Kint Mukerji* (34); *Sajid Ali v. Ibad Ali* (35); *Shama Charn Kundu v. Kheltromoni Dasi* (36); *Khoo Sit*

Hoh v. Lim Thean Tone (21); *Nawab Shah Ara Begam v. Nanhi Begam* (37). We may also bear in mind the fact that, although an ordinary rule the Judicial Committee does not interfere with concurrent judgments of the Courts below on questions of fact, instances are by no means rare where their Lordships have examined the whole evidence, formed for themselves an opinion on the entire case and reversed the unanimous decision of the two Courts in India on a question of fact: *Rungama v. Atchama* (38); *Huradhun Mookurjia v. Muthoranath Mookurjia* (39); *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry* (40); *Tayammaul v. Sasha-challa Naikar* (23); *Charles Seton Guthrie v. Abool Mozuffer* (41); *Baboo Lekraj Roy v. Baboo Mahtab Chund* (42); *Hay v. Gorden* (43); *Venkateswara Iyan v. Shekhar Varma* (44); *Muhammad Mumtaz Ahmad v. Zubaida Jan* (45); *Bishun Chand Bachhaot v. Bijoy Singh Dudhuria* (46). It is not necessary for the present purpose to consider whether any general principle is deducible from the expressions used by their Lordships as to the circumstances under which they will depart from the rule ordinarily observed by them, such as 'that the very clearest proof is shown that the decision is erroneous,' that 'the Board is clearly satisfied that there has been miscarriage in the appreciation of evidence,' that 'it is manifestly clear from the probabilities that the Court below was wrong,' that 'the case is very extraordinary,' that 'a strong case must be made out before the Board would recommend reversal,' that 'it

(37) 11 C. W. N. 130; 29 A. 29; 17 M. L. J. 32; 5 C. L. J. 4; 9 Bom. L. R. 80; 1 M. L. T. 429 (P. C.).

(38) 4 M. I. A. 1; 7 W. R. 57 (P. C.); 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 600.

(39) 4 M. I. A. 414; 7 W. R. 71 (P. C.); 1 Suth. P. C. J. 213; 1 Sar. P. C. J. 375; 18 E. R. 758.

(40) 4 M. I. A. 431; 7 W. R. 73 (P. C.); 1 Suth. P. C. J. 216; 1 Sar. P. C. J. 378; 18 E. R. 764.

(41) 14 M. I. A. 53; 15 W. R. (P. C.) 50; 7 B. L. R. 630; 2 Suth. P. C. J. 429; 2 Sar. P. C. J. 660; 20 E. R. 706.

(42) 14 M. I. A. 393; 17 W. R. 117; 10 B. L. R. 35; 2 Suth. P. C. J. 536; 3 Sar. P. C. J. 43; 20 E. R. 833.

(43) (1872) 1 A. Sup. Vol. 106; 10 B. L. R. 301; 18 W. R. 480.

(44) 1 A. 143; 3 M. 384.

(45) 16 I. A. 205; 11 A. 460; 5 Sar. P. C. J. 433.

(46) 11 Ind. Cas. 399; 15 C. W. N. 648 (P. C.); 13 C. L. J. 588; 8 A. L. J. 587; 13 Bom. L. R. 440; 21 M. L. J. 652; 10 M. L. T. 335; (1911) 1 M. W. N. 418.

(27) 6 Ind. Cas. 981; 14 C. W. N. 842; 12 Bom. L. R. 419; 7 M. L. T. 414 (P. C.); 32 A. 241.

(28) 25 I. A. 109; 25 C. 824; 2 C. W. N. 321.

(29) 33 C. 537; 3 C. L. J. 349; 10 C. W. N. 522; 1 Bom. L. R. 375; 1 M. L. T. 131; 16 M. L. J. 161.

(30) 9 C. W. N. 649; 15 M. L. J. 265.

(31) 22 C. 519; 22 I. A. 12.

(32) 4 Ind. Cas. 448; 36 C. 967; 10 C. L. J. 281 (P. C.); 11 Bom. L. R. 1197; 14 C. W. N. 134.

(33) 15 Ind. Cas. 184; 16 C. W. N. 466.

(34) 21 C. 1.

(35) 23 C. 1; 22 I. A. 171.

(36) 27 C. 521; 27 I. A. 10; 4 C. W. N. 501.

PARUKUTTI V. KELAPPAN NAIR.

must very clearly appear that the conclusion is very plainly erroneous,' that 'there has been some miscarriage in respect of a presumption to which too much weight was given,' that 'very definite and explicit grounds must be assigned for interference,' that 'there is so strong a preponderance of testimony that the Board can confidently pronounce the decision to be wrong,' and other expressions of like import. But it is obvious that if reversal of concurrent findings of fact is permissible, the Court of first Appeal should not be deemed fettered to a larger extent.

In the present case, as I have already stated, the finding that the sale was effected through the instrumentality of the plaintiff does not justify a decree in his favour. The purchaser does not make an explicit statement that the plaintiff introduced him to the defendant on or before the 28th June 1911, but even if this much be deemed to be implied in his statements, I cannot accept his testimony. The correspondence does not show any trace of the presence of Judah in the negotiations; one would have expected some mention of his name in the first or the second letter. It is also remarkable that no written communication appears to have passed between the plaintiff and the defendant, although the plaintiff had taken the precaution to accept the agency by a written instrument. There is further the unexplained fact that the purchaser received Rs. 200 as brokerage; he cannot explain why the sum was described by this obviously inappropriate term; it is extremely improbable that the defendant would have made a present of this sum to the purchaser, if he had really to pay Rs. 2,000 to plaintiff as broker. There is the further significant fact that the claim for brokerage was not put forward till the 26th January 1912, though, if the plaintiff is to be believed, he had earned it before the 26th June 1911 and the sale had been actually completed on the 27th September 1911. Finally, the case for the plaintiff is certainly not improved by the letter alleged to have been written on the 15th November 1911, which plainly bears the appearance of an attempt to create evidence for future use. After the most careful and anxious consideration

of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the plaintiff has failed to establish that he has earned the commission claimed in terms of the contract and that the decree in his favour cannot be supported. In my opinion, the appeal should be allowed and the suit dismissed with costs throughout.

SANDERSON, C. J.—The result is that, in view of the opinion expressed by the majority of the Court, this appeal will be allowed, the judgment of the Court of first instance set aside, and the plaintiff's suit dismissed with costs both of the Court of first instance and of this appeal.

Appeal allowed

MADRAS HIGH COURT.

PAUPER APPEAL NO. 284 OF 1913.

April 30, 1915.

Present:—Justice Sir Sankaran Nair and
Mr. Justice Coutts Trotter.

March 6, 1916.

Present:—Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

PUZHAKKAL THIRUPURATH VELU-
THAKKAL CHIRUDEVI AMMA'S
DAUGHTERS PARAKUTTI AND ANOTHER
—PLAINTIFFS—APPELLANTS

versus

PUZHAKKAL THIRUPURATH VELU-
THAKKAL TARWAD KARNAVAN AND
MANAGER THILLU AMMA'S SON
KELAPAN NAIR AND OTHERS—DEFENDANTS
—RESPONDENTS.

Malabar Law—Tarwad—Partition, right to—Family settlement or karar, right of minor members to impeach—Custom, decision on question of.

A Malabar *tarwad* can be validly partitioned only with the consent of all its members, and it is not open to any member to sue for partition of the family property. This, however, leaves unaffected the right of junior members to question alienations or acts of mismanagement by the *karnavan*, in order to preserve the integrity of the family property. [p. 819, col. 2; p. 821, cols. 1 & 2.]

Per Seshagiri Aiyar, J.—The minor members of a *tarwad* can question the acts of the *karnavan* for the purpose of preserving the *tarwad* property for

PARUKUTTI V. KELAPPAN NAIR.

their benefit and ask for the *karnavan's* removal. They also sue to set aside a *karar* or family arrangement arrived at by the adult members if their rights are prejudiced thereby. [p. 821, col. 2]

Per *Sankaran Nair* and *Coutts Trotter, JJ.*—The minor members are not entitled to interfere in a family arrangement in so far as it affects the adult parties thereto, but can show that their interests were not properly represented or that the *karar* was in fraud of their rights and ask for relief for themselves on that footing. [p. 819, col. 2; p. 822, col. 1.]

Per *Sankaran Nair, J.*—In deciding questions as to Customary Law, if there are texts or series of decisions, the Court should follow them. Otherwise the question should be decided on evidence. [p. 820, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Pauper Original Suit No. 20 of 1912.

Mr. C. V. Ananthakrishna Aiyar, for the Appellants.

Messrs. J. L. Rosario, K. Kutti Krishna Menon, P. Appu Nair and N. A. Vaidyanatha Aiyar, for the Respondents.

This appeal coming on for hearing on the 12th April 1915 and having stood over for consideration till the 30th April 1915, the Court (*Sankaran Nair* and *Coutts Trotter, JJ.*) delivered the following

JUDGMENT.

SANKARAN NAIR, J.—This is a suit brought by two females aged 8 and 5 respectively, members of a *marumakattiyam tarwad*, by their next friend and father to remove the first defendant, their *karnavan*, to declare certain junior members incapable of management and to appoint two ladies, defendants Nos. 4 and 14, managers of the *tarwad* affairs and to set aside two *karars*, Exhibits A and B, dated 4th June 1910 and 22nd June 1911 respectively. There are various pleas raised by the defence, but the suit was dismissed on the ground that the plaintiffs have no cause of action. A suit of this nature is not maintainable according to Malabar Law. The first defendant was the *karnavan* and manager of the *tarwad*. While he was in management on the 4th June 1910 an agreement was entered into, to which the defendants Nos. 2 to 5 and the 15th defendant, who is the mother of the plaintiffs, were parties by which certain arrangements were made for the future management of the *tarwad* affairs. Twelve to 14th defendants executed another *karar* on the 22nd June admitting the prior *karar*. Plaint-

iffs now say that these *karars* are not binding on them and that they are detrimental to the *tarwad*. Plaintiffs were represented by the 2nd defendant who was the senior *anandravan*, that is, the one who is entitled to succeed the first defendant in management. The Subordinate Judge holds that it is not open to the next friend of the minors to sue to remove the *karnavan*, nor is it competent for two ladies of a family to ask the Court to appoint a female or females as the managing member. He holds, however, that if the plaintiffs were majors, they would have a cause of action, but, as they were minors, they have no cause of action at present to sue. For these reasons he dismissed the suit.

The constitution of a Malabar *tarwad* is described in the Full Bench judgment in *Kenath Puthen Vittil Tavazhi v. Narayanan* (1). It is open to the members to enter into an arrangement for the management of the *tarwad* affairs. It is open to them also to divide the *tarwad* properties among themselves. Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be re-opened so far as they are concerned and they would be awarded the share which should have been set apart for them; but subject to this, the partition is final as between those who were parties to it. There is no reason why the principle should not apply to the *karars* which have been entered into. *Prima facie*, there must have been mismanagement of the *tarwad*, as otherwise it was unnecessary to enter into *karars* placing restrictions on the first defendant's rights of management. While, therefore, the plaintiffs are not entitled to set aside the *karars* so far as the defendants who are parties to it are concerned, they are entitled to ask the Court to take the necessary steps for the protection of their interests and we are, therefore, unable to agree with the Subordinate Judge that they have no remedy. He concedes that if they were not minors they would be entitled to bring a suit of this nature, though it is very doubtful, even in such a suit, the agreement will be set aside so far as the parties to it are concerned. On the other hand, if the claim as set up by the plaintiffs is allowed, it would be open to a stranger

(1) 28 M. 182 at p. 194 (F. B.).

PARCKUTTI v. KELAPPAN NAIR.

acting on behalf of the minors in a *tarwad* to interfere with every arrangement that might be made by the *karnavan* and the adult members in the family. Disclosures would often be to the prejudice of the *tarwad* and it would be taking away altogether from the *karnavan* and the other members of the *tarwad* the right to regulate the management of their affairs. The claim, therefore, to the extent that it has been put forward cannot be admitted. The plaintiffs in this Court have asked for their shares to be delivered to them or for the appointment of a Receiver. As the plaintiffs are minors and there is a general prayer in the plaint for such relief as they might be entitled to, I proceed to consider this prayer. The first defendant, the *karnavan*, has expressed his willingness to allot their shares to them. The other members, with the exception of the 15th defendant who is unwilling to allot their shares to the plaintiffs, however, have not expressed their assent or dissent. Therefore the question is whether, consistently with the principles of the *marumakkattayam* system, plaintiffs can in the circumstances of this case be allotted their share of the property. There can be no doubt from the admitted facts of the case that it would be beneficial to the *tarwad* to allot to the plaintiffs their share. According to Malabar Law "division cannot be enforced by a co-parcener" and "the head of the family has entire control over the concerns and property of the family which he has to administer for the good of the whole (section 387, Strangé's Manual of Hindu Law). The unity of the family may not be broken up by any member claiming a share and forcing on a division." This principle was laid down in 1814, and, though with interruptions, has been adhered to ever since. The head of the family, as pointed out in the extract above quoted, holds the property to administer it for the good of the whole and it certainly cannot be for the good of the family to allow strangers on behalf of minors to re-open family arrangements, if it can be prevented by securing to those minors their share without detriment to them or their *tarwad*. One course or the other has to be followed in this case. Reason seems, therefore, to suggest that he should have the power to give them such share. It was a prevalent idea for some time that the *karnavan* was not entitled to alienate the property and that the consent of the junior

members was necessary; but it is now settled law that, in the interests of the family, the *karnavan* may make any alienations [see *Kalliyani v. Narayana* (2) and the cases referred to therein for the old rule of law that the assent of all the members of the *tarwad* is required]. The alienation to the plaintiffs of their share of the property in exchange for their renunciation of their interest in the rest of the property, i.e., the sale to the plaintiffs of the interests of the *tarwad* in that property would seem to be within the powers of the *karnavan*, when it is beneficial to the family, or, in other words, it means that it would be open to the *karnavan* to allow a member to receive his share and leave the *tarwad* when it is in the interests of the family to do so. Again, though it has been decided that a member cannot claim partition of *tarwad* property, the question whether a member can claim his share, when it is in the interests of the *tarwad* that a partition should take place so far as the party claiming it is concerned, has not yet been decided. It has been decided by the Full Bench of this Court that certain members may entirely withdraw from the *tarwad* [see *Kenath Puthen Vittel Tavazhi v. Narayanan* (1)], but whether the *karnavan* may give them their share in consideration of such withdrawal when it is in the interests of the family that they should so get it, has not, as pointed out above, yet been settled. Nor is there any decision on the question whether the majority of the members may divide the family property. The late Mr. Justice Muthuswami Aiyar was of that opinion after he heard the evidence given before the Malabar Commission.

In deciding questions as to Customary Law, if there are texts or series of decisions, we should follow them. Otherwise such a question has to be decided upon evidence. I would, therefore, refer to the Subordinate Judge the following questions for decision:—

(1) Whether it is open to the *karnavan* of a *tarwad* to give to any member of the *tarwad* who claims partition his share of the property, when it is in the interests of the *tarwad* that he should do so.

(2) Whether partition can be claimed by any member of the *tarwad*, if it appears that such partition is in the interests of the *tarwad*

PARUKUTTI V. KELAPPAN NAIR.

or necessary for the preservation of his interests in the *tarwad* and generally beneficial to the *tarwad*.

3. Whether it is open to the majority of the members of the *tarwad* to enforce ■ partition of the family property.

It will be open to the Subordinate Judge to take such evidence ■ he considers necessary for the decision of these questions. He will bear in mind that what he has to decide is, not whether ■ custom has been proved against the general law of the country, but what is the Customary Law. If the ultimate decision of the High Court on the first two issues is in favour of the plaintiffs, they will be permitted to amend the plaint if necessary and be awarded their share.

The finding should be submitted in five months and seven days will be allowed for objections.

COURTS TROTTER, J.—I agree.

This appeal coming on for final hearing after the return of the finding in the negative of the lower Court upon all the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.

SESHAGIRI AIYAR, J.—I have listened with interest to the *resume* of the case-law on the liability of *tarwad* property to partition just quoted by Mr. Ananthakrishna Aiyar. From 1814 onwards, it has been regarded as accepted law in this High Court that, unless all the members of a *tarwad* consent, there can be no partition of the *tarwad* property. The decisions to which Mr. Ananthakrishna Aiyar drew attention, namely, those which give rights to the *anandravans* of a *tarwad* to question alienations made by the *karnavan* are not decisions which help the disruption of ■ *tarwad*; their effect is to preserve the property of the *tarwad* as impartible. These rights have been recognized, by Courts of Law, in *anandravans* for the express purpose of enabling them to see that the *tarwad* property is not wasted or damaged or alienated to their prejudice. I do not think that those cases are a halfway house to the position that it is open to any member of a *tarwad* to sue for a partition of the family property. It is conceded by Mr. Ananthakrishna Aiyar that there has never been any instance in which either some or a majority of the members of the *tarwad* have been allowed to divide the pro-

perty behind the back even of one single dissenting member. The principle of the father of a joint Hindu family allotting a share to some of the members, and keeping the rest of the properties of the family intact, is no doubt prevalent in the East Coast; and that is due to the development of the theory of partition mostly by the commentators on ancient Smriti texts. There has been no such development so far ■ Malabar is concerned. The Subordinate Judge says that there has not been evidence before him of a single instance in which *tarwad* property has been partitioned against the wishes of a dissenting member. The evidence in this case is clear that there is no such practice in this part of Malabar. I am, therefore, of opinion that it is not open to the Court to introduce this innovation by giving a share to the plaintiffs out of the *tarwad* property. It is not open to the Courts to introduce such a practice in the absence of clear and cogent evidence on the point. On the second question, I entirely agree with Mr. Ananthakrishna Aiyar that there is no reason why minor members of a *tarwad* should not be allowed to question the acts of a *karnavan* if he is found to mismanage the *tarwad* property. If adult members are entitled to come to a Court of law for a declaration that the acts of the *karnavan* are not binding and also to ask that he must be removed, I see no reason why that privilege should be withheld from the minor members of the *tarwad*. It would be to the interest of the minor members that they should be allowed to question the acts of the *karnavan*, for the purpose of preserving the *tarwad* property for their benefit.

I take it that on the last occasion the learned Judges who heard this appeal were inclined to the view that it is open to the present plaintiffs, if they are not entitled to get a share of the *tarwad* property, to question the acts of the 1st defendant against whom a large number of charges have been alleged in the plaint. This question has not been considered by the Subordinate Judge. Therefore, the decree of the lower Court will be reversed so far as this point is concerned, and the case will be remanded to it for disposal according to law. The enquiry should as far ■ possible be restricted to showing whether the minors (plaintiffs) have been prejudiced by the *karnavan* or whether

NIRANJAN NATH v. AFZAL HUSSAIN.

the *tarwad* property has been endangered by the acts of the first defendant. The costs will abide the result.

COUTTS TROTTER, J.—I wish just to add one word, because I was a party to the original decision. My view is that it is not open to these minors to interfere with the family arrangement carried out by the *karar* in so far as the persons who were parties to it and who were adults at the time are concerned; and that all that they are entitled to is to come to the Court for relief for themselves, on the footing that their own maintenance has to be provided for by the Court. The onus, of course, will be upon them to show that the *karar* was carried out in fraud of their rights. The onus will also be upon them to show that subsequent to the date of the *karar* there was mismanagement by the *karnavan*. In my opinion if they can show that the *karar* was carried out in order to defeat their rights and can show that by fraudulent recitals of non-existent debts the property in the hands of the *karnavan* was misrepresented or understated in the *karar*, they will be entitled to relief in respect of those false debts and in respect of subsequent acts of mismanagement. What they are not entitled to is to have the whole *karar* set aside in a manner that would affect the position of the signatories to it. I agree in the order proposed.

Appeal allowed; Case sent back.

V. R. P.

PUNJAB CHIEF COURT. FULL BENCH.

SECOND CIVIL APPEAL NO. 520 OF 1914.

May 30, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, Mr. Justice Chevis and Mr. Justice Shadi Lal.

NIRANJAN NATH—PLAINTIFF—
APPELLANT

versus

AFZAL HUSSAIN—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXII, r. 9—Adjudication directing abatement of suit on account of plaintiff's death, whether decree—Appeal.

When a Court passes a purely formal order recognizing the abatement which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon any rights and cannot be treated as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under Order XXII, rule 9, it amounts to a decree and is appealable as such. [p. 823, col. 2; 824, col. 2.]

Suppu Nayakan v. Perumal Chetty, 34 Ind. Cas. 372; 30 M. L. J. 456; (1916) M. W. N. 301; 19 M. L. T. 364; *Walayat Husain v. Ram Lal*, Ind. Cas. 643; 12 A. L. J. 1113; *Subramania Iyer v. Venkataramier*, 31 Ind. Cas. 4, referred to.

Second appeal from the decree of the District Judge, Delhi, dated the 16th of December 1913, affirming that of the Munsif, First Class, Delhi, dated the 30th April 1913, dismissing the suit.

Mr. Kanwar Narain, for the Appellants.

Dr. Muhammad Iqbal, for the Respondent.

ORDER OF THE FULL BENCH.

SHADI LAL, J.—The question submitted to the Full Bench is whether "an adjudication directing the abatement of a suit on account of the death of a plaintiff" amounts to a decree within the definition of the term contained in section 2 of the Civil Procedure Code. It is perfectly clear that the answer to the question must depend upon the determination of the point whether the adjudication in question satisfies the requirements of the definition of the word 'decree.' Now, the adjudications of a Court of Justice fall under two main heads; they may be either decrees or orders. To constitute a decree the decision must fulfil the following conditions:—

(i). It must have been arrived at in a suit.

(ii) It must have been expressed on the rights of the parties with regard to all or any of the matters in controversy.

(iii) It must be a conclusive determination of those rights, so far as the Court expressing the adjudication is concerned.

If in the case of a particular decision all these elements combine, then it is a decree, unless it is expressly excepted by the Code, e.g., an adjudication mentioned in the lists of appealable orders specified in section 104 and Order XLIII. On the other hand, if

NIRANJAN NATH v. AFZAL HUSSAIN.

any one of the three elements is absent, the decision cannot be viewed as a decree and must be treated as a mere order.

These principles of law are clear enough, and do not admit of any dispute; but the real difficulty, sometimes, arises in applying them to concrete instances and in determining whether a particular decision does, or does not, amount to a decree. If it is enumerated in the aforesaid lists, then the matter is perfectly simple; but when the decision does not find a place therein, it is either a decree, or a non-appealable order.

Turning now to the matter of abatement, which is directly before us, we think there can be no manner of doubt that, if a person claiming to be the legal representative of the deceased plaintiff applies for an order to set aside the abatement, and the Court finds no sufficient cause, which prevented him from continuing the suit, and consequently it declines to accede to the request, the adjudication refusing to set aside the abatement is not a decree, because it is expressly mentioned in Order XLIII, rule 1 (k), as an order from which an appeal is competent. But, suppose, no application under Order XXII, rule 9, for the revival of the suit is made and the person dissatisfied with the abatement comes direct to the Appellate Court, the question arises whether the decision, from which he is appealing, is a decree or not. It seems to us that no hard and fast rule can be laid down, which would cover all cases of this kind. It is a matter for consideration in each case whether the particular decision conclusively determines the rights of the parties with regard to all or any of the matters in controversy between them. For instance, the sole plaintiff dies, and no application to bring his legal representative on the record is made within six months, the abatement of the suit follows *ipso facto*, and no order of the Court directing the abatement is necessary. And here we may point out the difference between the Code of 1908 and its predecessor. It will be observed that section 366 of the Civil Procedure Code of 1882 contained the important words "the Court may pass an order that the suit shall abate;" and these words gave rise to a diversity of judicial opinion. The High

Courts of Bombay and Madras held that such an order was a decree, and was, therefore, appealable, *vide Bhikaji Ramchandra v. Purshotam* (1) and *Subbayya v. Saminadayyar* (2). The Allahabad High Court, however, took the contrary view, and held that it was a non-appealable order, see *Hamida Bibi v. Ali Husen Khan* (3) and *Mehdi Husain v. Sughra Begam* (4). For these words, the Code of 1908 substitutes the phrase "the suit shall abate," and we may, therefore, draw the inference that the Legislature contemplated that an abatement in consequence of the omission to make, within the prescribed period, an application to implead the legal representative of the deceased plaintiff results from the operation of law, and that it is not necessary to make an order that the suit shall abate. It is observable that, in spite of the change in the language, the conflict, which existed under the old Code, has continued, and that both the Madras and Allahabad High Courts have adhered to the divergent views previously held by them, *vide Suppu Nayakan v. Perumal Chetty* (5) and *Walayat Husain v. Ram Lal* (6). After examining the matter carefully we consider that if a Court passes a purely formal order recognizing the abatement, which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon any rights, and cannot be treated as a decree. An order of this nature, as observed already, merely records an abatement, which has already taken place by reason of the lapse of six months after the death of the plaintiff, and does not contain any decision arrived at by the Court. In a case of this kind Order XXII, rule 9, allows the legal representative to make an application for the revival of the suit, and the only question the Court is thereupon required to determine is whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is

(1) 10 B. 220.

(2) 18 M. 490; 5 M. L. J. 63.

(3) 17 A. 172; A. W. N. (1895) 42.

(4) 25 A. 206; A. W. N. (1903) 15.

(5) 34 Ind. Cas. 372; 30 M. L. J. 435; (1916) M. W. N. 301; 19 M. L. T. 364.

(6) 25 Ind. Cas. 643; 12 A. L. J. 1113.

NIRANJAN NATH v. AFZAL HUSSAIN.

entitled to prefer an appeal against that order under Order XLIII, rule 1 (k). The decision of the Appellate Court is, however, made final, and a second appeal is not competent.

The language of Order XXII, rule 9 (2), when carefully examined, leads us to the conclusion that it is confined to cases in which the abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff or the deceased defendant, and that it has no applicability to cases in which the suit has abated on account of some other cause. This view receives support from the decision of the Madras High Court in *Subramania Iyer v. Venkataramier* (7). Suppose, the sole plaintiff in a suit dies, and in spite of an application within six months by his legal representative the Court holds that the right to sue does not survive, and consequently directs the abatement of the suit. An abatement of this character obviously stands on a different footing. It does not take place *ipso facto*. The Court does not record a merely formal order reciting a past event, as in the case of an abatement in consequence of an application not having been made within the prescribed period to implead the legal representative, but it exercises its mind in the determination of a matter in controversy. The decision of the Court directing the abatement of the suit is, in our opinion, a decree, because the right to represent the deceased is a point in controversy between the claimant and the opposite party, and the adjudication determines their rights with respect thereto, and puts an end to the case, there being no appeal from the adjudication as an appeal from an order. An application under rule 9 is, as observed above, incompetent and it is difficult to believe that the Legislature intended that the decision of a matter, which concludes the suit, should be final and that the aggrieved party should have no remedy whatever.

These observations would apply *mutatis mutandis* to an abatement on account of the right to sue not surviving upon the death of the sole defendant. When there

are two or more plaintiffs, and one of them dies, and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, and no application to bring the legal representative on the record is made within six months, Order XXII, rule 3, lays down that the suit shall abate, so far as the deceased plaintiff is concerned. What is the effect of this partial abatement on the suit of the surviving plaintiff or plaintiffs? If the suit is of such a nature that it cannot proceed in the absence of the deceased's legal representative, the partial abatement will result in the total abatement or dismissal of the suit. Whether the final decision is called an abatement, or a dismissal, *qua* the surviving plaintiff or plaintiffs, it is manifest that it falls, within the definition of the term 'decree,' and is appealable as such.

We consider it unnecessary to multiply instances. Suffice it to say, that when the order of the Court merely recognizes an abatement, which has already taken place on account of the death of a plaintiff not followed by an application within six months to implead his legal representative, and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under Order XXII, rule 9, it amounts to a decree and is appealable as such.

With this answer to the question referred to us, the case will now be remitted to the Division Bench for final disposal.

Case remitted to Division Bench.

(7) 31 Ind. Cas. 4.

SUBBAI GOUNDAN v. PALANI GOUNDAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2383 of 1914.

March 24, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.SUBBAI GOUNDAN—PLAINTIFF—
APPELLANT

versus

PALANI GOUNDAN AND ANOTHER—
DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 83, 84—
Mortgage—Deposit in Court—Computation of interest—
Inclusion of interest for day of deposit—Payment of
batta—Tender insufficient, effect of—Cessation of interest
—Mortgagor's right to mesne profits—Day, fraction of,
when to be considered full day.*

If a mortgagor pays the exact amount due on his mortgage into Court and causes notice to be issued to the proper address of the mortgagee, paying *batta* therefor, he has done all that is required of him by sections 83 & 84 of the Transfer of Property Act to stop the running of interest. [p. 827, col. 1.]

Krishnaswami Chettyar v. Thippa Ramaswami Chettyar, 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89, followed.

Where the amount deposited falls short of what is due by even a few annas owing to a *bona fide* mistake in calculation, it is not a sufficient tender within the meaning of the section and the mortgagor is not entitled to mesne profits on the mortgagee's refusal to accept it. [p. 828, col. 2.]

Deo Dat v. Ram Autar, 8 A. 502 at p. 508; A. W. N. (1886) 149, referred to.

Haji Abdul Rahman v. Haji Noor Mohamed, 16 B. 141, not approved.

In the absence of a mercantile custom or usage, interest cannot be charged for either the day on which money was advanced or on which it was repaid. [p. 826, cols. 1 & 2.]

Raghub Prusti v. Bhobui Sahoo, 8 C. W. N. 216, referred to.

In computing the interest due on a mortgage amount for making a deposit under section 84 of the Transfer of Property Act, interest accruing due for the day of deposit should be included. [p. 826, col. 2.]

Where there are conflicting rights as between subject and subject, a fraction of a day will be treated as a whole day. [p. 826, col. 2.]

Commercial Steam Ship Co. v. Boulton, (1875) 10 Q. B. 346; 41 L. J. Q. B. 219; 33 L. T. 707; 23 W. R. 854; 3 Asp. M. C. 111, referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Coimbatore, in Appeal Suit No. 7 of 1914, preferred against that of the Court of the District Munsif of Udamalpet, in Original Suit No. 1726 of 1912.

Mr. V. Purushothama Aiyar, for the Appellant.

Mr. S. T. Srinivas Gopalachari, for the Respondents.

JUDGMENT.—The facts of the case which have given rise to this appeal may be shortly stated. The appellant who had obtained a subsequent possessory mortgage from 2nd defendant, sued to redeem a prior possessory mortgage, Exhibit I, dated 7th April 1903, for Rs. 1,000 in favour of the 1st defendant (1st respondent). The document provided that the principal amount was payable on 7th April 1910, and "that in default of payment within the prescribed time the amount was repayable with interest at 4 annas per Rs. 100 per mensem from the date of expiry."

On 28th May 1910 the appellant deposited Rs. 1,004-2-0 in Court under section 83 of the Transfer of Property Act. First respondent was served with notice of the deposit but he did not appear and admittedly the money was not drawn from Court: the petition under section 83 of the Transfer of Property Act was dismissed on 21st June 1910.

On 17th September 1912 the appellant instituted the present suit, in which he claimed Rs. 600 mesne profits for two years (May 1910 to May 1912). First respondent contended that the amount deposited was not correct, that he had surrendered the land to appellant, that he was entitled to Rs. 50 for value of improvements and also to interest up to the date of the written statement and that appellant's claim for mesne profits was unsustainable.

The District Munsif held that 1st respondent's plea that he had surrendered the land was untrue and that he was not entitled to anything for value of improvements.

At the same time he disallowed the appellant's claim for mesne profits and allowed 1st defendant's claim for interest on the ground that the amount deposited was incorrect, and directed each party to bear his own costs in the suit. On appeal, the Subordinate Judge confirmed the District Munsif's decision. The lower Court found that the amount deposited was incorrect and fell short of the amount due by 2 annas, the appellant having by mistake calculated interest for 50 days instead of for 51. In second appeal, it is contended *inter alia* that the lower Court should have held that interest ceased from the date of deposit.

SUBBAI GOUNDAN v. PALANI GOUNDAN.

The appellant is not, we think, entitled to raise this contention, Court-fee not having been paid on the amount of interest decreed. The valuation of the second appeal has been taken as Rs. 800, the amount of mesne profits for four years from 1910 to 1914. The only question, therefore, for determination is whether the appellant is entitled to claim mesne profits and whether there was a proper deposit of what was due under the mortgage.

Section 84 of the Transfer of Property Act provides that "when the mortgagor or such other person as aforesaid has deposited in Court the amount remaining due on the mortgage, interest on the principal money shall cease.....as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court." The section provides that the interest on the principal money shall cease from the date of the deposit of the "amount remaining due on the mortgage."

In *Deo Dat v. Ram Autar* (1) the opinion was expressed that, where the mortgagor deposits an amount which falls short of the amount actually due, presumably interest would not cease, even *pro tanto*. On the other hand in *Haji Abdul Rahman v. Haji Noor Mahomed* (2) Telang, J., held that the rule laid down in *Dixon v. Clark* (3) that the tender of only a part of the debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered.

It may be doubted whether the view taken by the learned Judge is supported by the language of section 84 of the Transfer of Property Act. On the wording of the mortgage document, Exhibit I, the principal amount was repayable on 7th April 1910 and interest was payable from the date of expiry (presumably 7th April), excluding that date. In the absence of mercantile custom or usage, interest cannot be charged for either the day the money was advanced or

on which it was re-paid. *Raghub Prusti v. Bhobui Sahoo* (4).

The appellant appears to have made a *bona fide* mistake in calculating the number of days for which interest was payable. Interest was payable clearly from and including 8th April 1910 up to the date of deposit, i.e., 28th May 1910. In other words, interest was payable for 23 days in April and 28 days in May. The appellant seems to have thought that interest was not payable for the 28th day of May, which was the date of deposit. For 23 days in April the interest came to Rs. 1-14-8 and for 28 days in May, it amounted to Rs. 2-4-1-17/31. Interest for 27 days only was Rs. 2-2-10-2/31. According to the plaintiff's calculation, therefore, he had to deposit Rs. 4-1-6-2/31 and he deposited Rs. 4-2-0 (in addition, of course, to the sum of Rs. 1,000). He evidently thought that he had paid about 6 pies more than what was due. Strictly speaking he had to pay Rs. 4-2-9-17/31, that is, 9-17/31 pies more than he paid. (The lower Court's view that the deposit fell short of 2 annas seems to be based on a wrong calculation). That the plaintiff had to pay the interest for the 28th May also seems to be clear from the maxim *fractionem diei non recipit lex*. Where there are conflicting rights as between subject and subject, a fraction of a day will be treated as a whole day; as for instance, in a claim for demurrage of a ship, in which case it was expressly held that a fraction of a day counts for a day, *Commercial Steam Ship Company v. Boulton* (5). A creditor cannot also be required in reason to seek another investment for his money on the very day it is paid up. We regret that we are constrained to hold that the deposit made by the plaintiff, having fallen short of the sum due by 9½ pies, was not a proper deposit, though we are unable to agree with the learned Subordinate Judge that the deposit should have included the interest till the date on which the defendant got notice of the deposit through Court. Section 84 requires the mortgagor only to do all that has to be done by him to enable the mortgagee to take such amount out of Court and when

(1) 8 A. 502 at p. 508; A. W. N. (1886) 149.

(2) 16 B. 141.

(3) (1847) 5 C. B. 365; 16 L. J. C. P. 237; 5 D. & L. 155; 136 E. R. 919.

(4) 8 C. W. N. 216.

(5) (1875) 10 Q. B. 346; 44 L. J. Q. B. 219; 33 L. T. 707; 23 W. R. 854; 3 Asp. M. C. 111.

DURGA BAI v. SOBHA SINGH.

he pays *batta* for notice with the proper address of the mortgagee he has done all that has to be done by him. See also *Krishnaswami Chettyar v. Thippa Ramaswami Chettyar* (6), where it is said that, if the mortgagor pays the proper amount into Court and causes a notice to be issued upon the mortgagee, there is nothing more that he has got to do under sections 83 and 84 of the Transfer of Property Act to stop the running of interest, except that he should not afterwards withdraw the money which he deposited in Court.

We are, therefore, constrained to substantially confirm the decree made by the lower Courts; but we think the mortgagee's conduct was altogether unreasonable. He dishonestly raised a false plea as to the delivery of the mortgaged property to the plaintiff and his claim to be entitled to the value of alleged improvements was also disallowed. We will, therefore, modify the lower Appellate Court's decree by directing the parties to bear their own costs in that Court. With this modification the second appeal will stand dismissed but without costs.

Appeal dismissed; Decree modified.

V. R. P.

(6) ■ Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131 at p. 260; (1911) 1 M. W. N. 89.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 4174 OF 1913.

May 23, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

Srimati DURGA BAI—PLAINTIFF—
APPELLANT

versus

SOBHA SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Joint family—Grant, ancient, in name of one member—Presumption—Ejectment, suit for—Title—Burden of proof—Waiver, proof of title by, whether binding on third party.

An ancient grant made to a member of a joint Hindu family must be presumed to be a grant to the family and not to the individual. [p. 329, col. 1.]

Badul Singh v. Chutterdharee Singh, 9 W. R. 558, referred to.

In a suit for ejectment the plaintiff must prove his own title. No title can be acquired against a

third party by a waiver not binding on that party, the more so when such waiver is, to the knowledge of the Court, false. [p. 828, col. 2.]

Plaintiff sued to eject defendant from property which, she alleged, was acquired by her father who was a member of a joint Hindu family:

Held, that it was plaintiff's duty to prove that the property was her father's separate acquisition and the fact that the other members of the family did not contest that position, could not dispense with such proof as against the defendant who was a stranger. [p. 828, col. 2.]

Appeal from ■ decision of the Judicial Commissioner of Chota Nagpur, dated the 17th June 1913.

JUDGMENT.—In this case the plaintiff sues to recover possession of property on the ground that it was bequeathed to her by her father by a Will, and in the alternative, that title therein vests in her ■ heiress of her father, who was the last surviving member of a joint family descended from one Bishnath. The Court of the Subordinate Judge and that of the Judicial Commissioner have come to concurrent findings of fact, that the joint family of which her father was a member was not confined to Bishnath and his two sons, but comprised also one Sadasib, who was the brother of Bishnath. They have also found that Sadasib was the last surviving member of that family, and, therefore, neither as heiress nor as the legatee of her father is the plaintiff vested with any title to recover any property which was the property of that joint family. Upon the further issue of fact,—was the property in dispute property of that joint family?—the lower Courts have again concurred in the conclusion that the burden of proof was on the plaintiff to show that the property of which she seeks to recover possession was the self-acquired property of Bishnath, and that she has failed to do so.

In second appeal the learned Vakil for the appellant concedes that if, indeed, the suit had been fought out upon these lines, these findings of fact would preclude the appeal. He urges, however, that the written statement was so carelessly drafted as to put the plaintiff upon no notice that this would be the line upon which the suit would be fought, that the issues were not framed upon these lines, and that the case was in this form sprung upon the plaintiff's

DURGA BAI V. SOBHA SINGH.

Vakil in his argument before the learned Subordinate Judge.

The sole point for our consideration, therefore, is, whether, taking the pleadings as a whole and the evidence upon the record as a whole, we are satisfied that the plaintiff realised the nature of the defence that she was required to meet. We are unfortunately not assisted greatly by the evidence upon the record in coming to a conclusion upon this point; for it appears that the suit was instituted so far back as 1907, and that the laches of the plaintiff was so great that her suit was dismissed in the first instance by the Subordinate Judge, and that dismissal was confirmed in appeal by the learned Judicial Commissioner, and came before their Lordships of the Calcutta High Court in Appeal from Appellate Decree No. 2020 of 1908. The order made by their Lordships upon that appeal was, that though they would give the plaintiff an opportunity of being heard further in support of her case, she must produce before the Subordinate Judge only those witnesses and documents and those records of Commissions which were shown to have been upon the record and named in the *ism-navisi* filed prior to the date upon which the learned Subordinate Judge dismissed the suit. We have, therefore, only the plaint, the written statement and the issues upon which to decide whether the plaintiff had notice of what was likely to be the nature of the defence. In turning to the plaint we see that the plaintiff herself had at least a suspicion of the lines on which the suit was to be fought; for she admits in paragraph 3 of the plaint, that Sadasib was in possession of the property after the death of her father and managed that property. She explains that fact by an assertion that he did so only because the plaintiff was in such a state of collapse from grief at the death of her father, that she was incapable of managing the property herself. In the written statement we find that the facts set forth therein are, that Sadasib and Bishnath were together in possession of this property and that Sadasib succeeded to sole enjoyment of it on the death of the sons of Bishnath. It is clear that in the written statement there was a clear indication that it was the defendants'

case that the property was not the property of Bishnath alone, but that his brother Sadasib had, during Bishnath's lifetime, a half-share in the property, and after the failure of that branch, a 16-annas share in that property. Moreover, the 5th issue framed was, did the plaintiff acquire any right by her father's Will? That Will had already been admitted to Probate in the Court of the District Judge, and it must have been obvious to the legal advisers of the plaintiff that there could be no sense in that issue, save that the defendant contested the plaintiff's title, on the ground that her father, being a member of a joint family, had no right to execute any Will.

With all these considerations before us, we are satisfied that the plaintiff must have been fully aware of the probable nature of the defence in the shape in which it has been accepted in the Courts of the Subordinate Judge and the Judicial Commissioner.

The only point remaining for decision is, whether the Courts were justified in placing upon the plaintiff the burden of proof, that the property in suit was acquired by Bishnath only. It is conceded that, as between the members of the family, the burden would be upon the plaintiff. But it is urged that, inasmuch as the defendant is a stranger to the suit, this rule would not apply in his case, and that so long as the members of the family were agreed that the property was Bishnath's own property, the defendant should not be allowed to contest the assertion of all the members of the family. It is settled law, that before a plaintiff can succeed in a suit for eviction the plaintiff must prove her own title, and it has been held so frequently that it is unnecessary to quote the authorities for the proposition, that no title can be acquired against a third party by a waiver not binding upon that party and still less can it be acquired by a waiver which to the knowledge of the Court is a false waiver. Clearly the plaintiff, before she can succeed, must prove by evidence, and not merely by waiver by the other members of the family, that she has a title to the property in suit. The evidence upon which it has been decided that Bishnath was not solely interested in this property is the admission made by Sadasib's

ANANTHARAMA IYER v. VETTATH KUTTIMALU KOVILAMMAL.

grandson, Kashi Nath, that there were a large number of *ijmali* properties held by the brothers Bishnath and Sadasib. And ■■ may refer in this connection to the case of *Badul Singh v. Chutterdharee Singh* (1), that there is a presumption that all ancient grants are made for the benefit of the joint family and not for the benefit of the individual in whose name they stand. We see no reason why presumptions of this nature should hold good as against one set of people and not as against another. We are of opinion that the lower Courts were justified in assuming, from the moment that it was found that Sadasib and Bishnath were joint, that a grant of the property now in dispute was made to them jointly, and not to Bishnath alone.

In this view of the case the plaintiff had no title upon which she could maintain an action for ejectment.

The suit was rightly dismissed, the appeal is dismissed with costs.

Appeal dismissed.

(1) 9 W. R. 558.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 107 OF 1914.

CIVIL REVISION PETITION NO. 879 OF 1914.
February 27, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Moore.

V. G. ANANTHARAMA IYER (RECEIVER)
—PETITIONER

versus

VETTATH KUTTIMALU KOVILAM-
MA *alias* NANGACHI KOVILAMMA AND
ANOTHER—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 34, 35—
Sale in execution of decree—Adjudication of judgment-
debtor in insolvency before sale—Sale, effect of. Ap-
plication by Receiver to set aside sale—Order refusing
application—Appeal, second—Civil Procedure Code
(Act V of 1908), ss. 47, 100, 115, O. XXI, r. 90.*

A sale held in execution of a decree after notice to the Court that the judgment-debtor was adjudged insolvent, is irregular and confers no title on the auction-purchaser, the property being already vested in the Receiver of the insolvent's estate. [p. 831, col. 1.]

The protection afforded by proviso (3) to section 34 of the Provincial Insolvency Act is only to a purchaser of the property of a debtor and not to a purchaser of property which has ceased in law to be the debtor's property. The protection does not apply where the purchaser had knowledge or means of knowledge of the adjudication of the debtor in insolvency prior to the sale. [p. 831, col. 2.]

An application by a Receiver of an insolvent's estate to set aside a sale on the ground of a prior adjudication of the debtor is an application under section 47, Civil Procedure Code, and a second appeal lies to the High Court from an order in appeal. [p. 830, col. 2.]

Whether a second appeal lies or not, the High Court can interfere with the order in revision on the ground of material irregularity in the exercise of jurisdiction by the lower Courts. [p. 830, col. 2.]

Proceedings to set aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge, or satisfaction of a decree and hence fall under both section 47 and Order XXI, rule 90, of the Code of Civil Procedure. Proceedings to set aside auction-sales on any other tenable ground also involve questions relating to execution, etc., and hence fall under section 47 of the Code of Civil Procedure though they may not fall under Order XXI, rule 90, of the Code of Civil Procedure. [p. 830, cols. 1 & 2.]

An executing Court is entitled to set aside a sale on an application under section 47, Civil Procedure Code, and no separate suit will lie. [p. 830, col. 2.]

Muthiah Chettiar v. Bawa Sahib, 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969; *Manasaram Paria v. Nagendra Nath Sahu Roy*, 16 Ind. Cas. 235; 16 C. L. J. 557; *Amirchand v. Harihar Prashad Singh*, 32 Ind. Cas. 354; 3 L. W. 257, 20 M. L. J. 238; *Krishnayya v. Unnissa Begam*, 15 M. 399; *Samandan Karkat Edathil Rayarappan Nambiar v. Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 267, followed.

It is only where Order XXI, rule 90, applies also besides section 47 to a petition to set aside an auction-sale that no second appeal lies under section 100, Civil Procedure Code. But where section 47, Civil Procedure Code, alone is applicable to the petition, the order passed thereon is a decree and a second appeal lies. [p. 830, col. 2.]

Appeal against the decree of the District Court, South Malabar, in Civil Miscellaneous Appeal No. 33 of 1912, preferred against that of the Court of the Subordinate Judge, South Malabar at Calicut, in Civil Miscellaneous Petition No. 839 of 1912, in Original Suit No. 61 of 1910, and Petition, under section 115 of Act V of 1908, praying the High Court to revise the said order of the District Court of South Malabar.

Mr. J. L. Rosario, for the Appellant.

Mr. B. Narasimha Rao, for Mr. A. Sundaram and Mr. K. P. Govinda Menon, for the Respondents.

ANANTHARAMA IYER v. VETTATH KUTTIMALU KOVILAMMAL.

JUDGMENT.—One Abdul Kadir was adjudged an insolvent on the 17th August 1911. In execution of a decree obtained against Abdul Kadir on the 21st January 1911, certain properties were attached. The Receiver of the insolvent's estate applied to the Subordinate Judge of Calicut on the 2nd March 1912 to stay the sale on the ground that Abdul Kadir had been declared an insolvent. A fresh sale proclamation was issued and the sale was adjourned to the 15th April 1912, on which date the property was sold subject to a mortgage of Rs. 6,119-3-0 in favour of one Ummar Sahib and purchased by the 2nd respondent. On the 19th April 1912 the Receiver applied to the Court under Order XXI, rule 90, of the Code of Civil Procedure, to set aside the sale. The Subordinate Judge dismissed the application on the ground, *inter alia*, that the insolvency proceeding in the District Court related to the insolvency of a firm of which the judgment-debtor was a member and that the property sold was not the property of the firm but the exclusive property of Abdul Kadir, that the auction-purchaser was a purchaser in good faith, and that neither section 47, nor Order XXI, rule 90, of the Code of Civil Procedure had any application. An appeal to the District Court was dismissed, the District Judge holding that Order XXI, rule 90, of the Code of Civil Procedure did not apply as there was no irregularity in publishing or conducting the sale. The District Judge further observed that no application such as is contemplated by section 35 of the Provincial Insolvency Act had been made by the Receiver.

Mr. Narasimha Rao takes the preliminary objection that no appeal lies, even if Order XXI, rule 90, of the Code of Civil Procedure, under which the application to set aside the sale was made, is applicable. We think that the petition may be taken as having been presented under section 47 of the Code of Civil Procedure also, though that section was not quoted.

Proceedings to set aside sales on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge or satisfaction of a decree and hence fall

under both section 47 and Order XXI, rule 90, of the Code of Civil Procedure. Proceedings to set aside auction sales on any other tenable ground also involve questions relating to execution, etc., and hence fall under section 47 of the Code of Civil Procedure, though they may not also fall under Order XXI, rule 90, of the Code of Civil Procedure. We agree with the opinion of Oldfield, J., in *Muthiah Chettiar v. Bawa Sahib* (1) that an executing Court is entitled to set aside a sale on an application under section 47 of the Code of Civil Procedure and that no separate suit will lie. See also *Manasaram Paria v. Nagendra Nath Sahu Roy* (2) and *Amir Chand v. Harihar Prashad Singh* (3). It is only where Order XXI, rule 90, applies also (besides section 47) to the petition to set aside the auction sale that no second appeal lies under section 100, Civil Procedure Code. But when section 47 of the Code of Civil Procedure alone is applicable to the petition, the order passed thereon is a decree and a second appeal lies.

Moreover, the appellant has also filed a civil revision petition and there can be no doubt that we have the power to interfere in revision, if it is shown that the lower Courts have acted with material irregularity in the exercise of their jurisdiction.

Mr. Rosario contends (1) that after adjudication no creditor is entitled to proceed against the person or property of the insolvent, and that when it was brought to the notice of the Court by the Receiver that the judgment-debtor had been adjudged an insolvent, the Court ought not to have proceeded with the sale; (2) that as a matter of procedure the Receiver, in whom the insolvent's estate vested on the making of the adjudication order, ought to have been made a party to the execution proceedings, and that the sale is bad. Mr. Rosario has referred us by way of analogy to certain cases, *Ramasami v. Bagirathi* (4) which was followed in *Krishnayya v. Unnissa Begam* (5) and *Samandan*

(1) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969.

(2) 16 Ind. Cas. 235; 16 O. L. J. 557.

(3) 32 Ind. Cas. 354; 3 L. W. 257; 30 M. L. J. 238.

(4) 6 M. 180.

(5) 15 M. 399.

TEK CHAND v. SOMAN SINGH.

Karkat Edathil Rayarappan Nambiar v. Malikandi Aketh Mayan (6), where it was held that a sale held without bringing on record the legal representatives of the deceased judgment-debtor is void or nullity against the representative of the judgment-debtor. We think that the sale was altogether irregular and that the Court, in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent, acted, if not without jurisdiction, at any rate with material irregularity in the exercise of the jurisdiction of the Court. Section 34 (1) of the Provincial Insolvency Act provides that "where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver, except in respect of assets realised in the course of the execution by sale or otherwise before the date of the order of adjudication." The terms of the section are quite clear and must, we think, be given effect to. In this case both the sale and the realisation of the assets took place after the adjudication order was made. We are also of opinion that the judgment-debtor had at the time of the sale no right, title or interest which could be sold or vested in a purchaser and that, consequently, the 2nd respondent acquired no title as to the property which had passed to the Receiver on the adjudication order being made. See *Raghunath Das v. Sundar Das* (7).

Mr. Narasimha Rao for the 2nd respondent relies on sub-clause 3 of section 34 of the Provincial Insolvency Act, which provides that "a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver."

It appears to us that a purchaser in good faith means a person who did not know at the time of the sale that the judgment-debtor was an insolvent, and could not by the exercise of due diligence have discovered

that an adjudication order had been made. The sale in this case was stayed at the instance of the Receiver and adjourned for a month and a fresh sale proclamation was issued. It is difficult to believe that the auction-purchaser could have been unaware of the fact that the judgment-debtor, whose property was sold, had been declared an insolvent. The insolvency of Abdul Kadir must have been a matter of notoriety in Calicut where the property was sold and the purchaser must have been aware of it. Further, it is only the purchaser of the property of the "debtor" who is protected, but when the property had vested in the Receiver before the sale it ceased in law to be the property of the debtor and hence section 34 has no application. Section 35 of the Provincial Insolvency Act, to which the District Judge refers, must be read with section 34. Section 35 of the Provincial Insolvency Act relates to the duties of a Court executing a decree as to property taken in execution, when notice has been given to the Court before the sale that an adjudication order has been made. The omission on the part of the Official Receiver to give such notice does not, we think, affect the case. The sale must accordingly be set aside and the appeal allowed with costs. No separate order in Civil Revision Petition No. 879 of 1914 is necessary.

Appeal allowed.

V. R. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1494 of 1913.

October 23, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

TEK CHAND—DEFENDANT—APPELLANT

versus

SOMAN SINGH AND ANOTHER—PLAINTIFFS,

Musammatt ASA DEVI—DEFENDANT

—RESPONDENTS.

Hindu Law—Alienation by widow of deceased proprietor—Reversioners, whether can contest alienation in presence of daughter.

(6) 23 Ind. Cas. 251; 26 M. L. J. 267.

(7) 24 Ind. Cas. 304; 42 C. 72 (P. C.); 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154.

TEK CHAND V. SOMAN SINGH.

Reversioners of a deceased Hindu can, despite the existence of a daughter, sue for a declaration that an alienation made by the widow of the deceased shall not affect their reversionary rights.

Kapuria v. Mangal, 149 P. R. 1908; 192 P. W. R. 1008, followed.

Barkat Ram v. Jagat Ram, 17 Ind. Cas. 379; 249 P. W. R. 1912 (F. B.), distinguished.

Second appeal from the decree of the Divisional Judge, Shahpur at Sargodha, dated the 22nd April 1913, affirming that of the Subordinate Judge, Shahpur, dated the 31st May 1912, decreeing the claim.

R. B. Pandit *Sheo Narain* and Mr. *Bhagat Ram Puri*, for the Appellant.

Lala Nihal Chand, for the Respondents.

JUDGMENT.

CHEVIS, J.—On 3rd April 1910, *Musammāt Asa Devi* mortgaged 2/3rds of a house to Tek Chand for Rs. 1,350. The plaintiffs, who are collaterals of the deceased husband of *Musammāt Asa Devi*, sue for the usual declaration that the alienation shall not affect their reversionary rights, and the lower Courts having given them a decree, the alienee appeals to this Court.

The question of necessity was first argued before us. This appears to be mainly a question of fact, but the admitting order shows that this appeal was admitted chiefly with regard to the item of Rs. 600. The details of consideration are all to be found on page 8 of the paper-book. As regards the item of Rs. 300, we learn that Santokh Singh actually obtained a decree on 9th February 1910, and in May 1910 when he had applied for execution *Asa Devi* asked for execution proceedings to be stayed, and then only was the mortgage-deed, which is the subject of the present suit, registered. Also there can be no doubt as to the existence of a former mortgage charge in favour of Uttam Chand, who has, we learn, since brought a suit on the basis of his mortgage and obtained a decree against *Musammāt Asa Devi* and others for over Rs. 600. The present plaintiffs were for some reason or another made parties to that suit, though how they could in *Musammāt Asa Devi's* lifetime resist Uttam Chand's claim as mortgagee is not clear. So at first sight it would appear that Rs. 900 out of the total sum of Rs. 1,350 was raised to meet existing liabilities, and that Tek Chand could not be expected to prove the necessity for these former liabilities. But it is admitted before us that Uttam Chand's

daughter-in-law and Tek Chand's wife are sisters, and also that Santokh Singh and Uttam Chand are brothers. All of them live in the same town, and the case appears to be one of juggling in one creditor in place of another simply to give the affair an air of genuine borrowing in order to meet existing claims, and to avoid the necessity of proving the genuineness of the transactions from the beginning. We consider that the circumstances are such that Tek Chand, the present alienee, must prove the necessity of all the items which go to make up the mortgage-debt. We agree with the lower Courts that such necessity has not been proved.

The only other point urged is that the plaintiffs cannot sue in the presence of *Musammāt Asa Devi's* daughter, and here reliance is placed on *Barkat Ram v. Jagat Ram* (1), a Full Bench ruling passed as long ago as 1882. It is to be noted that this ruling never appeared in the Punjab Record, though Full Bench rulings are generally reported. There is a much later ruling, *Kapuria v. Mangal* (2), the facts of which appear to be on all fours with the present case, and we prefer to follow this later ruling, though it is that of a single Judge. We should ordinarily consider ourselves bound by a Full Bench decision, but in addition to the fact that the Full Bench ruling was, for some reason, never reported in the Punjab Record, we note that it was a case where the last male owner had left not only a widow and a daughter but also a daughter's son, so that the chance of the remote reversioners' ever succeeding was small indeed.

We uphold the decision of the lower Courts and dismiss this appeal with costs.

Appeal dismissed.

(1) 17 Ind. Cas. 379; 249 P. W. R. 1912 (F. B.).

(2) 149 P. R. 1908; 192 P. W. R. 1908.

DWARIKA NATH ROY v. MATHURA NATH ROY.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 52 OF 1913.

May 15, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

DWARIKA NATH ROY CHOWDHURY
—DEFENDANT No. 1—APPELLANT

versus

MATHURA NATH ROY CHOWDHURY
AND OTHERS—PLAINTIFF AND DEFENDANTS
Nos. 2 TO 7—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 155, 188, Sch. III, Art. 1—Transfer of Property Act (IV of 1882), ss. 12, 111, 117—Landlord and tenant—Lease—Covenant against alienation, voluntary or involuntary—Forfeiture for breach and re-entry by lessor—Ejectment, suit for, of lessee's alienee—Alienee in possession under involuntary sale, whether tenant—Right to claim notice to quit under Transfer of Property Act or equitable provisions of section 155, Bengal Tenancy Act—Suit for ejectment by fractional landlord, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 142.

Under the terms of a permanent lease executed by defendants Nos. 2 and 3 to plaintiffs, the lessees undertook not to transfer their interest by sale, gift or mortgage and the lessors reserved the right to put an end to the lease and re-enter on breach of the covenant, or on a sale of the property in auction for the debts of the lessees. The lessees mortgaged their interest to 1st defendant. The 1st defendant sued defendants Nos. 2 and 3 on the mortgage, obtained a decree and in execution thereof brought the leasehold interest to sale and purchased it himself. Plaintiffs instituted the present suit to eject the 1st defendant. It was found that plaintiffs were entitled to a 12-annas share and the 8th defendant to a 4-annas share in the leased property:

Held, (1) that the covenant was enforceable, and the assignment was not *ad-inritum* as the execution sale was directly due to the voluntary acts of the lessees, viz., the execution of the mortgage and the omission to pay the mortgage-debt; [p. 837, col. 2; p. 838, col. 2.]

(2) that, in the absence of any act done by the landlords amounting to a recognition of the transfer, the 1st defendant was not a tenant entitled to claim the procedure laid down in section 155 of the Bengal Tenancy Act or to a notice to quit under the provisions of the Transfer of Property Act, and that he occupied no better position than that of a trespasser; [p. 837, col. 1; p. 840, col. 2.]

Buddhimanta Paramanik v. Sarat Chandra Banerjee, 6 Ind. Cas. 147; 13 C. L. J. 672, referred to.

(3) that the suit was governed by Article 142 of Schedule I of the Limitation Act and not by Article 1 of Schedule III of the Bengal Tenancy Act, which applies only to actions for ejectment of tenants; [p. 837, col. 1; p. 840, col. 2.]

Watson & Co. v. Ram Chund Dutt, 18 C. 10; 17 I. A. 110; *Hossein Mahomed v. Fakir Mahomed*, 4 Ind. Cas. 740; 10 C. L. J. 618; *Dilbar Sardar v. Hossein Ali Bepari*, 26 C. 553, referred to.

(4) that plaintiffs were entitled to a decree for

khas possession of the 12-annas share jointly with the 8th defendant, the rule that all sharers should unite in a suit to determine a lease not applying to a suit to eject a trespasser. [p. 837, col. 1; p. 840, col. 2.]

Radha Proshad Wasti v. Esuf, 7 C. 414; 9 C. L. R. 76, referred to.

Per Mookerjee, J.—A lease in perpetuity is forfeitable for breach of covenant notwithstanding that it is permanent. [p. 838, col. 1.]

Abhiram Goswami Mohant v. Shayama Charan Nandi, 4 Ind. Cas. 449; 26 I. A. 146 at p. 167; 14 C. W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857; 19 M. L. J. 530; 10 C. L. J. 284; 36 C. 1003, referred to.

A covenant for forfeiture of a lease upon an involuntary sale is enforceable both under the English and the Indian Law, though section 12 of the Transfer of Property Act expressly mentions the case of forfeiture for bankruptcy and does not specifically refer to cases of forfeiture for involuntary sales. [p. 838, col. 2.]

Vyankatraya v. Shivrambhat, 7 B. 256; *Mahananda v. Sarat Moni Debi*, 10 Ind. Cas. 374; 14 C. L. J. 585; *R. v. Topping*, (1825) Mc. & Yo. 544; 29 R. R. 839; *Davis v. Eyton*, (1830) 7 Bing. 154; 33 R. R. 408; 4 Moo. & P. 820; 9 L. J. (o. s.) C. P. 44; 131 E. R. 60; *Roe v. Gallier*, (1887) 2 T. R. 133; 1 R. R. 445; 100 E. R. 72; *Doe v. Hawke*, (1802) 2 East 481; 102 E. R. 453; *Cooper v. Wyatt*, (1821) 5 Madd. 482; 21 R. R. 336; 56 E. R. 980; *Yarnold v. Moorhouse*, (1830) 1 Rus. & My. 364; 39 E. R. 141; 32 R. R. 223, referred to.

An involuntary alienation may, in one sense, be attributed to a remote act of a party quite as much as a voluntary alienation, but a covenant for forfeiture by voluntary alienation does not include, by implication, a covenant for forfeiture for involuntary alienation. [p. 838, col. 2.]

Doe v. Carter, (1799) 8 T. R. 57; 101 E. R. 1264; 4 R. R. 986; *Doe v. Carter*, (1799) 1 T. R. 300; 101 E. R. 1400; 4 R. R. 586; *Croft v. Lumley*, (1855) 5 El. & Bl. 648 at p. 679; 103 R. R. 663 at p. 681; 119 E. R. 622; 25 L. J. Q. B. 73; 3 Jur. (n. s.) 62; 4 W. R. 94; 26 L. T. (o. s.) 123; *Croft v. Lumley*, (1858) 6 H. L. C. 672 at p. 742; 108 R. R. 252 at p. 289; 27 L. J. Q. B. 321; 4 Jur. (n. s.) 903; 6 W. R. 523; 10 E. R. 1459, referred to.

Where there is a covenant in a lease against alienation by the tenant but no right of re-entry reserved in the landlord, the lease is not forfeited by breach of the covenant and the remedy of the landlord is either by way of injunction against an apprehended breach or by recovery of damages for the breach already committed. But where the lease reserves a right of re-entry, the landlord is not limited to the reliefs by injunction or damages but may at his choice treat the lease as forfeited and exercise his right of re-entry. [p. 839, cols. 1 & 2.]

Doe v. Godwin, 16 R. R. 463; 4 M. & S. 265; 105 E. R. 833; *Bibi Sahodra v. Rai Jang Bahadur*, 5 I. A. 210; 1 C. 224; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108; *Governors of Bridewell Hospital v. Pawkner*, (1892) 8 T. L. R. 637; *McEacsharn v. Colton*, (1902) A. C. 104; 71 L. J. P. C. 20; *Williams v. Earle*, (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041; *Paul v. Nurse*, (1828) 8 B. & C. 486; 2 M. & Ry. 525; 7 L. J. (o. s.) K. B. 12; 108 E. R. 1123;

DWARIKA NATH ROY v. MATHERRA NATH ROY.

32 R. R. 456; *Basarat Ali Khan v. Manirulla*, 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49; *Blyth v. Dennett*, (1853) 13 C. & B. 178 at p. 180; 22 L. J. C. P. 72; 138 E. R. 1165; 93 R. R. 480; *Bowser v. Colby*, (1841) 1 Hare 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969; *Davenport v. R.*, (1877) 3 A. C. 115 at p. 128; 47 L. J. P. C. 8; 37 L. T. 727; *Doe v. Baucks*, (1821) 4 B. & Ald. 401 at p. 406; Gow. N. P. 220; 23 R. R. 318; 106 E. R. 984; *Roe v. Gulliers*, (1897) 2 T. R. 133; 1 R. R. 445; 100 E. R. 72; *Church v. Browne*, (1808) 15 Ves. 258; 10 R. R. 74; 33 E. R. 752; *James v. Young*, (1884) 27 Ch. D. 652; 53 L. J. Ch. 793; 51 L. T. 75; 32 W. R. 981, referred to.

Where section 111 of the Transfer of Property Act does not apply, it is not necessary for a landlord prior to the institution of a suit for ejectment of the tenant to manifest his intention to avail himself of the forfeiture as the forfeiture is complete as soon as the breach occurs; so the institution of the suit itself is a sufficient, manifestation of the exercise of the option of the lessor to treat the lease as determined. [p. 840, col. 1.]

Anandamoyee Bhatta v. Lakhi Chandra, 33 C. 339; 3 C. L. J. 274; *Venkatramana v. Gundaraya*, 31 M. 403; 4 M. L. T. 221; *Padamanabaya v. Ranga*, 6 Ind. Cas. 447; 34 M. 161 at p. 164; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930; *Korupalu v. Narayana*, 20 Ind. Cas. 930; 25 M. L. J. 315; (1913) M. W. N. 655, referred to.

When a lease is forfeited, an under-lease or any other interest created by the lessee is extinguished; but if the lessee surrenders the lease, the estate of the under-lessee or of the person who claims under him is not prejudiced. [p. 840, col. 2.]

Appeal against the judgment of Mr. Justice Chapman, dated the 19th March 1913.

FACTS material will appear from the arguments and the judgment of Chapman, J., printed below:—

"Defendants Nos. 2 and 3 were the holders of a permanent lease. There was a clause in the lease giving the landlords rights of entry in the event of a transfer or a sale in execution. Defendants Nos. 2 and 3 mortgaged their leasehold to defendant No. 1. Defendant No. 1 sued upon the mortgage and purchased the rights of defendants Nos. 2 and 3 at the sale in execution. The plaintiffs, claiming to be the 16-anna landlords, sued in ejectment under the forfeiture clause in the lease above referred to. It was held that the plaintiffs were entitled to a 12-annas share only. The plaintiffs obtained a decree for joint possession with defendant No. 1 to the extent of their 12-annas share. Defendant No. 1 appeals.

The first contention in appeal is that limitation began to run from the date of the mortgage. I am, however, of opinion

that the sale in execution provided a fresh ground for forfeiture and the suit is within time counting from the date of the sale.

The next ground taken is that the condition providing for re-entry in the event of a sale in execution was void. It is said that such a condition can legally provide against private transfer only. It is, however, now settled law that a condition providing for re-entry in the event of a sale in execution is valid.

It is then pleaded that the Transfer of Property Act was applicable to the case and that under section 111 (g) of that Act the plaintiffs, having been found to be landlords to the extent only of a share, were not entitled to succeed. Much has been said upon the question whether the Transfer of Property Act was applicable to the case. It has been pointed out that in the lower Courts it was assumed that the Bengal Tenancy Act was the Act applicable. The fact is that the Bengal Tenancy Act did apply. Defendants Nos. 2 and 3 were *raiya*s at fixed rates: *Hurry Ram v. Nursingh Lal* (1). But the land being horticultural and not agricultural, the provisions of section 111 of the Transfer of Property Act were applicable. It has been laid down in the case of *Bhikharee Ram Mohoori v. Dhakeswar Pershad Narain Singh* (2) that one of the several co-sharer landlords cannot succeed by himself in a suit for ejectment upon the ground of forfeiture.

The lessees are, however, *raiya*s and having regard to that fact I am clear that upon the pleadings as between defendant No. 1 and the plaintiffs taken with the findings in the case, there was clearly an implied surrender or abandonment. It is common ground in the pleadings that defendants Nos. 2 and 3 have given up possession of the land except the portion on which the dwelling-house stands, which they now hold as tenants under defendant No. 1. Defendants Nos. 2 and 3 have ceased to pay rent to the plaintiffs. Their lease-

(1) 21 C. 129.

(2) 7 C. L. J. 483; 35 C. 807.

DWARIKA NATH ROY v. MATHURA NATH ROY.

hold was publicly sold and they accepted the sale ■ valid.

The Munsif states that defendant No. 3 has denied that the plaintiffs are their landlords. Defendants Nos. 2 and 3 did not appeal from the Munsif's decision to this Court. These facts might not perhaps be considered sufficient to constitute surrender in English Law. But they are well within the principle of the cases upon the subject of surrender by ■ *raiyat*. I need only refer to the case of *Kallinath Chakravarti v. Upendra Chunder Chowdhry* (3). I am of opinion that there was an implied surrender or abandonment. In such a case ■ co-sharer landlord is entitled to sue in ejectment and get ■ decree for joint possession.

The appeal is dismissed with costs."

Dr. Sarat Chandra Basak (with him Babu Romesh Chandra Sen), for the Appellant.—In an ejectment suit, the defendant is allowed to raise all possible objections. The lease here must be determined in the way provided therein. The bringing of ■ suit does not operate as the cessation of the lease. In this case notice must be given to determine the lease. The appellant is not a trespasser unless and until the lease is put an end to, *vide Blyth v. Dennett* (4), and this seems to be the position according to all subsequent rulings. The lease must be held to continue so long as the lessor does not determine it, *Foa on Landlord and Tenant*, 5th edition, pages 267 and 263. The assignment would not be bad till the lessor exercised his option and the assignee would be bound by the lease. The lessor must do something to avoid the lease in the case of forfeiture for breach of contract. My position is not that of a trespasser until that is done, *Woodfall on Landlord and Tenant*, 19th edition, page 371. Until the lease is avoided by the lessor I cannot be ejected. The landlord cannot re-enter until he has determined the lease according to law. The lease did not cease *ipso facto* by reason of the unauthorised transfer, the landlord must do something to determine it.

(3) 24 C. 212; 1 C. W. N. 163.

(4) (1853) 13 C. B. 178 at p. 180; 22 L. J. C. P. 72; 138 E. R. 1165; 93 R. R. 480.

[MOOKERJEE, J.—It is ■ suit to eject ■ third party and not the tenant.]

The tenant here is ■ necessary party. I am not a trespasser, section 111, clause (g), Transfer of Property Act.

[SANDERSON, C. J.—Clause (f) might apply.]

Surrender would not affect the right of ■ third party. It is a case of forfeiture of ■ lease. In ■ permanent lease surrender does not affect ■ 3rd party. If the lessor has failed to do some act to determine the lease, it is not at an end. Section 155 would apply notwithstanding that defendant No. 1 is the only appellant. A lease does not become void on the sale of the property.

[MOOKERJEE, J.—Is this ■ suit against the tenant?]

I am in the position of ■ tenant here. The assignment is not void *ipso facto*, it is voidable at the option of the lessor. The lease has got to be determined under section 111, Transfer of Property Act, and all lessors must join, *Ghasiram Mondal v. Asirbad Mahto* (5), *Bhikharee Ram Mohoori v. Dhakeswar Pershad Narain Singh* (2). In order to succeed the lease must be determined before a suit is brought [*Anandamoyee v. Lakhi Chandra Mitra* (6)]. This lease was treated as subsisting in 1900. Acceptance of rent or demand for that would constitute waiver [*Venkataramana Bhatta v. Gundaraya* (7)].

My next point is that the covenant against execution sale is not valid. Sections 10 and 12, Transfer of Property Act, refer to voluntary sale and insolvency.

MOOKERJEE, J.—The Transfer of Property Act deals with acts of parties.]

Insolvency is not an act of parties. *Nil Madhal Sikdar v. Narattam Sikdar* (8). A decree for joint possession should not have been given [*Hosseini Mahomed v. Fakir Mahomed* (9)].

Babu Joges Chandra Roy (with him Babu Abinash Chandra Ghua and Babu Biraj Mohan Majumdar, for the Deputy Registrar), for the

(5) 9 Ind. Cas. 69; 15 C. W. N. 259; 13 C. L. J. 660.

(6) 33 C. 339; 3 C. L. J. 274.

(7) 31 M. 403; 4 M. L. T. 221.

(8) 17 C. 826.

(9) 4 Ind. Cas. 740; 10 C. L. J. 618.

DWARIKA NATH ROY v. MATHURA NATH ROY.

Respondents.—A purchaser becomes trespasser if there is a covenant against alienation coupled with a condition of re-entry: *vide Korapalu v. Narayana* (10).

The purchaser has never been treated as a tenant and the transfer has never been recognised by my client. According to *Radha Proshad Wasti v. Esuf* (11) any of the lessors can avoid the lease. Here the lease is, *ipso facto*, void by reason of the transfer in breach of the covenant. The purchaser is clearly a trespasser and cannot arrogate to himself the position of a tenant.

Dr. Sarat Chandra Basak, in reply.—The lease is not forfeited by the breach, *Davenport v. Reg.* (12). The lease is not void but voidable, *Roberts v. Davey* (13). The whole body of lessors must join to determine the lease according to section 111 (g), Transfer of Property Act, *vide Bhikharee Ram Mohoori v. Dhakeswar Pershad Narain Singh* (2), *Gholam Mohiuddin Hossein v. Khairan* (14), *Surendra Nath Roy v. Krishna Sakhi Dasi* (15). *Surendra Nath Roy v. Krishna Sakhi Dasi* (15) does not apply in this case.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the first defendant against the judgment of Mr. Justice Chapman, who dismissed the appeal from the judgment of the Subordinate Judge, which affirmed the decree of the learned Munsif.

The suit was brought for a declaration of title with respect to certain lands and for the ejectment of defendant No. 5.

In the statement of claim the plaintiffs claimed a sixteen-annas interest in the said lands but under the decree it was held that their proprietary right was limited to 12 annas. The defendant No. 8 was the owner of the 4-annas interest in the said lands.

Defendants Nos. 2 and 3 had held the lands under a lease which was granted by the plaintiffs and defendant No. 8.

The defendants Nos. 2 and 3 mortgaged their interests under the lease to the defendant No. 1.

In 1893 defendant No. 1 brought a suit upon the mortgage against the defendants Nos. 2 and 3 and obtained a decree.

On the 24th July 1897 the property was sold under the lease to defendant No. 1.

On the 29th November of 1897 the sale was confirmed.

On the 23rd November 1898 possession was given to defendant No. 1.

On 20th March 1908 this suit was instituted.

It is common ground that the defendants Nos. 2 and 3 have given up possession of the land except the portion in which the dwelling-house stands, and this they now hold as tenants under the defendant No. 1. Their leasehold was publicly sold and they accepted the sale as valid and they have not appealed against the decision of the lower Courts.

The learned Judge in this Court has held that there was an implied surrender or abandonment and I think there were admitted facts in the case on which he could come to that conclusion. The lease contained the following words: "We shall not be competent to make any manner of transfer as sale, gift etc., and to mortgage, etc., to any person the land of the *miras karsa* but only to hold and enjoy the same, nor can the same be sold for our debts. If the same be transferred or sold by auction or if we or our heirs do not dwell in the said *bari*, the land constituting the *miras karsa* shall come into your *khas* possession."

The lower Courts held that by reason of this provision in the lease defendant No. 1 obtained no title by his purchase and consequently the plaintiff could recover *khas* possession of the property.

The first point urged in this appeal was that the defendant No. 1 was in the position of a tenant and could rely upon section 155 of the Bengal Tenancy Act,—that the lease

(10) 20 Ind. Cas. 930; 25 M. L. J. 315; (1913) M. W. N. 655; 38 M. 445.

(11) 7 C. 414; 9 C. L. R. 76.

(12) (1877) 3 A. C. 115 at p. 128; 27 L. J. P. C. 8; 37 L. T. 727.

(13) 4 B. & Adolp. 664; 1 N. & M. 443; 2 L. J. K. B. 141; 110 E. R. 606; 38 R. R. 348.

(14) 31 C. 786; 8 C. W. N. 325.

(15) 9 Ind. Cas. 110; 15 C. W. N. 239; 13 C. L. J. 228.

DWARIKA NATH ROY v. MATHURA NATH ROY.

only voidable and that until the plaintiff had taken the steps provided by the said section, defendant No. 1 could not be regarded as a trespasser.

In my judgment, defendants Nos. 2 and 3 had no interest which they could convey to defendant No. 1 which he must have ascertained on reference to the terms of the lease, and that in the absence of any act done by the plaintiffs, which could be said to be a recognition of the transferee, the defendant No. 1 was in no better position than a trespasser.

Defendant No. 1, therefore, cannot rely on section 155 of the Bengal Tenancy Act, which is not applicable to one in his position. [See *Buddhimanta Paramanik v. Sarat Chandra Banerjee* (16).] It was then urged that the suit was barred by limitation and reliance was placed upon sections 184 and 185 and Schedule III (1) of the Bengal Tenancy Act, and section 28 of the Limitation Act, 1908. I do not think that the Bengal Tenancy Act applies to the case of defendant No. 1, for the reason, already mentioned, that he was not a tenant within the meaning of that Act. The sale of the property to the defendant No. 1 was on July 24, 1897, and possession was given to him on the 23rd November 1898, and the action to recover the possession of the lands was brought on the 20th March 1902, and was, therefore, within the twelve years specified in the Indian Limitation Act. Consequently, in my judgment, the suit was not barred by the Limitation Act.

It was next argued that the plaintiffs being merely co-sharer landlords could not determine the lease. This question, in my judgment, does not arise as between the plaintiffs and the defendant No. 1, who, as above stated, must be treated as a trespasser.

It was then urged that plaintiffs could not sue in ejectment without joining the defendant No. 8 as plaintiff but the defendant No. 1 being no more than an intruder, the plaintiffs were entitled to the decree for *khas* possession of the 12-annas share jointly with this defendant. [See *Radha Proshad Wasti v. Esuf* (11).]

The covenant in question contained a provision for re-entry and, therefore, may be said to have been for the benefit of the lessor and those claiming under him, and inasmuch as the execution sale was directly due to voluntary acts of the lessees, viz., the execution of the mortgage and omission to pay the mortgage-debt, the assignment cannot be said to be *ad-invitum*.

Finally, it was argued that mesne profits had been allowed from the 23rd of November 1898, the date of the dispossession. The learned Vakil for the respondents agreed that this part of the decree should be modified and the mesne profits should be limited to three years. Subject to such modification, in my judgment, the decree should stand and the appeal be dismissed with costs.

MOOKERJEE, J.—This is an appeal, under clause 15 of the Letters Patent, from a judgment of Mr. Justice Chapman, who in concurrence with the Courts below has decreed the claim of the plaintiffs-respondents. The disputed land constituted the permanent tenure of the second and third defendants under a lease granted by the landlords on the 29th November 1886. The lease contained a covenant that the tenants would not be competent to make any manner of transfer such as sale, gift, mortgage, etc., but would only hold and enjoy the land which could not also be sold for their debts. The lease further provided that if the land was transferred or sold by auction, it would come into the *khas* possession of the landlords. The tenants, in contravention of this covenant, executed a mortgage in favour of the appellant; whether the landlords ever become aware of this transaction or not has not been investigated; but we know this much that in 1893 the mortgagee obtained a decree, and, in execution thereof, himself purchased the property on the 24th July 1897. The sale was confirmed on the 29th November 1897, and the execution Court delivered possession to the decree-holder purchaser on the 23rd November 1898. It appears that the second and third defendants (whose possession was thus terminated), as also some of the other defendants, subsequently came into possession of portions of the land under sub-leases granted by the first defendant. On the

DWARIKA NATH ROY v. MATHURA NATH ROY.

20th March 1908 the plaintiffs commenced this suit for ejectment of the defendants as trespassers. They claimed this relief in respect of the whole land but have been awarded relief in respect of a three-fourths share, ■ they hold that share only in the superior interest. The owners of the remaining one-fourth share were added as *pro forma* defendants. The Court of first instance decreed the suit, and that decree has been affirmed successively by the Subordinate Judge and by Mr. Justice Chapman. On the present appeal by the first defendant, the decision of the Courts below has been assailed substantially on five grounds, namely, *first*, that the covenant for forfeiture of the lease upon an involuntary sale was bad in law; *secondly*, that if the covenant was valid, the landlords were bound to follow the procedure prescribed in section 155, Bengal Tenancy Act; *thirdly*, that the suit was barred by limitation under Article 1 of Schedule III of the Bengal Tenancy Act; *fourthly*, that a decree for ejectment cannot be made in ■ suit instituted by a fractional landlord; and *fifthly*, that the decree should have specified that the plaintiffs are entitled to mesne profits, not from the date of dispossession as claimed in the plaint, but only for three years antecedent to the suit.

As regards the *first* point, it is plain that, as pointed out by the Judicial Committee in *Abhiram Goswami Mohant v. Shyama Charan Nandi* (17), ■ lease in perpetuity is forfeitable for breach of covenant, notwithstanding that it is permanent. It is equally plain that ■ covenant for re-entry by the landlord upon an involuntary sale is valid under the law of England. This is conclusively established by the decisions in *R. v. Topping* (18) and *Davis v. Eytton* (19). In the latter case Tindal, C. J., observed, with reference to a covenant of this description, that the estate of the lessee was certain at first, but

liable to be defeated by a condition which he allowed to be inserted in the contract in which was a lawful condition; it was sufficient that the condition was broken, to ■ that the landlord entered on his title paramount and took the property - then ■ he had it originally [see also *Roe v. Galliers* (20), *Doe v. Hawke* (21), *Cooper v. Wyatt* (22), *Yarnold v. Moorhouse* (23)]. We have also the high opinion of Sir Charles Sargent, C. J., in *Vyankatraya v. Shivrambhat* (24) that the same rule is applicable in India, although section 12 of the Transfer of Property Act expressly mentions the case of forfeiture for bankruptcy and does not specifically refer to the case of forfeiture for involuntary alienation [*Mahananda Roy v. Sarat Moni Debi* (25)]. It may also be observed that, as explained in the case of *Ram Pershad Koeri v. Jawahir Roy* (26) in connection with ■ question of abandonment by ■ tenant, an involuntary alienation may in one sense be attributed to a remote act of the party quite as much as a voluntary alienation [*Doe v. Carter* (27), *Doe v. Cartar* (28); see also the judgment of Lord Campbell, C. J., in *Croft v. Lumley* (29) as also the contrary opinion of Baron Alderson in the Exchequer Chamber and of Lord Wemsleydale in the House of Lords: *Croft v. Lumley* (30)]; this analogy, however, does not justify the view that a covenant for forfeiture for voluntary alienation includes by implication ■ covenant for forfeiture for involuntary alienation. I hold accordingly that the covenant in question is valid and operative in law.

As regards the *second* ground it is plain that section 155 of the Bengal Tenancy Act, which prescribes the mode whereby relief may be granted against forfeiture,

(20) (1787) 2 T. R. 133; 1 R. R. 445; 100 E. R. 72.

(21) (1802) 2 East 481; 102 E. R. 453.

(22) (1821) 5 Madd. 482; 21 R. R. 336; 56 E. R. 980.

(23) (1830) 1 Rus. & My. 364; 39 E. R. 141; 32 R. R. 223.

(24) 7 B. 256.

(25) 10 Ind. Cas. 374; 14 C. L. J. 585.

(26) 12 C. W. N. 899 at p. 904; 7 C. L. J. 72.

(27) (1798) ■ T. R. 57; 101 E. R. 1264; 4 R. R. 586.

(28) (1799) 8 T. R. 300; 101 E. R. 1400; ■ R. R. 586.

(29) (1855) 5 El. & Bl. 648 at p. 679; 103 R. R. 663 at p. 681; 119 E. R. 622; 25 L. J. Q. B. 73; 3 Jur. (N. S.) 62; 4 W. R. 94; 26 L. T. (O. S.) 123.

(30) (1858) 6 H. L. C. 672 at p. 742; 108 R. R. 252 at p. 289; 27 L. J. Q. B. 321; 4 Jur. (N. S.) 903; 6 W. R. 523; 10 E. R. 1459.

(17) 4 Ind. Cas. 449; 36 I. A. 148 at p. 167; 14 C. W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857; 19 M. L. J. 530; 10 C. L. J. 284; 36 C. 1003.

(18) (1825) Mc. & Yo. 544; 29 R. R. 839.

(19) (1830) 7 Bing. 154; 33 R. R. 408; 4 Moo. & P. 820; 9 L. J. (O. S.) C. P. 44; 131 E. R. 60.

DWARIKA NATH ROY v. MATHURA NATH ROY.

is applicable only to a suit for the ejectment of a tenant who has forfeited his tenancy by breach of a covenant. The first defendant, who has contested the claim of the plaintiffs, obviously cannot take shelter under section 155, unless he establish that he is a tenant, that is, that he has acquired by his purchase the tenancy originally held by the second and third defendants. This raises the question of the effect of the execution sale, in other words, did the tenancy pass by the sale to the purchaser and is now liable to be annulled by the plaintiffs, or, has it been forfeited by reason of the very act of the sale. For the correct solution of this question, it is necessary to bear in mind the fundamental distinction between two classes of cases, which has been recognised in a long line of decisions [*Nil Madhab Sikdar v. Narattam Sikdar* (8), *Golak Nath Roy Chowdhry v. Mathura Nath Roy Chowdhry* (31), *Vyankatraya v. Shivrambhat* (24), *Tamaya v. Timapa Ganpaya* (32), *Diwali v. Apaji Ganesh* (33), *Madar Saheb v. Sunnabawa* (34), *Basarat Ali Khan v. Manirulla* (35), *Kesar Lal Nag Mozumdar v. Harasit Ghose* (36), *In the matter of the West Hopetown Tea Company, Limited* (37), *Netrapal Singh v. Kalyan Das* (38), *Parmeshri v. Vittappa Shanbaga* (39), *Keshob Lal Nag Mazumdar v. Jnanendra Nath Ghose* (40), *Doe v. Carter* (27), *Croft v. Lumley* (30)], namely, cases where there is a covenant in the lease against alienation, but no right of re-entry reserved in the landlord; and cases where there is a covenant in the lease against alienation coupled with a clause for re-entry. In the first class of cases, the lease is not forfeited by breach of covenant [*Doe v. Godwin* (41)] and the remedy of the landlord is either by way of injunction against an apprehended

breach [*Bibi Sahodra v. Rai Jang Bahadur* (42), *Governors of Bridewell Hospital v. Fawcner* (43), *McEacharn v. Colton* (44)] or by recovery of damages for a breach already committed [*Williams v. Earle* (45), *Paul v. Nurse* (46), *Weatherall v. Geering* (47), *Basarat Ali Khan v. Manirulla* (35)]. In the second class of cases, where the lease reserves a right of re-entry, the landlord is not limited to the reliefs by injunction or damages, but may, at his choice, treat the lease as forfeited and exercise his right of re-entry; as was said by Maule, J., in *Blyth v. Dennett* (4), the lease becomes not void but voidable, and only the lessor and not the lessee at default can treat the term as at an end [*Bowser v. Colby* (48), *Davenport v. Reg.* (12), *Doe v. Bancks* (49), *Roe v. Galliers* (20), *Church v. Browne* (50), *Fryer v. Ewart* (51)]; the election by the lessor may be made by express words or by acts [*Roberts v. Davey* (13), *James v. Young* (52)]; when, however, the landlord indicates his election to take advantage of the forfeiture, the forfeiture takes effect from the moment of breach, namely, from the date of the alienation. We cannot hold that the tenancy continues even after the alienation, because such an assumption is contrary to the very condition of the contract itself, that on the alienation the landlord is entitled to re-enter. Section 111 of the Transfer of Property Act admittedly does not govern the case before us, as the tenancy was of agricultural land (section 117, Transfer of Property Act), and consequently the principle recognised in

(31) 20 C. 273.

(32) 7 B. 262.

(33) 10 B. 342.

(34) 21 B. 155.

(35) 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49.

(36) 6 Ind. Cas. 685; 12 C. L. J. 126.

(37) 12 A. 192; A. W. N. (1890) 71.

(38) 28 A. 400; A. W. N. (1906) 60; 3 A. L. J. 196.

(39) 26 M. 157; 12 M. L. J. 189.

(40) 24 Ind. Cas. 538; 20 C. L. J. 332.

(41) (1815) 16 R. R. 463; 4 M. & S. 265; 105 E. R. 833.

(42) 8 I. A. 210; 8 C. 224; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108.

(43) (1892) 1 T. L. R. 637.

(44) (1902) A. C. 104; 71 L. J. P. C. 20.

(45) (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041.

(46) (1828) 8 B. & C. 486; 2 M. & Ry. 525; 7 L. J. (o. s.) K. B. 12; 108 E. R. 1122; 32 R. R. 456.

(47) (1860) 12 Ves. Jun. 504; 8 R. R. 369; 33 E. R. 191.

(48) (1841) 1 Hare 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969.

(49) (1821) 4 B. & Ald. 401 at p. 406; Gow. M. P. 220; 23 R. R. 318; 106 E. R. 984.

(50) (1808) 15 Ves. 258; 10 R. R. 74; 33 E. R. 752.

(51) (1902) A. C. 167; 71 L. J. Ch. 433; 86 L. T. 242; 18 T. L. R. 426; 9 Manson 281.

(52) (1884) 27 Ch. D. 652 at p. 662; 53 L. J. Ch. 793; 51 L. T. 75; 32 W. R. 981.

DWARIEKA NATH ROY v. MATHURA NATH ROY.

Anandamoyee v. Lakhi Chandra Mitra (6) and *Venkatramana Bhatta v. Gundaraya* (7), that the landlord must prior to the institution of the suit for ejectment have manifested his intention to avail himself of the forfeiture, has no application. As pointed out by Krishna-swamy Iyer, J., in *Padmanubaya v. Ranga* (53) and by Sadasiva Aiyar, J., in *Korapain v. Narayana* (10), in this class of cases where section 111 of the Transfer of Property Act does not apply the forfeiture is complete when the breach of the condition occurs. Consequently, the election is not a condition precedent to the right of action, but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined. The technicalities which at one time hedged in the English law on the subject are well illustrated by the cases of *Goodright v. Hare* (54), *Jones v. Carter* (55), *Grimwood v. Moss* (56), *Clough v. London N.-W. Railway Co.* (57), *Evans v. Davis* (58), *Serjeant v. Nash, Field & Co.* (59) and they need not be needlessly introduced here. In the case before us, it is, in my opinion, plain that no title passed to the first defendant by the execution sale, the landlord has not waived the forfeiture by receipt of rent or otherwise, and the forfeiture must be held to have taken effect from the date of sale. The first defendant thus cannot take advantage of section 155 of the Bengal Tenancy Act, as he is not a tenant but a trespasser. The original tenants are quite content with the decree for ejectment and do not claim to be relieved against forfeiture [*Buddhimanta Pramanik v. Sarat Chandra Banerjee* (16)]. If they are now in occupation of any portion of the land, they do not claim to do so as tenants under the plaintiffs; they have

repudiated the tenancy under the plaintiffs and have attorned to the appellant; their title, if any, must now fall with that of their new lessor [*Kallinath Chakravarti v. Upendra Chunder Chowdhry* (3)]. As Mellish, L. J., said in *Great Western Railway Co. v. Smith* (60), affirmed in *Smith v. Great Western Railway Co.* (61), it is rule of law that if there is a lessee and he has created an under-lease or any other legal interest if the lease is forfeited, then the under-lessee or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him. In my opinion the second ground is entirely untenable and the defendants are liable to be ejected as trespassers.

As regards the third ground, reliance is placed upon Schedule III, Article 1, of the Bengal Tenancy Act which provides that a suit to eject a tenure-holder or ryot, on account of a breach of condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach, must be instituted within one year from the date of the breach. This argument must be overruled on the same grounds as the second contention. The suit is for the ejectment of a trespasser and of persons deriving title from him, and is consequently governed by Article 142 of the Schedule to the Limitation Act. The third contention accordingly fails.

As regards the fourth ground, it is obvious that the first defendant and those that claim title under him are in the position of trespassers, the plaintiffs are entitled to recover possession of the disputed land in respect of their own share; section 188 of the Bengal Tenancy Act has no application nor do any equitable considerations come into play, such as might possibly have operated [*Watson and Company v. Ram Chund Dutt* (62), *Hossein Mohamed v. Fakir Mohamed* (9)] if a co-sharer landlord

(53) 6 Ind. Cas. 447; 34 M. 161 at p. 164; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

(54) (1780) 2 Douglas 477; 99 E. R. 304.

(55) (1846) 15 M. & W. 718; 71 R. R. 800; 153 E. R. 1040.

(56) (1872) 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 20 W. R. 972.

(57) (1871) 7 Ex. 26 at p. 34; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

(58) (1879) 10 Oh. D. 747 at p. 763; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285.

(59) (1903) 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 12; 19 T. L. R. 510.

(60) 2 (1876) 2 Ch. D. 235 at p. 253; 45 L. J. Ch. 235; 34 L. T. 267; 24 W. R. 443.

(61) (1877) 3 A. C. 165; 47 L. J. Ch. 97; 37 L. T. 645; 26 W. R. 130.

(62) 18 C. 10; 17 I. A. 110.

MADHAB CHANDRA MANDAL v. NAGENDRA NATH SEN.

had sought to eject a tenant brought upon joint undivided land by another co-sharer [*Radha Proshad Wasti v. Esuf* (11), *Dilbar Sardar v. Hosein Ali Bepari* (64), *Bhikhare Ram Mohoori v. Dhakeswar Pershad Narain Singh* (2)]. The fourth ground consequently fails.

As regards the fifth ground, it is not disputed by the plaintiffs that the mesne profits must be limited to 3 years antecedent to the suit and could not be claimed for the entire period between the date of dispossession (23rd November 1898) and the recovery of possession under the decree in this suit. The decree must be amended in this respect.

The result follows that subject to variation in respect of mesne profits the decree under appeal will stand affirmed with costs.

Appeal dismissed; Decree varied.

(64) 26 O. 553.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 195
OF 1914.

June 8, 1916.

Present:—Justice Sir John Woodroffe, Kt.,
and Mr. Justice Chaudhuri.

MADHAB CHANDRA MANDAL AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

NAGENDRA NATH SEN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Jalkar—Fishery right, suit for recovery of—Limitation Act (IX of 1908), Sch. I, Art. 142.

Article 142 of the Limitation Act applies to a suit for recovery of possession of a *jalkar* on declaration of plaintiff's title thereto, where the question is whether the *jalkar* belongs to the plaintiff or the defendant ■ persons claiming to receive rent in respect thereof and which of them is entitled to collect the rent. [p. 843, col. 1.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 19th September 1913, reversing that of the Additional Munsif, Satkhira, dated the 6th May 1912.

FACTS.—This appeal arose out of a suit brought by the plaintiffs for ■ declaration of their title to and for recovery of possession of a certain *jalkar*, of which they got a lease from its owners in 1880. The first Court decreed the suit, holding that the plaintiffs had a title to the *jalkar* and their suit was not barred by limitation. On appeal by the defendants

the first Appellate Court dismissed the suit, on the ground that it ■■ barred by limitation under Article 142 of the Limitation Act without entering into the question of title. Against this decision the present appeal ■■ preferred to the High Court.

Babu Dwarkanath Chackrabutty (with him Babu Anilendra Nath Roy Choudhury), for the Appellants.—A suit for recovery of possession of a *jalkar* is not a suit for recovery of possession of land but is ■ suit for recovery of an interest in land. Hence Article 142 of the Limitation Act does not apply but the suit is governed by Article 144. No specific provision has been made in the Limitation Act in respect of a suit for recovery of possession of ■ *jalkar* on declaration of title thereto. In the case of *Lokenath Bidyadhar Mohapatra v. Jahania Bibi* (1) it was held that such a suit is governed by Article 144, of the Limitation Act. If Article 144 applies the onus is upon the defendant to show that he has acquired ■ statutory title by exclusive and adverse possession for 12 years. The lower Appellate Court was wrong in throwing the onus on the plaintiff to show that he was in possession within 12 years before the institution of the suit. It was the duty of the defendant to prove that he was in adverse possession to the exclusion of the plaintiffs for 12 years. The title was in the plaintiffs. Mere occasional fishings in the *jalkar* from time to time by the defendant cannot affect the lawful title of the plaintiffs. The first Court very properly treated these occasional fishings to be mere acts of trespass.

[CHAUDHURI, J.—Is it your case that you are the owner of the land ■ well as of the *jalkar* ?]

No. My lessor is the owner of the land as well as of the *jalkar*. I am only lessee under him of the *jalkar*.

The first Appellate Court has held that unless I can show that I have fished in the *jalkar* within 12 years of the suit my claim is barred by limitation. I submit that the Court has proceeded upon ■ wrong basis. The plaintiffs having title to the *jalkar*, it must be presumed that they were in possession unless and until the defendant proves that they were excluded from possession by his adverse

(1) 12 Ind. Cas. 305; 14 C. L. J. 572.

MADHAB CHANDRA MANDAL v. NAGENDRA NATH SEN.

possession. A right of fishery cannot be continuously exercised. It is, ■ ■ ■ matter of fact, exercised from time to time. It cannot be the defendant's case that he was catching fish continuously for 12 years. As he was a trespasser as soon as he ceased catching fish and left the *jalkar*, possession reverted to the rightful owners, the plaintiffs.

[CHAUDHURI, J.—What is the nature of your dispossession?]

My tenants have been driven away.

I submit that the case has been decided on ■ wrong issue. It should at least go back for a finding whether the defendant has acquired ■ right by exclusive and adverse possession for twelve years. The lower Appellate Court has proceeded upon a wrong standpoint, when it found that the case should be dismissed because the plaintiffs have failed to prove possession within twelve years. Here the lower Appellate Court is obviously wrong, because the onus of establishing title by proof of possession should be upon the defendant and not upon the plaintiffs. Occasional catching of fish is nothing but a trespass and such trespass cannot confer right on the trespasser.

Babu *Brajolall Chakravarty* (with him Babu *Guru Das Singha*), for the Respondents.—The whole question is one of ownership between the two parties, i.e., who is entitled to the *jalkar* in dispute. The plaintiffs allege that the *jalkar* is situated in *Mauza Madra* and that they are the lessees of it. Defendant, on the other hand, denies this allegation of the plaintiffs and says that the *jalkar* in question is situated in a different *mauza*. The lower Appellate Court held that when the case was hopelessly barred by limitation it was not necessary to enter into questions of title. The lower Appellate Court was quite right and justified in doing so. See *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (2). Article 144 of the Limitation Act has no application to this case. Even if Article 144 applies to a *jalkar*, it cannot apply when the question is, as in this case, whose property it is. In such a case it is Article 142 that will apply.

According to *Lokenath Bidyadhar Mahapatra v. Jahania Biti* (1), relied upon by the appellants, Article 144 would apply if the question be one of catching fish. But here

(2) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321.

the question is one of property to the *jalkar* itself.

Right to fishery is immoveable property and that is what the plaintiffs claim. *Jalkar* rights are often treated ■ rights of property. See U. N. Mittra's *Limitation and Prescription*, Volume II, page 467 (5th edition). Article 142 of the Limitation Act is the specific Article which covers this case, because the claim is as to the possession of immoveable property. Article 144 does not cover this case, because it requires that the possession of the defendants was not originally adverse but became subsequently adverse.

Babu *Dwarkanath Chackrabutty* replied.

JUDGMENT.

WOODROFFE, J.—In this case the first Court has found the plaintiffs' title and the second Court dismissed the suit, on the ground that the plaintiffs had not shown that they had been in possession of the *jalkar* within 12 years of the suit. This finding has been impugned, upon the ground that it is not applicable to ■ case such ■ this is alleged to be—a case in which there has been, it is said, an assertion of the incorporeal right of fishery and the question at issue properly was whether the defendants had acquired ■ right by adverse possession, and not whether the plaintiffs had been in possession within 12 years of the date of suit. It is said that the mere exercise of the right of fishery would not affect the plaintiffs, except either to establish easement in favour of the defendants or to establish adverse possession which had not been found. But this is not the case here, where the question is whether the *jalkar* belongs to the plaintiffs or the defendant as persons claiming to receive rent in respect thereof and which of those parties is entitled to collect the rent. This appears clearly from the fifth and seventh paragraphs of the plaint. The first paragraph of the plaint says that the *jalkar* of the *khal* specified in the schedule appertains to *Mauza Madra*.

The defendant's case is that the disputed *jalkar* is situated in *Bisukati*. The fifth paragraph of the plaint says:—"The defendants Nos. 1 to 6 in collusion with the most influential defendants Nos. 24 to 27 made an attempt to interfere with the

GOVINDA PILLAI v. MESSRS. BEST & CO., LTD.

plaintiffs' possession by forcibly taking *kabuliats* from the plaintiffs' tenants." It further says that "the defendants Nos. 1 to 6, being emboldened thereby, dispossessed some tenants and made fresh settlements to tenants and forbade some tenants to pay rent to the plaintiffs and thereby dispossessed the plaintiffs from the disputed *jalkar*." That is, obviously dispossessed them by receiving rents from the tenants who were in possession of the *jalkar*. It is then said that the defendants refused to pay rent to the plaintiffs, and the plaintiffs brought this suit for a declaration of their *jamai* right and right by adverse possession of the *jalkar* of the *khal* and for recovery of possession.

The first Court which decided in favour of the plaintiffs found as follows:

"It is, however, neither party's case, certainly it is not the defendants' case, that during this period any of those proprietors of village Madra actually and personally exercised any fishing right in the disputed *jalkars*. So in these years either the plaintiffs or the defendants or both these parties were in possession of the disputed *jalkars* through fishermen tenants."

Under these circumstances I think the Subordinate Judge was right in applying the 12 years' rule in the manner in which he has done and that being so, he has found that "the Sen defendants had long possession of the property and that the possession of the plaintiffs was confined to paper alone and that they never succeeded in getting actual possession of the disputed *jalkars*. It is found that the plaintiffs' lessors Messrs. Daverine and Morris were never in possession of the disputed *jalkars* and the plaintiffs have failed to prove that they obtained any settlement from the Addy Babus." He further says that "a heavy onus lay upon the plaintiffs to prove their possession within 12 years before suit. They have failed to discharge the onus and they are not entitled to disturb the long possession of the Sen defendants, which is proved by some of their own witnesses. The plaintiff having failed to prove their possession at any time within the 12 years before the institution of the suit, the suit must fail."

The appeal also, in my opinion, fails and is dismissed with costs.

CHAUDHURI, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL No. 55
OF 1915.

April 6, 1916.

Present:—Sir John Wallis, Kt., Chief Justice
and Mr. Justice Phillips.

M. GOVINDA PILLAI—PLAINTIFF—
APPELLANT

versus

MESSRS. BEST AND COMPANY, LTD.—
DEFENDANTS—RESPONDENTS.

Contract—Carriage by sea—Agreement to ship cargo at certain port—Shipper not ready to ship—Ship not putting at appointed port and proceeding to another destination—Dispensing with laying days—Breach of contract—Damages.

Engagements to ship goods and to keep space for goods must be punctually performed. The shipper must be ready with his cargo before he can enforce the obligation on the shipowner to call at the port of shipment and proceed against him in damages for its breach. [p. 844, cols. 1 & 2.]

A ship is not bound to remain for the whole of the laying days at a port, if the charterer dispenses with it. [p. 845, col. 1.]

Arery v. Bowden, 5 El. & Bl. 714; 119 E. R. 647; 25 L. J. Q. B. 49; 1 Jur. (N. S.) 1167; 4 W. R. 93, 27 L. T. (O. S.) 119; 103 R. R. 695; referred to.

Plaintiff contracted with the defendant Company to ship cargo in their ship, the City of Madras, at Cuddalore during July-August. The City of Madras arrived in Madras harbour on August 7th en route for Cuddalore. The defendant Company repeatedly asked plaintiff to advise them if he was ready to make the shipment. The plaintiff intimated to them that, owing to war conditions and other causes, he was not ready with his cargo and the City of Madras proceeded to another destination on the 21st August.

Held, that, under the circumstances, the plaintiff dispensed with the ship's coming from Madras to Cuddalore, that the defendants performed their contract and that plaintiff broke it and that defendants were not liable in damages to plaintiff. [p. 845, col. 1.]

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 358 of 1914.

Mr. M. D. Devadoss for Mr. M. K. Ramaswami Aiyar, for the Appellant,

GOVINDA PILLAI V. MESSRS. BEST & CO. LTD.

Messrs. *David Brightwell and Moresby*, for the Respondents.

JUDGMENT.—This is an appeal from a judgment of Kumaraswami Sastri, J., dismissing the plaintiff's suit for breach of contract. The contract was embodied in what is known in modern business as a Cargo Engagement Form, under which the defendants bound themselves to ship the plaintiff's cargo at Cuddalore during the months of July-August, by ss. *City of Madras* or other steamers. It is well settled, as observed by the late Mr. Cawn in his work on *Carriage by Sea*, section 51, that engagements to ship goods and to keep space for goods must be punctually performed, and it is quite clear that the defendants could perform their contract by shipping the goods at Cuddalore at any time during the months of July and August, and that the plaintiff was bound to have his cargo ready to ship when the ships called. The *City of Madras* after loading manganese at Vizagapatam and Cocanada arrived in Madras harbour on August 7th, 1914, en route for Cuddalore, which is only eight hours distant for an ordinary cargo steamer from Madras. War had been declared on the 4th August, and had made it very difficult for shippers to arrange shipments. On the 12th defendant's branch at Pondicherry reported in Exhibit V that neither the plaintiff nor their other shippers were yet in a position to say whether or not they would be able to tender any cargo for shipment, as they had not yet been able to insure against war risks. Even if that difficulty were surmounted the shippers would have to ascertain whether their buyers in Marseilles were still carrying on business. The plaintiff's ground-nuts had been pledged to the Banque de la Indo Chine at Pondicherry and were stored in defendants' godowns at Cuddalore on behalf of the Bank. It is perfectly clear on the evidence that the Bank would not part with the goods, on which it had made advances, for shipment or allow shippers to draw on their Marseilles buyers against shipments in the usual way unless the war risk was covered. Exhibit VI, a letter of the following day, shows that the shippers had cabled in vain to their Marseilles buyers and were not yet in

a position to ship. As regards the plaintiff, we have the evidence of Mr. Thomson that he saw the plaintiff on the 12th with reference to his ability to furnish cargo. He told him the ship was ready in Madras and asked whether his goods were ready and he could ship. The plaintiff said he was not then in a position to ship. "He said he must first consult the representatives of his buyers and would let me know. I put it to him several times whether he would let me know and he said he would. As a matter of fact he did not let me know." Mr. Thomson also deposed that he saw Mr. Gannay, the Manager of the Bank, who told him that he could not release the goods unless the shippers had communicated with their buyers to find out whether the buyers were there and whether insurance of the war risk had been effected. This evidence is confirmed by the letters written at the time, Exhibits V, VI, and we see no reason for not accepting it. Mr. Thomson's evidence shows what is abundantly clear from the rest of the evidence, including the evidence of the plaintiff's own witnesses, that neither the plaintiff nor the other shippers were in a position to ship any cargo at Cuddalore or Pondicherry during the month of August. The plaintiff, as already said, was under a duty to have his cargo ready when called for on the 12th August, and if he had been ready, there can be no doubt the defendants would have sent the ship on to Cuddalore and completed their part of the contract. As appears from the rest of the evidence, they kept 'the *City of Madras*' in Madras harbour for several days waiting for the plaintiff and the other shippers, and it was not until the 21st that the owners decided to send the ship to Calcutta for other cargo.

Mr. Devadoss's main point is that the plaintiff never came under any obligation to ship as the *City of Madras* never put into Cuddalore, but the effect of the evidence is that this was dispensed with by the plaintiff as pleaded in paragraph 10 of the written statement. There was no in sending the *City of Madras* from Madras to Cuddalore unless there was cargo to load there, and it is clear upon the evidence that the plaintiff did not want her to come

SRIKISHIN-ROCHUMAL V. RELUMAL-PARIOMAL.

there unless he had cargo to ship, and after informing Mr. Thomson on the 12th that he was not then in a position to ship any cargo, he promised to let him know after consulting his buyers if he was in a position to ship. This clearly meant that he would let the defendants know if he wanted the ship to come to Cuddalore from Madras. He did not do so, and after the ship had been at his disposition at any rate from the 12th, the owners on the 21st decided to send her elsewhere. In our opinion they had abundantly performed the contract and did far more than was required of them in keeping the ship at the disposition of the shippers at great expense for so many days, and the plaintiff and other shippers have no ground of complaint because the owners eventually decided that they had done enough and would send the ship elsewhere. Mr. Devadoss referred us to *Avery v. Bowden* (1), a decision of the Court of Queen's Bench, which was affirmed by the Court of Exchequer Chamber. That was an action by the charterers against the shipowner for failure to load a cargo at Odessa on the eve of the Crimean war. Under the charter the ship was bound to remain for forty-five days at Odessa to allow of loading, and as the charterers' agent was not in a position to load any cargo the ship left before the completion of the laying days. It was admitted that if the charterers' agent had dispensed with the ship's remaining for the whole of the laying days no action would have lain, but it was held by the Exchequer Chamber affirming the judgment of the Court of Queen's Bench that there was no evidence to support the finding of the Jury that there had been a dispensation in that case. There is in this case sufficient evidence that the plaintiff did not insist and dispensed with the ship's coming from Madras to Cuddalore, and it is clear in other respects the defendants performed the contract and the plaintiff broke it. The judgment of the learned Judge was clearly right and the appeal is dismissed with costs.

Appeal dismissed.

V. R. P.

(1) 5 El. & Bl. 714; 119 E. R. 647; 25 L. J. Q. B. 49; 1 Jur. (N. S.) 1167; 4 W. R. 93; 27 L. T. (O. S.) 119; 103 R. R. 695.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 23 OF 1913.

September 10, 1915.

Present:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

SRIKISHIN ROCHUMAL—PLAINTIFF—
APPLICANT

versus

RELUMAL PARIOMAL AND OTHERS—
DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), Sch. II, cls. 15, 16—Arbitration—Award, questions affecting validity of—Forum for decision—Appeal—Revision—Irregularities in procedure, rectification of, by High Court—Judgment on award before expiry of time allowed for objections—Jurisdiction—Pleader, power of, to apply for reference—Minor, benefit to, consideration of, before decree on award.

Under paragraph 15 (1) of Schedule II, Civil Procedure Code, all questions affecting the validity of an award are to be decided by the Court in which the award is being filed. [p. 847, col. 1.]

Alim v. Moledino, 19 Ind. Cas. 348; 6 S. L. R. 168, referred to.

The Legislature has allowed no right of appeal from that decision and a revision application seems to have been prohibited by the Limitation Act. [p. 847, col. 1.]

Ghulam Khan v. Muhammad Hissan, 29 C. 167; 29 I. A. 51 (P. C.); 6 C. W. N. 226, referred to.

The High Court has power, under section 155, Civil Procedure Code, to revise the proceedings of the lower Court, after the delivery of the award to it; and it can rectify any illegality or material irregularity in the procedure of the lower Court in dealing with the award. [p. 847, col. 1.]

Rangasami v. Muttusami, 11 M. 144; *Chatarbuj Das v. Ganesh Ram*, 20 A. 474; A. W. N. (1898) 132; *Merali Visram v. Sheriff Derji*, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017; *Velchand Chhaganlal v. Lieut. Liston*, 25 Ind. Cas. 371; 16 Bom. L. R. 617; 38 B. 638, referred to.

A judgment ordering a decree in terms of an award on a reference through Court under the Civil Procedure Code, on receipt of the award and before the expiry of the time allowed by law for making an application to set aside the award, is illegal, notwithstanding that before the expiry of such time an application may have been made to set aside the award or that the parties may have stated that they had no objections to urge. [p. 848, col. 1; p. 849, col. 1.]

Such statements do not amount to estoppel, nor do they prevent the parties from retracting them at any time within the 10 days on the ground of mistake or fraud. [p. 848, col. 2.]

A decree passed on an award will not be binding on a minor who is a party, unless the Court considered and found that its terms were beneficial to the minor. And the Court is not absolved of this duty by reason of its having considered it prior to the reference. [p. 848, col. 2.]

SRIKISHIN ROCHUMAL V. RELUMAL PARIOMAL.

Gunga Narain Ghose v. Ram Chand Ghose, 20 W. R. 311; *Wazir Mahton v. Lulit Singh*, 7 C. 166 at p. 169; 8 C. L. R. 505, referred to.

Under the new Civil Procedure Code (Act V of 1908), a Pleader duly appointed to act for a party has authority under Order III, rule 1, to make any application, including an application for a reference to arbitration. [p. 848, col. 1.]

Faciell v. Eastern Counties Railway Company, (1848) 17 L. J. Ex. 297; 2 Ex. 344; 6 D. & L. 54, referred to.

Sadashiv Rayaji v. Marute Vithal, 14 B. 455, distinguished.

Application for revision against the order of the Sub-Judge, Hyderabad, directing the award to be filed.

Mr. *Partabrai D. Punwan*, for the Applicant.

Mr. *Kimatrai Bhojraj*, for Opponent. No. 1.

JUDGMENT.

PRATT, J. C.—In this case plaintiff, who is a minor and an adopted son, sued by a next friend for partition and possession of his share in the joint property of the family into which he had been taken in adoption.

This suit was conducted by a Pleader and it came to a sudden termination owing to certain proceedings taken by that Pleader on the 25th day of February 1913.

On that day the Pleader presented an application, stating that parties had agreed to appoint arbitrators and asking permission of the Court for such appointment on behalf of the minor plaintiff. What was intended apparently was to ask leave of the Court to arbitration on behalf of the minor under Order XXXI, rule 7, *Atmaram Yekoba Vani v. Bhila Ganpat Vani* (1). At any rate the application seems to have been so construed and it was endorsed by the Sub-Judge as "granted."

Immediately after this an application was filed signed by the plaintiff's Pleader and by most of the defendants either in person or by Pleader. The application is as follows:

"The parties beg to state that they have appointed the following arbitrators in the above case, who will make their award, whatever it may be, with or without hearing the parties on the issues or not, with or without taking evidence, which will be accepted and agreed by the parties. None of the parties will raise any objection thereto. Such award

will not be appealable. The said arbitrators will unanimously make their award; failing which the case will proceed again in Court. The said arbitrators are present, therefore, they have agreed and there is no need of issuing reference to them."

Names of the arbitrators.

1. Bhai Asandas Kundomal, merchant, resident of Tando Adam.

2. Bhai Chainmal Mukhi Premchand, merchant, resident of Tando Adam.

3. Bhai Hotchand Mukhi Bherumal, merchant, resident of Tando Adam.

This application was apparently intended to be the application under Schedule II, paragraph 1, but it does not state the matter sought to be referred and does not ask for an order of reference. The order made on this is equally difficult to understand. It is as follows:

"Plaintiff's Pleader Mr. Dharamdas and defendants Nos. 2 Relumal, 3 Mulchand, 5 Khubchand, 8 Teckchand, 10 Valiram, 11 Rijumal, 24 Ranoo, 25 Parsu, and Mr. Hardasmal for Nos. 6, 7, 9, 12, 13, 14—19 and Nazir for No. 21 and Mr. Valiram for Nos. 24—45, 26 admitted (the reference). Defendant No. 4 will be produced to-morrow and the award will also be made to-morrow as they state witnesses should get their *bhatta* and expenses."

The reference to defendant No. 4 implies that the Judge would make the order of reference after defendant No. 4 had appeared and joined in the application. But, on the other hand, the Sub-Judge fixes a time for the award. He does not appear to have realized that the withdrawal of the matter in difference from his Court to the arbitrators could only be made by his own order and he does not, therefore, seem to have made an order of reference, and paragraph 3 required an express order of reference made by the Judge. After this so-called order an award was filed the very same day. The difficulty caused by the absence of defendant No. 4 and some other defendants was got over by these defendants being "given up" and the Judge gave judgment there and then in terms of the award under paragraph 16.

It is to set aside the decree passed on this judgment that the plaintiff makes this application in revision.

SRIKISHIN ROCHUMAL V. RELUMAL PARIOMAL.

He complains that his Pleader was not authorized to refer the matters in difference in the suit to arbitration, that the reference was not lawfully made and that the award is in consequence invalid.

But all these are points affecting the validity of the award and, as pointed out in *Alim v. Moledino* (2), by the addition of the words "or being otherwise invalid" in paragraph 15 (1) of the Arbitration Schedule all questions as to the validity of the award are to be decided by the Court in which the award is being filed. The Legislature has given no appeal from that decision and the Privy Council in *Ghulam Khan v. Muhammad Hassan* (3) ruled that a revision application would be prohibited by the Limitation Act.

But *Ghulam Khan's* case (3) does not forbid our revising the proceedings of the lower Court after the award has been delivered to it. After receiving the award the Court has to exercise a judicial function before it determines to give judgment in accordance with the award. If in the exercise of the function it commits a material irregularity it is the duty of this Court to rectify the proceedings and undo what has been done in a procedure opposed to the law. Revision on such grounds as these does not impugn the award but rather the procedure of the Court in dealing with the award.

As instance of revision on such grounds reference may be made to the cases of *Hangasami v. Mattusami* (4) and *Chatarbu Das v. Ganesh Ram* (5). In these cases the Court failed to give notice of the filing of the award in accordance with section 516 of the Code of 1882, corresponding to paragraph 10 of the Arbitration Schedule of the present Code. The High Court reversed the judgment and decree and directed the Court to proceed to hear objections after giving notice. These cases were before *Ghulam Khan's* case (3) but they are undoubtedly still good law. There have also been two cases of revision in the Bombay High Court since *Ghulam Khan's* case (3). The first is the case of *Merali Visram v. Sheriff*

Devji (6). This was judgment and decree passed on an award under paragraph 16. *Ghulam Khan's* case (3) was referred to in the judgment, but the High Court did not consider it debarred them from revising the decree for gross irregularities of procedure. The second is the case of *Velchand Chhaganlal Shah v. Lieut. Liston* (7). A bogus award had been procured by a money-lender. It was filed in Court under paragraph 20 and judgment and decree was passed in its terms under paragraph 21. The High Court set aside the decree under sections 115 and 151, on the ground that the Court had not followed the procedure enjoined by paragraph 21 and had not satisfied itself that there was a matter in difference between the parties which had been referred to arbitration. This is a very strong case, for an appeal lay against the order under paragraph 21 and had not been filed. The reference to section 151 is instructive. It shows that whatever may be the rights of the parties as to appeal or the limitations put upon its own powers in revision, the High Court will not allow any party to abuse the process of the Court and obtain a judgment and decree on a bogus award. I am not now suggesting that the present award is a bogus award. I merely indicate what our powers are.

The question that now arises is whether there has been any material irregularity by the lower Court in the exercise of its jurisdiction after receiving the award. The only one indicated in the revisional application is that no notice of filing was given to the plaintiff. But the plaintiff's Pleader was present and accepted the award and, therefore, had notice and notice to the Pleader is equivalent to notice to the party, Order III, rule 5. As to this, it is said that plaintiff's Pleader had no authority to refer and, therefore, did not represent plaintiff in the proceedings ensuing on the award. Under section 506 of the Code of 1882 a Pleader could not apply for an order of reference without special authority from his client. This provision has been omitted, for the special authority is a matter between the Pleader and client

(2) 19 Ind. Cas. 348; 6 S. L. R. 168.

(3) 29 C. 167 (P. C.); 29 I. A. 51; 6 C. W. N. 226.

(4) 11 M. 144.

(5) 20 A. 474; A. W. N. (1898) 132.

(6) 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017.

(7) 25 Ind. Cas. 371; 38 B. 638; 16 Bom. L. R. 517.

SRIKRISHN ROCHUMAL v. RELUMAL PARIOMAL.

and does not affect the Court or the other party. In England an attorney who has been duly authorized to appear has incidentally authority to conduct the cause and to refer it. *Fariell v. Eastern Counties Railway Company* (8). So here a Pleader duly appointed to act for a party has authority under Order III, rule 1, to make any application including an application for reference to arbitration. If he does so against the wishes of his client, he is responsible to his client but the client is nevertheless bound. There is a dictum to the contrary in *Sadashiv Rayaji v. Maruti Vithal* (9), but there the powers of the Pleader seem to have been limited to those of the agent who employed him. The notice to the Pleader was, therefore, sufficient compliance with paragraph 10.

But there is an irregularity in the proceedings of the Sub-Judge in dealing with the award which, though not noticed in the revisional application, is so serious that it completely invalidates the judgment and decree. The Sub-Judge gave judgment on the very day that the award was made. Under paragraph 16 he is not empowered to give judgment until the time for making an application to set aside the award has expired. This condition is not affected by the consideration that an application may have been made and set aside or that parties may have stated that they have no objections to urge. It is a condition subject to which jurisdiction to make judgment is conferred on the Court and when that condition is not fulfilled, the judgment is no judgment. See *Gunga Narain Ghose v. Ramchand Ghose* (10) explained by Mitter, J., in *Wazir Mahton v. Lulit Sing* (11). The condition is one that should have been strictly observed in the present case, for the speed with which the award was procured raises a doubt as to its genuineness. Mr. Kimatrai seeks to get over this difficulty by suggesting that the decree should be given effect to as a consent decree. It is true that the parties did say that "all agreed to the award", but this

statement must be construed in the light of the nature of the proceeding, and, therefore, means nothing more than that they had no objections to urge to the award. If the parties had agreed to a settlement of the suit there was no occasion to refer to arbitration. Further the decree could not be binding on the plaintiff as a consent decree, for the Court never considered whether its terms were beneficial to the minor. It professes to give this consideration to the reference but not to the award.

On this ground we must reverse the judgment and decree of the lower Court. The time for filing objections has expired but the act of the Court shall prejudice no man. If the Court had stayed its hand for ten days after the making of the award the plaintiff might have filed objections. The statement that he agreed to the award was merely an admission that he had no objections to urge to it. Admissions are not conclusive unless they operate as estoppels, section 31, Indian Evidence Act. There is no question of estoppel here, for the Court had no jurisdiction to give judgment at once on the admission. The plaintiff could at any time within ten days have filed objections, explaining that his previous admission was due to a mistake of fact or of law. He was deprived of this opportunity by the precipitate and illegal action of the Court. To remove this prejudice the lower Court must act *nunc pro tunc*. We, therefore, make the same order as was made in the case of *Rangasami v. Muttusami* (4). We reverse the decree of the lower Court and direct that Court to re-admit the suit under its original number in the register and to give all the parties ten days' time in which to file objections and after considering them to proceed to dispose of the suit according to law. Costs to abide the result.

BOYD, A. J. C.—I concur. Paragraph 16 of Schedule 2, Civil Procedure Code, empowered the Judge to deliver judgment on the award on or after a particular day. He delivered judgment ten days sooner than the law allowed. He thus acted *ultra vires*. The result is that there has been no legal adjudication on the award. It cannot be rightly argued that the parties could and did contract themselves out of the law contained in paragraph 16. It may be

(8) (1848) 17 L. J. Ex. 297; 2 Ex. 344; 6 D. & L. 54.

(9) 14 B. 455.

(10) 20 W. R. 311.

(11) 7 C. 166 at p. 169; 8 C. L. R. 505.

RADHAKRISHNA MUDALIAR v. SUBRAYA MUDALIAR.

doubted whether their agreement (if they made one) could give the Court jurisdiction sooner than the law gives it. And, however that may be, plaintiff was not present; and to effect such an extraordinary contract on his behalf was far beyond the scope of his Pleader's powers, described in Order III, rule 1 of the Code.

The lower Court's mistake is not incurable. There is nothing in the decision in *Ghulam Khan v. Muhammad Hassan* (3) to prevent us from setting things right. It is true that the greater part of plaintiff's application in revision is an application to set aside an award and so far ■ it is that, it is time-barred under Article 158, Limitation Act, as the Privy Council said. But part of the application mentions the lower Court's mistake in dealing with the award and this latter part need not be construed as an attack on the award itself. Anyhow, sitting in revision under section 115, Civil Procedure Code, we may take action without any application at all. In doing so we must of course respect the wishes of the Privy Council. What they virtually said was that awards, duly adjudicated upon by the original Court, should be final. But in the present case there had been no valid adjudication. So we are clearly justified in putting the parties back in the *status quo* before the illegal judgment was delivered. In doing this we do not arrogate to ourselves the right of adjudicating on the award. That is a duty of the Court below, which it omitted to do before and must do now.

Near the beginning of his judgment the learned Judicial Commissioner has shown that our interference in revision may be worth while in the interests of justice.

Decree reversed.

MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL No. 62 OF 1915.

April 7, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

P. RADHAKRISHNA MUDALIAR—
PLAINTIFF—APPELLANT

versus

P. SUBRAYA MUDALIAR—DEFENDANT—
RESPONDENT.

Succession Act (X of 1865), s. 50—Will—Illiterate testator—Mark of testator affixed by one of the attestors, validity of—Attestation.

An unprivileged Will is not duly 'executed' within the meaning of section 50 of the Succession Act when the testator, who cannot sign his name, simply touches the pen and hands it to some one to affix his mark. The mark should be affixed by the testator himself. [p. 850, col. 2.]

Nirmal Chunder Bandopadhyay v. Saratmoni Debba, 25 C. 911; 2 C. W. N. 642 and *Mukta Nath Roy Chowdhuri v. Jitendra Nath Roy Chowdhuri*, 27 Ind. Cas. 677; 22 C. L. J. 262; 19 C. W. N. 1295, distinguished.

Shamu Patter v. Abdul Kadir Rowthan, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.), applied.

Section 50 of the Succession Act provides only for the testator signing the Will by a substitute and there is no corresponding provision for the testator's mark being affixed by some other person. [p. 850, col. 1.]

The person who signs a Will by direction of testator cannot be one of the two attesting witnesses required by the last paragraph of section 50. A Will, therefore, signed by a person for the testator and attested by himself and another is not duly attested within the meaning of the said paragraph and is inoperative. [p. 851, col. 1.]

Appeal from the judgment and order of Mr. Justice Bakewell, in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court, in Testamentary Original Suit No. 2 of 1905, in Original Petition No. 110 of 1914. (In the matter of the last Will and Testament of P. Papathi Ammal deceased).

Mr. V. Raghunadha Sastri, for the Appellant.

Messrs. C. V. Ananthakrishna Aiyar and V. Siraprakasa Mudaliar, for the Respondent.

JUDGMENT.—This is an appeal from ■ judgment of Bakewell, J., and raises a question of some importance as to whether under section 50 of the Indian Succession Act, when the testator is a marksman or unable to sign his name, his mark ■ distinct from his signature may be affixed by any one but

RADHAKRISHNA MUDALIAR v. SUBRAYA MUDALIAR.

himself. The Wills Act, XXV of 1838, which in this respect reproduced the provisions of the English Wills Act of 1 Vict., did not contain any express provision as to signature by means of affixing ■ mark where the testator was unable to write but merely required the Will to be signed "by the testator or by some other person in his presence and by his direction." It was, however, well settled that under these provisions a testator unable to write might sign by affixing his mark. In section 50 of the Indian Succession Act, probably on account of the great number of illiterate people in India, it was thought desirable to provide expressly for execution by affixing a mark, and in that section three ways of execution are provided: "The testator shall (1) sign or (2) shall affix his mark to the Will or (3) it shall be signed by some person in his presence and by his direction." And it is next provided "the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will." It is expressly provided that it is the testator who is to affix his mark, and while the section goes on to provide for the Will being signed by some other person in his presence and by his direction, there is no corresponding provision about the testator's mark being affixed by some other person in his presence and by his direction. Further, the language of the following rule as to "the signature or mark of the testator, or the signature of the person signing for him" clearly shows that what was contemplated was that the mark should be affixed by the testator himself. As already mentioned, this section for the first time contained ■ separate provision for execution by affixing ■ mark, and the decisions on the Statute of Frauds and the Wills Act, according to which affixing ■ mark was a mode of signature, are, therefore, inapplicable. It was, in our opinion, clearly the intention of the Legislature that to satisfy the provisions of the section as to execution by affixing a mark, the mark must be affixed by the testator himself. We are, therefore, with great respect, unable to agree with the learned Judge that the placing of the mark upon the paper in the presence of the testatrix and by her direction is an affixture by her of her mark to the Will within the meaning of section 50. In *Nirmal Chunder*

Bandopadhyaya v. Saratmoni Debya (1) all that was decided was that the affixing by a servant of the testator under his direction of the name stamp of the testator was ■ signature by some other person in the testator's presence and by his direction, and not the affixing of ■ mark, and there is nothing in the case to suggest that the learned Judges considered that the affixture of ■ mark and the direction of the testator would be sufficient. In *Mukta Nath Roy Chowdhuri v. Jitendra Nath Roy Chowdhuri* (2) it was held that the section was sufficiently complied with where the mark was actually affixed by the testator though with the assistance of another person, but there the testator took an active part in affixing the mark. In this case according to the finding of the learned Judge the testatrix touched the pen and gave it to Doraiswami Iyengar who wrote in Tamil:

This mark X Papathiammal

This mark taken

D. V. Doraiswami Aiyangar.

This may amount to ■ signature by some other person in her presence and by her direction within the meaning of the section, and if attested by two witnesses other than the signatory would be sufficient, but the mere handing the pen to Doraiswami Aiyangar who affixed the mark in her presence is not, in our opinion, an affixture of her mark by the testatrix such as is required by the section. It is said truly, that touching the pen and handing it to some one to sign for one is a very common form of signature in this Presidency, but this cannot affect the construction of the section, and in the recent attestation case, *Shamu Patter v. Abdul Kadir Rowthan* (3), with reference to this and similar sections their Lordships of the Judicial Committee observed that they could not agree with what had been said by the learned Judges of another High Court regarding the policy of placing a larger construction

(1) 25 C. 911; 2 C. W. N. 642.

(2) 27 Ind. Cas. 677; 22 C. L. J. 262; 19 C. W. N. 1295.

(3) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 11034; 16 C. L. J. 596; 39 I. A. 220 (P. C.).

DINA NATH DAS v. SARAT CHANDRA CHACKERBUTTY.

on the word "attest" in consequence of the social institutions of the country. This observation appears to apply equally to the present case.

If the signature ■ distinct from the mark of the testatrix is taken to have been affixed by Doraiswami Aiyangar in her presence and by her direction, the Will fails for want of due attestation, ■ the section requires that the Will should be attested by two or ■ witnesses each of whom must have seen the testator sign or affix his mark, or have seen ■ other person sign the Will in the presence and by the direction of the testator. The language of the section is perfectly plain, and it is unnecessary to refer to decided cases to show that the person who signed, by direction of the testator, cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.

Appeal allowed; Suit dismissed.

V. R. P.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 258,
1490 AND 1491 OF 1914.

April 18, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

DINA NATH DAS AND OTHERS—DEFENDANTS
—APPELLANTS

versus

SARAT CHANDRA CHACKERBUTTY

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—

Decree for full rent overruling claim for abatement, if appealable—Abatement of rent, when lands let out are found subject to right of pasturage of others.

In a suit for rent when the Court, after considering the question whether the tenants ■ entitled to get ■ abatement of rent or are bound to pay the full rent, makes a decree for the full rent, the decree decides the question of the amount of rent annually payable by the tenants, and ■ such an appeal against it is not barred under section 153 of the Bengal Tenancy Act. [p. 852, col. 2.]

Where, after lands have been let out at a certain rent, it is established that other persons have rights of pasturage over the lands, the tenants are entitled to get ■ abatement in respect of the land which may be required for the purpose of pasturage. [p. 853, col. 1.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Tipperah, dated the 25th September 1913, reversing those of the Munsif, 2nd Court, Bramhanbaria, dated the 12th of August 1912.

FACTS material to the report were ■ follows:—

Plaintiffs brought these suits for recovery of arrears of rent against defendants who had executed registered *kabuliyats* for ■ term in favour of the plaintiffs. The term had expired and the defendants resisted the plaintiffs' claim on the ground that the lessors had not been able to put them in possession of the lands. One of the lessees brought a suit for recovery of possession and his right was declared subject to the right of pasturage claimed by nine of the villagers. Before that the lessees in their attempt to take possession of the lands had been worsted in the Criminal Court and suffered imprisonment. The learned Munsif dismissed these suits but the lower Appellate Court fully decreed the claim and the lessees-defendants preferred a second appeal to the High Court.

Babu Broja Lal Chuckerbutty, for the Respondents, raised ■ preliminary objection to the second appeal, on the ground that section 153 of the Bengal Tenancy Act was a bar to it as the decree did not decide the question as to the amount of rent annually payable.

Babu Dwarkanath Chuckerbutty (with him Babu Upendra Kumar Roy), for the Appellants, —There is no substance in the preliminary objection ■ to the competency of these second appeals under section 153, Bengal Tenancy Act although the value was less

DINA NATH DAS V. SARAT CHANDRA CHACKERBUTTY.

than one hundred rupees in each. The Subordinate Judge found that although the *kabuliyats* were for the entire piece of land the lessees got a decree for the same subject to the right of pasturage of nine villagers, and on that ground he was of opinion that the defendants were entitled to get an abatement of rent but in spite of this finding the lower Appellate Court has decreed the plaintiffs' claim in full. Clearly a question as to the amount of rent annually payable has been decided and the second appeals are not barred.

On the merits I submit it was incumbent upon the lessors to put the lessees into possession, there being an implied contract always to that effect. This was not done in the present case. The defendants did their very best to obtain possession. As a result of their attempts they were sent to jail and then a suit was instituted by them in which though their right was established, it was burdened with the right of pasturage of some villagers. After the expiry of the lease the defendants were not bound to hold over; nay, they were entitled to repudiate the contract even during the continuance of the term when they found that villagers had pasturage rights in the lands. The *kabuliyats* could not be operative under these circumstances. The defendants not being able to get possession in spite of their efforts, they could not be made liable for rent. At any rate, there should have not been a decree for rent for the portion of the land which the nine villagers, who had been declared to have the right of pasturage, would claim to exercise that right in.

Babu Brojo Lal Chuckerbutty, for the Respondents.—The decree does not decide any question as to the amount of rent annually payable. In the decree the plaintiffs have been awarded the full amount claimed in the suit. The expression of opinion regarding abatement in the judgment has not been acted upon and the decree of the lower Appellate Court has not decided any such question. No appeal, therefore, lies to this Court under section 153, Bengal Tenancy Act.

In the title suit the defendants got a decree for possession and the lower Appellate Court finds as a matter of fact that under that decree they did obtain possession, and there was no

further obligation upon the lessors to put the lessees in possession. If they did not choose to execute that decree it was their fault and they cannot, on any ground, claim exemption from payment of rent which they are bound to pay under the *kabuliyats*. The defendants after the expiry of the terms must be held to have been holding over on the same terms as before and it is not possible for them to resile from the contract solemnly entered into by them with the plaintiffs.

JUDGMENT.—These appeals arise out of suits for rent. A preliminary objection is taken to the hearing of the appeal, on the ground that a second appeal is barred under section 153 of the Bengal Tenancy Act. But the question whether the defendants are entitled to get an abatement of rent or they are bound to pay the full rent was gone into by the lower Appellate Court, and a decree for the full rent claimed was passed. The decree decided the question of the amount of rent annually payable by the defendants and the preliminary objection must accordingly be overruled.

Turning to the merits of the case it appears that the plaintiffs settled the lands in suit with the defendants. But defendants were obstructed in getting possession of the lands by the villagers, on the ground that they had a right of pasturage over the lands. One of the defendants thereupon brought a suit for declaration of title to and for recovery of possession of his share against the villagers, numbering about 200, and the lessors, the present plaintiffs, were also made parties to that suit. The suit was decreed and he was ordered to be put into *khas* possession, subject to the right of pasturage of the nine persons who appeared and claimed such right in that case. It was further provided in that decree that in the case of a difference between the parties as to the exact quantity of land that was to be set apart for pasturing the cattle of the nine persons, reference should be made to the Court by application. In execution of that decree the plaintiff in that suit obtained joint possession of his share. Objections were raised on behalf of the judgment-debtor, on the ground that the decree was incapable of execution. Those objections were over-

SWAMI CHETTY v. ETHIRAJULU NAIDU.

ruled. It was held, however, that it was not possible to ascertain in that proceeding (in which the co-sharer landlords were not made parties) the question as to the extent of land required for pasturage and the said question was accordingly left open to be determined in ■ subsequent proceeding properly framed for the purpose.

In these suits for rent the Court of first instance held that the plaintiffs were not entitled to get any rent. On appeal, the lower Appellate Court held that as the defendants had obtained possession in execution and as they did not apply to the Court for determining the area required for pasturage in accordance with the decree in the previous suit obtained by one of them, the plaintiffs were entitled to the full rent reserved in the lease. But the plaintiffs having let out the lands at ■ certain rent and it having been subsequently found that other persons had some right in the land, we do not think the plaintiffs are entitled to the full rent as stipulated in the lease, and the defendants are entitled to get an abatement in respect of the land which may be required for the purpose of pasturage by the villagers whose right had been established in the previous suit.

Under these circumstances we set aside the decree of the Court below and send the case back to the Court of first instance, with directions that the defendants do apply to the Court in Suit No. 313 of 1903 for determination of the quantity of land required by the nine persons who are declared to have ■ right of pasturage in that suit within a fortnight from the arrival of the record in that Court. On the application being made to the Court in the said Suit No. 313 of 1903 for fixing the quantity of land so required, the Court will determine the same and the defendants will be entitled to the deduction of rent proportionate to the quantity of land which may be so determined and the plaintiffs will be entitled to a decree for rent accordingly in these suits.

Costs of these appeals will abide the result.

If, however, the defendants do not apply to the Court below in Suit No. 313 of 1903 as stated above, then these appeals will stand dismissed.

Appeals allowed; Suits remanded.

MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL No. 56 OF 1915.

April 5, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

C. B. SWAMI CHETTY—DEFENDANT—
APPELLANT

versus

S. T. ETHIRAJULU NAIDU AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 49—Equitable mortgage, document purporting to create—Recital of terms—Registration—Evidence.

A document which purports to create an equitable mortgage is admissible in evidence though not registered, if it is only a memorandum or narrative of the facts constituting the mortgage. Where something is to be done by the parties to complete the transaction, it will only be an agreement to mortgage. [p. 854, cols. 1 & 2.]

Where, however, ■ document sets forth the terms of a contract in such a way that the terms can be said to have been reduced to the form of a document, it is compulsorily registrable and inadmissible in evidence if not registered. [p. 854, cols. 1 & 2.]

Plaintiffs executed two promissory notes to defendant for re-payment of certain sums of money. Simultaneously they executed two documents setting forth the conditions of the pro-notes and asking the defendant to redeem a prior equitable mortgage in favour of a third party and retain the title-deeds as security for the amount due under the pro-notes. The documents modified the terms of the pro-notes by a stipulation for compound interest, but were not registered:

Held, that they were inadmissible in evidence for want of registration even as regards the stipulation for compound interest. [p. 854, cols. 1 & 2.]

Dwarkanath Mitter v. Sarat Kumari Dasi, 7 B. L. R. 55; *Moore v. Culverhouse*, 27 Beav. 639; 29 L. J. Ch. 419; 6 Jur. (N. S.) 115; 1 L. T. 386; 54 E. R. 254; 122 R. R. 570 and *Neve v. Pennel*, *Hunt v. Neve*, 2 H. & M. 170, 33 L. J. Ch. 19; 9 L. T. 285; 11 W. R. 986; 71 E. R. 427, referred to.

Kedarnath Dutt v. Sham Lal Khattri, 11 B. L. R. 405; 20 W. R. 150, distinguished.

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 31st March 1915, passed in the exercise of the Ordinary Original Civil Jurisdiction of the Madras High Court, in Civil Suit No. 144 of 1914.

Messrs. T. Pattabirama Aiyar and G. S. Ramachandra Aiyar, for the Appellant.

Messrs. Rencontre and Tirumalai Pillai, for the Respondents.

JUDGMENT.

WALLIS, C. J.—Exhibits V and VI both contain agreements about effecting an equitable mortgage by deposit of title-deeds

SWAMI CHETTY v. ETHIRAJULU NAIDU.

Similar documents have been held in England to affect land and require registration under the Statute of 7 Anne relating to Middlesex in *Moore v. Culverhouse* (1), *Neve v. Pennel*, *Hunt v. Neve* (2). The case of *Kedarnath Dutt v. Sham Lall Khettry* (3) is distinguishable. The learned Judge was, therefore, right in holding that Exhibits V and VI required registration and were inadmissible under section 49 of the Registration Act, even as regards the stipulation for compound interest on the equitable mortgages.

The appeal is dismissed with costs.

PHILLIPS, J.—The question for decision in this appeal is whether Exhibits V and VI are admissible in evidence, although they are not registered. Plaintiffs had effected an equitable mortgage by deposit of title-deeds with a third party, and then arranged with the defendant to pay off this mortgagee and to mortgage the property to him. They accordingly executed two promissory notes for the mortgage-amount, and executed the two agreements Exhibits V and VI. These documents set out the terms of the contract and authorised the defendants to receive the title-deeds from the previous mortgagee. There is further an agreement that the terms of the promissory notes should be modified by a provision for compound interest. There is no other evidence of agreement to pay compound interest. Consequently defendant's claim thereto has been disallowed on the ground that Exhibits V and VI are inadmissible in evidence. If Exhibits V and VI are to be excluded for want of registration, defendant cannot support his claim for compound interest. This question of whether a document executed contemporaneously with a mortgage by deposit of title-deeds requires registration, is one not without difficulty and the answer depends upon the effect of the document, that is, whether it is a mere memorandum or narrative of facts constituting the mortgage, or whether it sets forth the terms of the contract in such a way that the terms of the contract

can be said to have been reduced to the form of a document (*vide* Shephard and Bown's Transfer of Property Act, page 255, and Ghose on Mortgage, page 158). That the distinction is a very narrow one is shown by the opposite conclusion arrived at in the cases reported in *Dwarkanath Mitter v. Sarat Kumari Dasi* (4) and as *Kedarnath Dutt v. Sham Lall Khettry* (3). In the present case, however, I think that the facts of the case and the terms of Exhibits V and VI show that those documents are more than mere memoranda of facts; when the promissory notes were executed, no deposit of title-deeds was effected and consequently the subsequent deposit cannot be connected with the loan without some connecting link of evidence and without that link, there would be no evidence of a mortgage. That link is supplied by Exhibits V and VI and it is really those documents which evidence the mortgages and it is only under them that the compound interest agreed to be paid becomes chargeable upon the property. Those documents accordingly purport to create a charge on and thus affect immoveable property and are consequently compulsorily registrable.

It is further contended that Exhibits V and VI should be treated as mere agreements to mortgage, but I cannot accede to this contention, for after execution of Exhibits V and VI the mortgages were complete so far as the mortgagors were concerned, and the mortgagors had no further act to perform, nor document to execute to complete the mortgage.

Being unregistered, they are inadmissible in evidence and there is then no proof of defendant's claim to compound interest.

I agree in dismissing this appeal with costs.

Appeal dismissed.

V. R. P.
(4) 7 B. L. R. 55.

(1) 27 Beav. 639; 29 L. J. Ch. 419; 6 Jur. (N. S.) 115; 1 L. T. 386; 54 E. R. 254; 122 R. R. 570.

(2) 2 H. & M. 170; 33 L. J. Ch. 19; 9 L. T. 285; 11 W. R. 986; 71 E. R. 427.

(3) 11 B. L. R. 405; 20 W. R. 150.

PEARI MOHAN KUNDU v. MOHINI KANTA SAHA CHOUDHURY.

CALCUTTA HIGH COURT.

Rule Nisi No. 783 of 1915.

May 15, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

PEARI MOHAN KUNDU, PLEADER—
COMMISSIONER—PETITIONER

versus

MOHINI KANTA SAHA CHOUDHURY

AND OTHERS—OPPOSITE PARTIES.

Calcutta High Court Rules and Circular Orders, Vol. I, r. 122, notes 6,8,9—Commissioner's remuneration fixed by Trial Court—Jurisdiction of District Judge to set aside—Civil Procedure Code (Act V of 1908), O. XXVI, r. 15.

The powers given to a District Judge under the Calcutta High Court General Rules and Circular Orders, Volume I, do not authorise him to set aside any orders made by a Subordinate Court in respect of the remuneration of a Commissioner for local investigation in a pending suit. These powers are given to the District Judge for maintaining a particular standard of efficiency among Pleader Commissioners who undertake commissions. [p. 857, col. 1.]

Rule against the order of the Sub-Judge, 2nd Court, Dacca, in Suit No. 16 of 1908.

FACTS material were as follows:—

In the Partition Suit No. 16 of 1908, in the Sub-Judge's 1st Court at Dacca the petitioner, a Pleader was appointed Commissioner, for local investigation and partition of two estates, the subject-matter of the said suit.

On the day fixed for settling the question of remuneration of the Commissioner, as the Pleaders of either parties did not appear, the Sub-Judge ordered the Commissioner to resume work at once.

On the 18th September 1914, the Commissioner submitted his report and other papers in compliance with the expedition order of the Sub-Judge.

The report and the other works of the Court were to the full satisfaction of the Sub-Judge and he fully accepted the same.

On submission of the bill for Rs. 3,660 by the Commissioner the plaintiffs alone preferred an objection on the ground of excessive rate per diem. But considering the quality and quantity of the work the Subordinate Judge settled the remuneration at Rs. 3,260.

On 25th February 1915, on the second petition of objection filed by the plaintiffs the Subordinate Judge heard the Pleaders of both the plaintiffs and the defendants and the Commissioner; and all the parties

agreed that Rs. 2,860 should be paid to the Commissioner as his remuneration and the Court passed the order accordingly on 6th March 1915.

The petitioner demanded the money from the parties but failing to realise the amount he took out execution and in Execution Cases Nos. 93 and 94 of 1915 some immoveable properties of the parties were attached.

On 15th June 1915, i. e., 3 months 9 days after the order of the Subordinate Judge was passed, the defendants alone filed a petition before the District Judge objecting to the amount allowed to the Commissioner, and the District Judge on hearing petitioner and the Pleader for the defendants directed that Rs. 1,800 instead of Rs. 2,860 should be the Commissioner's remuneration and the Sub-Judge varied his order in pursuance of the District Judge's order.

The petitioner then moved the High Court against the said order of the District Judge, dated 5th July 1915.

Babu Gunada Charan Sen (with him Babu Prokash Chandra Pokrasi), for the Petitioner, contended (1) that the District Judge had no jurisdiction to revise the order of the Trial Court as to the remuneration of the Commissioner appointed by the Trial Court, though the Commissioner was nominated by the District Judge.

(2) That the District Judge had only disciplinary jurisdiction as to the nomination of Commissioners.

(3) Referred to Order XXVI, rule 15, Civil Procedure Code, and Calcutta High Court Circular Orders for the Muffussil, Chapter I, Rules 112 to 131.

(4) That after 3 months the District Judge should not have revised the order.

(5) That the order being an agreement of parties the District Judge should not have revised the order.

Babu Sarat Chandra Roy Chowdhury (with him Babu Kumar Sankar Roy and Babu Probadh Kumar Das for Babu Khitish Chandra Chakraborty), for the Opposite Party.—The District Judge had jurisdiction under the Rule No. 122, notes (8) and (9), of the High Court Circular Orders, Part I, page 52, Edition 1910. The Pleader for defendants was not fully acquainted with the facts and he practically did not consent but only failed to object.

PEARI MOHAN KUNDU v. MOHINI KANTA SAHA CHOUHDURY.

In this case the High Court has no jurisdiction to revise the executive order of the District Judge.

All the Rules 112 to 131 tend to show that the District Judge is the only person who is to settle the Commissioner's remuneration. The quality and the quantity of the work done by the Commissioner was properly considered by the District Judge and his finding that the Commissioner's bill was excessive should not be revised by your Lordships.

JUDGMENT.—This is a matter which arises out of proceedings in a partition suit.

A Commissioner was appointed for making the partition without, however, settling his fees. On the 22nd December 1913, the order of the Subordinate Judge was as follows:—"None of the parties turned up. So the Commissioners' remuneration could not be settled. They will begin work at once and the remuneration matter will be put up on the 2nd January 1914." The matter was put up later on the 5th January and it was decided that only one Commissioner, namely Babu Pyari Mohan Kundu, should be appointed. Then on the 29th May 1914, the Commissioner put in a petition asking for two months' time and he was ordered to submit report within the time allowed. The question of his remuneration was left to be considered when the papers were filed and the quantity and quality of his work judged by Court. On the 19th February 1915, the Commissioner's bill was considered and Rs. 3,260 was passed as his fees besides travelling and other expenses. There seems to have been an objection; and upon the hearing of the objection on the 6th March 1915, the learned Judge says: "I have heard the Pleaders of the parties and the Commissioner and they all agree that the Commissioner may get Rs. 400 less than what was allowed to him on the 19th February 1915. The Commissioner agreed to reduce his remuneration in consideration of his getting a handsome amount in all". After this, there was an application to the District Judge by some of the defendants complaining against the order of the Subordinate Judge and in this petition, the petitioners do not say anything about the agreement mentioned by the Subordinate Judge. In paragraph 9 of their petition they said that they expected that

in the ordinary course the said bill would be submitted to the District Judge who would settle what was fairly payable to the Commissioner but that they understood that unfortunately the bill had not been sent up as usual. The learned Judge upon this seems to have issued notice to the parties and upon hearing them passed an order making a further reduction in the fees allowed to the Commissioner.

In speaking of the agreement, the learned Judge says, "It is said that Rs. 2,860 was fixed by a compromise. The Pleader states that the matter was not properly understood and that there was not any real compromise but only a failure to object by a party who had not the information necessary to enable it to object."

In the counter-affidavit which is filed before us, we find that paragraph 4 is to the effect that it is not true that the Pleader of the defendants-opposite parties agreed to the Commissioner's fees being settled at Rs. 2,860 on the 6th March 1915, the said Pleader raised objections but could not press them strongly as he was under the impression that the bill of the Commissioner had been duly submitted to the District Judge and approved by him according to the Circular Orders of the High Court, whereas, as a matter of fact, it had not been submitted to the District Judge at all.

If there was no such agreement as stated by the learned Subordinate Judge, we should have expected that the Pleader who was present and who is supposed to have agreed to the proposal, would have made an affidavit to that effect. No such affidavit, however, has been filed and only an officer of the defendants says, upon information said to have been received from the Pleader, what is stated in paragraph 4 of the counter-affidavit.

We are not satisfied that upon these materials the agreement said to have been made before the learned Subordinate Judge is disproved, and if there was an agreement by the parties and an order was passed upon such agreement, they cannot now be allowed to back out of it without sufficient reason; and we see no sufficient reason in this case. This is one view of the case.

IMRIT MAHTON v. BAHADUR SINGH.

It is further contended that the order of the learned District Judge in this connection is without jurisdiction and ought not to have been made. The Circular Orders of the High Court give the District Judge a certain amount of disciplinary jurisdiction in the matter of the appointment of Commissioners to make inquiries. The learned Vakil for the opposite party has referred to notes 6 and 8 of Rule No. 122, Chapter I, of the Rules relating to Practice and Procedure (High Court General Rules and Circular Orders, Vol. I).

Note 6 authorises the District Judge to keep in his office a brief record of the cases entrusted to Pleader Commissioners and note therein all instances of dilatory or unsatisfactory work on their part. Under Note 8, the District Judge should himself take action if it appears from a Pleader Commissioner's diary that his work has been either dilatory or insufficient, or if the final report submitted by him in form No. (M) 75 of Volume II appears to require explanation. Note 9 says that it is open to the District Judge to withhold cases from those Commissioners whose work is found to fall below a reasonable standard of punctuality and efficiency.

It seems to us that these rules do not interfere with the powers of the Court in which the case is pending in respect of which the commission is being executed. These powers are given to the District Judge for maintaining a particular standard of efficiency among Pleader Commissioners who undertake these commissions, but they do not seem to us to authorise him to set aside any order passed by the Trial Court which is in a position to decide as to the quality of the work done by the Commissioners. In this view of the case also the order of the District Judge appears to us to have been passed without jurisdiction.

The whole trouble in this case seems to have arisen from the learned Subordinate Judge not acting in accordance with the obvious intention of the law in Order XXVI, rule 15, which provides that before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed,

paid into Court by the party at whose instance or for whose benefit the commission is issued. If that were done, a question of this kind would hardly arise. As the amount given to the Commissioner was arrived at by agreement, we do not feel called upon to express any opinion on the merits of the order of the District Judge.

The Rule is made absolute. We make no order as to costs.

Rule made absolute.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3589 OF 1914.

May 18, 1916.

Present:—Mr. Justice Atkinson.

IMRIT MAHTON AND OTHERS—DEFENDANTS
—APPELLANTS

versus

BAHADUR SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885) s. 103—Record of Rights, entry in—Presumption as to correctness, when arises.

It is not until the Record of Rights is finally published that a presumption of correctness arises. Such presumption, however, is not conclusive, but is rebuttable. [p. 858, cols. 1 & 2.]

Messrs. Kulwant Sahai and Sivanandan Roy, for the Appellants.

Mr. G. Dutt Sinha, for the Respondents.

JUDGMENT.—This is an action brought by the plaintiffs to recover from the defendants arrears of rent at the rate of Rs. 134-9-6 (*dams*) payable under a lease, dated the 27th of May 1900. The lease was executed on behalf of the defendants by defendant No. 2, who is the son of defendant No. 1. Defendants Nos. 3. to 6 are also sons of the defendant No. 1. The lands demised by the lease cover an area of about 8 *bighas* 17 *cottas* and are described as the *khudkasht* lands of the plaintiffs. The plaintiff contends that he is entitled to recover from the defendants the rent stipulated by the terms of the lease.

Mr. Sahai appearing on behalf of the defendants as appellants developed a very ingenious argument that "*khudkasht*" lands are the proprietary lands of the *zamindar* within the provisions of section 116 of the

IMRIT MAHTON v. BAHADUR SINGH.

Bengal Tenancy Act and that by virtue of section 120 his clients were not bound by the recitals in the lease as to the character of the lands; and that the plaintiff had not given sufficient proof to show that the lands were his private lands and that, therefore, his clients the defendants-tenants could acquire occupancy rights in these 8½ *bighas*.

Mr. Sinha for the plaintiff has frankly and candidly admitted that as to the *khud-kasht* lands as described in the lease of the 27th of May 1900, these defendants as tenants are entitled in point of law to acquire occupancy rights provided they occupy the lands for the qualifying period of 12 years. With that admission by the plaintiff and accepted by Mr. Sahai for the defendants and recorded now in the body of my judgment, it becomes unnecessary for me to further consider the argument that was addressed to me under sections 116 and 120 of the Bengal Tenancy Act. I think the admission made by Mr. Sinha is a generous concession to the defendants.

Now the only other question that remains for determination is, what rent are the tenants bound to pay for these 8½ *bighas* of lands. The rent reserved by the lease is Rs. 134 9-6 (*dams*); the defendants admit that they have paid Rs. 42-0-9 and no more; that that is the rent which they are bound to pay, and they say furthermore that they do not really hold under this lease at all, because by what they are pleased to call the entry in the Record of Rights they are described as occupancy *raiya*s at a rent of Rs. 42-0-9. The Record of Rights was never proved in this case nor was it ever produced before the Court for its consideration. The finally published Record of Rights only came into being after the disposal of the appeal. What the defendants did tender in evidence were the drafts of certain entries made in the course of the preparation of the Record to be finally published as the complete and correct Record of Rights. In my opinion it is perfectly clear, not only on the section itself but by authority, that these drafts are not evidence and that what alone is evidence is the finally published Record of Rights as required by the Statute.

In the case reported as *Gulab Kuer v.*

Ram Ratan Pandey (1) that is laid down to be the law. It is there stated that it is not until the Record of Rights is finally published that a presumption of correctness arises. Therefore, in my opinion, the defendants have not even established the fact of their occupancy rights; nor does any presumption arise from the entry in the Record of Rights that they pay ■ rent of Rs. 42-0-9. However, assuming that the Record of Rights had been validly proved and that it did record the defendants ■ occupancy tenants at a rent of Rs. 42-0-9, in my opinion, that would not be conclusive. It is only a presumption as to the correctness of the record in their favour; but it is a presumption that may be rebutted and, in my humble judgment on the findings of fact of this case and on the evidence in support of those findings of fact as proved to the satisfaction of two Courts, it is beyond all doubt that the evidence in this case completely rebuts the presumption that arises from the Record of Rights as now stated.

Every conceivable defence was made against the validity of this lease as being executed by a minor, by a mere stripling, a person without intelligence, without capacity, without knowledge of what he was doing; but against these arguments both the Courts have found that the defendant No. 2 was a competent contractor, that he was manager on behalf of the joint Hindu family, that he knew that what he was doing and that he did it for the benefit of the entire family. They, the defendants as a whole, took the benefit of the contract made by defendant No. 2 and have entered into possession and enjoyed the land under the contract. Now they seek to evade their liability upon only a statutory presumption arising under the Bengal Tenancy Act from the Record of Rights. I should be prepared to hold as a matter of law that even if the Record of Rights had been proved and had contained the entries that are now alleged to be in it, the evidence arising from the execution of the contract and the conduct of the parties themselves all conclusively rebut the inference which the defendants seek to draw from the Record of Rights. I feel certain that the finding of the Judge was right

SUBRAMANIA AIYAR v. SUBRAMANIA PATTAR.

that these defendants were not in occupation of the $8\frac{1}{2}$ bighas of land prior to the execution of the lease. For all these reasons it appears to me that the lease of the 27th of May 1900 is unimpeachable. It is binding on the parties and the defendants are liable to pay, while they remain tenants of these lands, the rent reserved by the lease. I think the rent is a bit too high and I am sorry a compromise cannot be effected, but Mr. Sinha cannot see his way to make a reduction in the rent. He has declined to do so and I must, therefore, confirm the finding of the Judge as to the amount of the rent. I disallow all interest of any kind and I think that in this particular case having regard to the legal importance of it, it is not a case in which Mr. Sinha ought to accept any costs. No costs will be allowed here.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1460 OF 1914.

March 9, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Napier.

MAHARAJAPURAM A. SUBRAMANIA
AIYAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

PALLASANA GRAMOM S. SUBRAMANIA
PATTAR—DEFENDANT—RESPONDENT.

*Transfer of Property Act (IV of 1882), ss. 3, 132—
Mortgage, assignment of—Suit by assignee—Set-off
as against assignor, whether provable—Equitable set-off—
Civil Procedure Code (Act V of 1908), O. VIII, r. 6.*

The transfer of a mortgage-debt, being the transfer of an actionable claim under section 132, Transfer of Property Act, the defendant cannot, in a suit by the assignee to enforce the mortgage, set off an independent debt due to him by the assignor and not covered by the mortgage. [p. 860, col. 1.]

Even under English Law, the principles applicable to the assignments of choses-in-action do not apply to transfers of mortgages. [p. 860, col. 1.]

No set-off, which is not covered by the provisions of Order VIII, rule 6, Civil Procedure Code, can be pleaded in suits. But it is permissible to plead an equitable set-off where it is confined to unascertained sums and arises out of the same transaction. [p. 859 col. 2.]

In a suit by the assignee of a mortgage for recovery of the mortgage amount, the defendant wanted to set off a judgment-debt due to him by the assignor of the mortgage and bearing date subsequent to the assignment:

Held, that the set-off could not be allowed as the decree was a debt independent of the mortgage. [p. 861, cols. 1 & 2.]

Quære.—Whether the defendant could prove the state of account in existence at the date of the assignment? [p. 860, col. 1.]

Turner v. Smith, (1901) 1 Ch. 213 at p. 219; 83 L. T. 704, 49 W. R. 186; 70 L. J. Ch. 144; 17 T. L. R. 143 *Taylor v. London and County Banking Company*, (1901) 2 Ch. 231 at p. 254; 84 L. T. 397; 49 W. R. 451; 70 L. J. Ch. 477; 17 T. L. R. 413, referred to.

Chinnayya Rawutan v. Chidambaram Chetti, 2 M. 212 and *Dwarka Doss Govardana Doss v. Danakoti Ammal*, 23 Ind. Cas. 129; 15 M. L. T. 198, explained and distinguished.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 704 of 1913, preferred against that of the Court of the Principal District Munsif of Calicut, in Original Suit No. 613 of 1912.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.

Mr. A. S. Venku Aiyar, for the Respondent.

JUDGMENT.

NAPIER J.—This is an appeal from a judgment of the District Judge of Malabar, in which he has allowed a decree-debt against an assignor to be set-off against the claim by an assignee of the mortgage in a mortgage suit. It is admitted that the set-off is not one that is covered by Order VIII, rule 6, of the Code of Civil Procedure. But it is argued that it is a set-off of an equitable nature and that the Civil Procedure Code not being exhaustive as to rights of set-off, it is permissible. There is authority for that proposition in a case reported in *Subramanian Chettiar v. Muthuswami Aiyangar* (1). With the greatest deference to the learned Judges I doubt whether it is advisable to introduce, under the name of equity, cases which appear to be rather one of hardship on the facts. The doctrine that there is a right of equitable set-off is well-founded, but has always been confined to unascertained sums arising out of the same transaction. To give the words "equitable set-off" a wider meaning than this appears to me to be very dangerous. But

(1) 17 M. L. J. 481.

SUBRAMANIA AIYAR v. SUBRAMANIA PATTAR.

assuming that there could be a set-off of this nature, we have to consider whether there is any doctrine under which this equitable set-off can be pleaded as an equity attaching to the rights of the assignee. What ~~is~~ to be conclusive against this argument is that under the express words of the Transfer of Property Act an assignment of this nature is not an 'actionable claim' within the meaning of section 132. The principle that transferees of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer is, of course, well founded on the original nature of the assignment of a chose-in-action under English Law; the principle being that a person cannot ignore his liability on a debt to another person and bring a suit to recover that person's debt to him simply by assigning that debt. Prior to the Judicature Act such a suit could only be brought in the name of the original creditor and the debt due to the defendant in the suit could, of course, be set off. But section 3 of the Transfer of Property Act contains this definition: "'Actionable claim' means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property." It is argued before us that although under the strict words of the Act this equitable right of set off could not be pleaded against an assignee of the mortgage, still there remains available to the defendant a Common Law doctrine that it can be so set off and that this doctrine even goes beyond the language of section 132 and makes the assignee liable not only to the equities at the date of the transfer but to any debts due from the assignor to the mortgagor prior to notice having been given of this assignment by the assignee to the mortgagor. The authority relied on in support of that proposition was the case of *Norris v. Marshall* (2). Whatever that case decides, however, the true doctrine is to be found in the language used by the Court of Appeal in *Turner v. Smith* (3), where it is said by Mr. Justice Byrne:—

"The effect in law of taking a transfer of

a mortgage without the privity of the mortgagor has been so recently summed up by Cozens-Hardy, J., in the ~~case~~ of *Dixon v. Winch* (4), that I cannot do better than adopt his words, which are to be found at page 742 of the report: 'It is well settled that where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of transfer.'"

This doctrine has been accepted by this Court in *Chinnayya Rawutan v. Chidambaram Chetti* (5). The language is, of course, very general but I am unable to accept it as laying down that not only the state of account between the mortgagor and the mortgagee with reference to the mortgage is to be taken as against the assignee, but also any independent debt in no way connected with the mortgage which has not been paid but is due from the mortgagee to the debtor. I know of no authority and the learned Vakil has not been able to show any authority for this proposition. The theory that an assignee of a mortgage stood in English Law in no better position than the assignee of an ordinary chose-in-action is opposed to the doctrine laid down by the Court of Appeal in the case of *Taylor v. London and County Banking Company* (6): "Although a mortgage-debt is a chose-in-action, yet, where the subject of the 'security' is land, the mortgagee is treated as having 'an interest in land,' and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty." The reason is thus stated by Sir William Grant in *Jones v. Gibbons* (7): "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is, of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order

(2) (1621) 5 Madd. 475; 53 E. R. 977.

(3) (1901) 1 Ch. 213 at p. 219; 83 L. T. 704; 49 W. R. 186; 70 L. J. Ch. 144; 17 T. L. R. 143.

(4) (1900) 1 Ch. 736 at p. 742; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276.

(5) 2 M. 212.

(6) (1901) 2 Ch. 231 at p. 254; 84 L. T. 397; 49 W. R. 451; 70 L. J. Ch. 477; 17 T. L. R. 413.

(7) (1804) 9 Ves. 407; 7 R. R. 247; 32 E. R. 659

MATHURA PRASAD V. GANGA.

to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt, ■ the estate can never be taken from him except by payment of the debt."

I have heard nothing in the case quoted to us which is at variance with this doctrine, which is laid down by the Court of Appeal. It, therefore, follows that in England it has never been an accepted doctrine that an assignment of a mortgage is covered by the same rules that govern assignments of other choses-in-action. We have been pressed with the decision of the present Chief Justice in ■ case reported as *Dwarka Doss Govardana Doss v. Danakoti Ammal* (8) and it is suggested that the reasons given for that decision narrow the rights of an assignee of mortgage to the rights of an assignee of an ordinary chose-in-action. I do not think that the learned Judge's reasons bear that interpretation, but if they do, I should have to express my dissent from them in view of the broad language which I have quoted from the decisions of the Court of Appeal. It follows, therefore, that there is no doctrine under the Common Law of England which will support the case for the respondent outside the Transfer of Property Act. It is suggested that this set-off can be pleaded as a debt which was in existence at the time of the assignment. This is not the *ratio decidendi* of the lower Court and, in my opinion, it is not open to the respondent to argue it here. The judgment-debt which he seeks to set off is undoubtedly one of a later date than the assignment. The original cause of action may have been prior to the assignment but as that original cause of action has merged in the debt, I am clear that he cannot fall back on it and ignore the judgment debt at the same time as he seeks to use the actual debt itself as the basis of the set-off. If he was able to ignore the judgment-debt he would have to prove the original liability on which it is based and that, of course, he has neither attempted to do nor could do in the suit. It follows, therefore, that even giving the broadest construction to the language of the decision in *Turner v. Smith* (3) he cannot set up this debt as coming

(8) 23 Ind. Cas. 129; 15 M. L. T. 195.

within the phrase "state of account in existence at the date of the assignment."

Another objection was taken in the lower Court to the maintainability of the set-off, namely, one of jurisdiction. But we do not think it necessary to decide that point, ■ we are satisfied that there is no equitable right of set-off known to law which is ■ defence to this mortgage suit.

The appeal must, therefore, be allowed with costs.

AYLING, J.—I agree.

Appeal allowed; Suit decreed.

V.R.P.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 106 of 1914-15 of
KHURI DISTRICT.

March 31, 1915.

Present:—Mr. Campbell, J. M.

MATHURA PRASAD—DEFENDANT—
APPELLANT

versus

GANGA—PLAINTIFF—RESPONDENT.

Landlord and tenant—Thekadar, position of—Oudh Rent Act (XXII of 1886), s. 3 (10), (11).

As between a landlord and his *thekadar*, the latter is a tenant under section 3 (10) of the Oudh Rent Act; but as between the *thekadar* and the cultivating tenants, the former is a landlord under section 3 (11) of the Act, and the latter are his tenants, and not sub-tenants. [p. 862, col. 1.]

Appeal from the decree of the Commissioner, Lucknow, dated the 5th October 1914.

FACTS of the case appear from the order of the Commissioner, which was passed as follows:—

"The plaintiff is a tenant. The defendant is a *thekadar*—a person whom collection of rents in the village in suit has been leased by the landlord. It is argued that the defendant is an ordinary tenant and that, therefore, the plaintiff is a sub-tenant. Acting on this theory, the defendant tries to eject the plaintiff on an unstamped notice.

"This is clearly wrong. Only for certain particular purposes, specified in clause (10) of section 3, Rent Act, can a *thekadar* be deemed ■ tenant. A tenant who holds from a *thekadar* is not necessarily a sub-tenant. The respondent should have caused ■ stamped

SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANOBIS.

notice to issue. The appeal is accepted and the present notice is cancelled. Costs of both Courts on respondent."

Baub Ram Prasad, for the Appellant.

Babu Salig Ram, for the Respondent.

JUDGMENT.—I think that the Commissioner's order is perfectly correct. As between Government and the lessee, the latter is a tenant under section 3 (10); but as between the lessee and the cultivating tenants the former is a landholder under section 3 (11). Respondent is not a sub-tenant of the lessee, and it has been rightly held that the notice of ejectment should have been stamped.

I uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 56 OF 1915.

May 26, 1916.

Present:—Justice Sir John Woodroffe, Kt., Mr. Justice D. Chatterjee and Mr. Justice Newbould.

SATISH CHANDRA MITRA—PLAINTIFF
—APPELLANT

versus

JOGENDRA NATH MAHALANOBIS AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 68, 70—Document requiring attestation—Admission of execution by executant, effect of.

Per Woodroffe, J. (concurring with D. Chatterjee, J.)—In the case of a document required by law to be attested, the admission by a party to it of its execution dispenses with the necessity of proving its execution as against him, but as against persons other than the party making the admission the document is not admissible in evidence until it has been proved by attesting witnesses in the manner prescribed by section 68 of the Evidence Act. [p. 864, col. 2.]

Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundopadhyaya, 7 C. W. N. 384, distinguished.

Per Newbould, J., dissentient.—An admission by the sole executant of an attested document of its execution by himself dispenses with the necessity of calling an attesting witness under section 68 of the Evidence Act for the purpose of proving its execution as against any person. [p. 863, col. 2.]

Per D. Chatterjee, J.—Section 70 of the Evidence Act seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it, and so reading the section, the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution of a document required by law to be attested if

the executant admits execution, but this proof must be considered as confined in its operation only to the person making the admission. [p. 863, col. 1.]

Per Newbould, J.—Section 70 of the Evidence Act must be read as a proviso to section 68 and section 68 must be read subject to the provisions of the subsequent sections. Where an executant admits execution of an attested document, the document is admissible as against persons other than the executant without the formality of proof by an attester, but such admission will not prove the document as against such persons. [p. 863, col. 2.]

The appeal was first heard by D. Chatterjee and Newbould, JJ., on 5th May 1916, when their Lordships delivered the following **JUDGMENT.**

CHATTERJEE, J.—This was a suit upon a mortgage bond. The defendant No. 1 was the executant of the mortgage and the other defendants derived title to the mortgaged property subsequently by execution and certificate sales. The defendant No. 1, executant of the document, admitted the mortgage-deed and the first Court gave a decree on the basis of the mortgage.

It appears that defendants Nos. 3 to 5 made an attempt to have the case postponed for the purpose of getting an order of transfer of the case to the Court of the Sub-Judge for trial with another suit in the same matter. Before the order of the District Judge on the application for transfer was recorded the case was disposed of by the learned Munsif. Upon appeal, the learned Sub-Judge remanded the case holding that the document, that is, the mortgage-deed, had not been proved by the examination of any of the attesting witnesses as required by section 68 of the Evidence Act.

On appeal, it is contended before us that the order of the learned Judge below is wrong, in that section 70 of the Evidence Act provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested and that, therefore, it was not necessary to prove the attestation of the document.

It is contended by the learned Vakil for the respondents, however, that an admission of the execution by the executant has the effect of proving the document as against the party making the admission and not against them, and that they stated in the written statement that the document was not executed in accordance with law, the docu-

SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANOBIS.

ment ought to have been proved, so far as they are concerned, in accordance with the general provisions of section 68.

Section 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Section 69 provides for cases where no attesting witness can be found. Section 70 says that if a person who has executed a document admits the execution, then that will be taken as sufficient proof of its execution as against him, i.e., the person making the admission. Section 70, therefore, seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it and so reading the section, the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution if the executant admits that he has executed the document, but this proof must be considered as confined in its operation only to the person making the admission. If that be so, the defendants Nos. 3, 4 and 5, who do not admit execution of the document, cannot be said to be bound by the sufficiency of the proof of the execution supplied by the admission of the executant. This contention of the learned Vakil for the respondents seems to be supported by principle also. The defendant No. 1, I take it, executed the mortgage and thereafter he made sales in favour of the respondents, or the respondents derived title to his right, title and interest existing after the execution of the mortgage. If it were to be held that the respondents were bound by the admission made by the executant subsequent to their acquisition of title, it would be sinning against the law of admissions, because in that case, the executant of the document would be making a derogation from his own grant by making an admission to the detriment of persons deriving title from, or through, him before the admission.

In this view of the case, I think that the lower Appellate Court was right in sending the case back for the formal

proof of the document as against defendants Nos. 3, 4 and 5, who did not admit the execution of the document. I would, therefore, dismiss the appeal with costs.

As there has been a difference of opinion in this case, it will be placed before the Hon'ble the Chief Justice so that it may be referred to a third Judge. The point on which the Court has differed, is whether in a suit on a mortgage-bond, the admission of execution by the sole mortgagor made after the transfer is sufficient to render it unnecessary for the mortgagee to comply with the provisions of section 68 of the Evidence Act, in order to prove the execution of the document as against the subsequent transferees of the mortgaged property who do not admit the execution, or must the execution be formally proved against them.

NEWBOULD, J.—In this case, I regret that I am unable to agree with my learned brother. We are, I think, agreed that section 70 of the Evidence Act must be read by way of proviso to section 68. From this it appears to me to follow that an admission by the sole executant of an attested document of its execution by himself dispenses with the necessity to call an attesting witness under section 68 for the purpose of proving its execution. There is a marked difference in the language used in the two sections 68 and 70. Section 68 speaks of the document being used as evidence, section 70 of its being proved. Under section 70 and even apart from it, the admission of a party to an attested document cannot prove it against a person who is not a party to it. But I see no reason why such admission should not render the document admissible in evidence against him. The admission does not prove the document against him, but it is sufficient to prevent his taking the technical plea that the provisions of section 68 have not been complied with.

I am aware that a contrary view was expressed by a Divisional Bench of this Court in *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundepadhyaya* (1). But this is only

SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANOBIS.

an *obiter dictum*, as the document there in question was held to have been proved to be duly attested on other grounds. The correctness of the view taken by the learned Judges who decided this case has been doubted in *Ameer Ali and Woodroffe's Law of Evidence* 5th Edition, page 506, where it is stated, if the admission of the executant has not the effect of dispensing with proof of attestation there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only.

It, therefore, seems to me that section 68 must be read subject to the provisions of subsequent sections and where an executant admits execution of an attested document, the document can be used as evidence against other parties to the suit and proved in the ordinary way without it being necessary to call, or prove the handwriting of an attesting witness.

I would, therefore, decree the appeal and set aside the order of the learned Subordinate Judge remanding the case for a fresh trial and direct him to dispose of the appeal on the evidence on the record.

In consequence of this difference of opinion, the case was referred to Woodroffe, J.

Babus Bepin Behari Ghose and Surendra Kumar Bose, for the Appellant.

Dr. Sarat Chandra Basak and Babu Asita Ranjan Ghose, for the Respondents.

JUDGMENT.

WOODROFFE, J.—In the case of a document required by law to be attested the admission of a party to it of its execution by himself is under section 70 of the Evidence Act sufficient proof of its execution as against him. If, therefore, the question had arisen solely between the plaintiff and the mortgagor in this case, it would not have been necessary to have called any attesting witnesses or other evidence. The admission by the party to the document would have dispensed with the necessity of all further proof. In the present case, however, there are other defendants than

the mortgagor. The learned Pleader who appears on behalf of the plaintiff admits that the admission of the mortgagor is not evidence against his co-defendants and that it will, therefore, be necessary for him to produce by evidence affecting these co-defendants that the mortgage was executed and operative. He, however, contends that the effect of the admission by the executor is to dispense him from proof in a particular form, namely, by calling an attesting witness. He contends that the effect of sections 68 to 72 of the Evidence Act is that where there are several defendants against whom a mortgage is sought to be proved and one of the defendants being the executant of the document admits execution, that admission, whilst not dispensing with the necessity of proof of the mortgage as against the defendants other than the executant, does dispense with the necessity of calling an attesting witness. I am, however, unable to agree with this contention. The effect of section 70 is, in my opinion, that the proof by calling attesting witnesses is dispensed with where the party executant admits execution, only as against him, but where there are other defendants than the party making such admission, the document is not admissible in evidence as against them until it has been proved by an attesting witness in the manner prescribed by the Act. It is the common practice that a document is admitted against a particular party only or for a particular purpose and not as against other parties or for other purposes. In the case before me it is, in my opinion, necessary not only to prove the document against the defendants other than the admitting executant but to prove it in the way required by sections 68 and 69, namely, the production of an attesting witness. The admission of the executing party has no effect at all except as regards the party himself. As regards others, the position is just the same as if there had been no such admission; that is, the case must be proved against them in the way required by those sections. The decision in the case of *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bandopadhyaya* (1) does not touch the matter before us, for there the question was not as to the

BISMILLA BEG V. AZAM ALI BEG.

effect of ■ admission by an executant upon the question of the proof required against parties other than the executant nor does the passage cited from the text book quoted in Mr. Justice Newbould's judgment refer to the matter now in issue, but to the point which appears to have been raised by the decision in *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bandopadhyaya* (1). That decision is open to this construction that even when the executant admits execution, his admission is proof of execution or signing only and does not dispense with proof of attestation. If this be the meaning of that judgment, I am unable to agree with it ■ I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of an admission of signing, then there was no necessity of section 70 at all, regard being had to the general provisions of the Evidence Act relating to admission. This is also indicated by the last words of section 70 "though it be a document required by law to be attested." I, therefore, agree with the conclusion of Mr. Justice Chatterjee that in a suit on a mortgage-bond the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act, in order to prove the execution of the document as against other parties in the suit who do not admit such execution. I think that ■ document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

I, therefore, dismiss this appeal with costs, three gold mohurs, each hearing.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 5 OF 1916.
February 22, 1916.

Present:—Mr. Lindsay, J. C.

BISMILLA BEG—DEFENDANT—APPLICANT—
APPELLANT

versus

AZAM ALI BEG—PLAINTIFF—OPPOSITE
PARTY—RESPONDENT.

Ex parte decree—Merits, decision on—Defendant's evidence partly recorded—Default of defendant on adjourned hearing—Remedy—Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 3.

Where some of the defendant's evidence is recorded and he makes default on an adjourned date of hearing and the Court proceeds to decide the suit on merits, although professing to pass an *ex parte* decree, the defendant's remedy lies by appeal and not by application for setting aside the *ex parte* decree. [p. 865, col. 1.]

Appeal against the order of the Subordinate Judge, Unao, dated the 15th January 1916.

Babu Rudra Dat Sinha, for the Appellant.

Pandit Brijnath Sharga and Babu Mahesh Prasad, for the Respondent.

JUDGMENT.—This ■ miscellaneous appeal directed against an order of the Subordinate Judge of Unao. It appears that the applicant was the defendant in a suit for foreclosure in which issues were framed in the month of March 1915. The 25th of August 1915 was fixed for the hearing of evidence in the case. For that date the defendant-applicant summoned seven witnesses, three of whom were absent. The four who were in attendance were examined. The case was adjourned to the 31st of August 1915 on an undertaking given by the defendant that he would produce the absent witnesses in Court on that date. The defendant and his witnesses failed to appear on the 31st of August 1915 and the Court proceeded to give judgment. The judgment shows that the evidence which had already been taken on behalf of the defendant was examined by the Court and although the Court professed to pass an *ex parte* decree under the provisions of Order IX, it is quite clear that the case was not decided in this way at all, and that the reference to Order IX in the judgment of the Subordinate Judge was wrong. The provision of the law which was applicable to the circumstances of this case is Order XVII, rule 3. After the case had been decided, an application was put in by the defendant

ABDUL SAMAD v. MUNICIPAL COMMITTEE, DELHI.

under Order IX, rule 13. He asked the Court to set aside the decree and to have the case started afresh, pleading that he had been detained by rain on the 31st of August and that he had thereby been prevented from reaching the Court in time. This application was refused by the Subordinate Judge. I have heard Counsel in support of the application and I have also heard Counsel for the other side. It appears to me that the defendant-applicant has mistaken his remedy. As I have already mentioned the provisions of Order IX were not applicable to this case at all and the defendant ought to have sought relief by way of appeal against the decree of the lower Court. I am unable to give him any relief in this appeal, which I accordingly dismiss with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 592 OF 1911.

October 18, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice LeRossignol.

ABDUL SAMAD—PLAINTIFF—
APPELLANT

versus

MUNICIPAL COMMITTEE, DELHI, AND
SECRETARY OF STATE FOR INDIA

—DEFENDANTS—RESPONDENTS.

Principal and agent—Decree against principal acquiesced in—Agent, whether can appeal.

Plaintiff sued the Municipal Committee, Delhi, for certain reliefs on account of their refusal to sanction the proposed erection by the plaintiff of a building on a site, the lease of which had been sold by auction by the Committee to the predecessor-in-title of the plaintiff. The Committee justified their refusal on the ground that they had sold the lease as trustees of the Crown and that no permanent building could be erected on *nazul* land. The Secretary of State then applied to be made a party and the application was sanctioned, on the ground that the Committee was merely a kind of agent or trustee for the management of the land of which the Secretary of State was the beneficial owner.

The first Court decreed the plaintiff's suit and from this decree the Committee alone appealed. This appeal having been accepted by the Divisional Judge, the plaintiff preferred a further appeal:

Held, that the Committee, who were merely agents, were not competent to appeal to the Divisional Judge

when the principal had withdrawn from the contest and that, therefore, the first Court's decree must be restored. [p. 867, col. 1.]

Second appeal from the decree of the Divisional Judge, Delhi, dated the 6th February 1911.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

Lala Moti Sagar, for the Respondents.

JUDGMENT.

LEROSSIGNOL, J.—This suit arose out of the refusal of the Municipal Committee, Delhi, to sanction the proposed erection by the plaintiff of a building on a site, the lease of which had been sold by auction by the defendant Committee in 1892 to one Muhammad Ishak and had subsequently passed into the hands of the plaintiff.

The original pleas of the Committee were that they had sold the leases as trustees of the Crown, and that as no permanent building could be erected on *nazul* land, their refusal to grant plaintiff's application to build was justified.

Next, the Secretary of State applied to be made a party to the suit; his right to be impleaded was contested by the plaintiff and the matter was concluded by a decision of this Court, dated 30th June 1909, in which it was held that the Secretary of State was the beneficial owner and that the defendant Committee was merely a kind of agent or trustee for the management of this land which was admittedly *nazul*, and the Secretary of State should, therefore, be made a party to the suit.

Accordingly, the Secretary of State was impleaded and his impleadment was supported by the Municipal Committee.

The first Court found throughout against the defendants; it held that the pleas of the Crown were invalid; that the Municipal Committee in auctioning the leases had not exceeded its rights; further, with reference to a plea advanced by the defendant Committee only after the Secretary of State had been impleaded, it decided that in spite of section 36 of the Municipal Act of 1891, the contract was binding on the Committee.

It then decreed all the reliefs claimed by plaintiff except that the amount of damages payable by the Committee was fixed at Rs. 175 instead of the Rs. 1,400 claimed, and gave costs against both defendants.

KHUDADAD v. MORIOKHAN.

From this decree the Committee alone appealed and the learned Divisional Judge dismissed plaintiff's suit, holding that the land in suit belonged to the Committee and that section 36 of the Municipal Act rendered the contract invalid.

Against this appellate decree the plaintiff has preferred this further appeal which, in our opinion, must succeed.

The Committee did not come into Court with the plea that they were the owners of the land, on the contrary they described themselves as mere trustees or agents on behalf of Government. It is the Committee and not the plaintiff who are on the horns of a dilemma. Had they described themselves as owners of the land, the Secretary of State would have had no *locus standi*, but they described the Secretary of State as the real owner, and the real owner acquiesced in the decree of the first Court.

How could the mere agent contest the appeal when his principal had withdrawn from the contest?

On the merits, the decision must be decidedly against the Committee. Their ground for their refusal to sanction the plaintiff's application was not any contravention of any bye-law but their inability to sanction any building at all on the land in suit.

This was found by the first Court not to be the case against both defendants, and the injunction issued by the Court restraining the Committee from prohibiting building for the reason alleged was perfectly justified. The sum awarded as damages was by no means excessive and we refuse to interfere in that matter.

So far as we are able to understand the case, we think the Committee have been ill advised in their pleas, but on these pleas we do not doubt that plaintiff is entitled to the decree granted by the first Court; had the Committee urged that the land belonged to them, the result might well have been different.

We accordingly accept this appeal and restore the decree of the first Court with costs throughout.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 9 of 1914.

September 24, 1915.

Present:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

**KHUDADAD wald MAHOMED—PLAINTIFF
—APPELLANT**

versus

**MORIOKHAN AND ANOTHER—DEFENDANTS—
RESPONDENTS.**

Limitation Act (IX of 1908), ss. 5, 12, Sch. I, Art. 156—Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal from decree—Decree prepared after judgment—Judgment deferring preparation of decree till payment of penalty—Limitation, starting point for.

Where a Court gives a judgment but refuses to give a decree till the successful party complies with a certain condition, the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment, which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which limitation runs. [p. 868, col. 2.]

Where, therefore, a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid and the decree was actually signed three months after the judgment on the day when the penalty was paid:

Held, that time commenced to run, for the purpose of appeal, from the date of the decree. [p. 868, col. 2.]

Ranjit Singh v. Ilahi Bakhsh, 5 A. 520; A. W. N. (1883) 151, referred to.

Topandas v. Manager, Encumbered Estates, 10 Ind. Cas. 210; 5 S. L. R. 47 and *Lakhoomal v. Joomromal*, 1 S. L. R. 71, distinguished.

Appeal against the decree of the Additional Judicial Commissioner, Sind.

Mr. Parsram Tolaram, for the Appellant.

Mr. Rewachand Vasanmal, for the Respondents.

JUDGMENT.

PRATT, J. C.—This was a suit for a declaration to compel defendant to effect mutation of names in the Collector's register in respect of land which he had sold to the plaintiff. The Judge decreed the suit, subject to the condition that plaintiff should pay to the defendant prior to the mutation of names a sum of Rs. 300, balance of the purchase-money, and a sum of Rs. 150 for damages.

The plaintiff appeals in respect of this condition of Rs. 150.

A preliminary objection taken is that the appeal is time-barred. The judgment of the lower Court was delivered on 11th August 1913, but as the Judge considered that

KHUDADAD V. MORIOKHAN.

plaintiff was liable under the Stamp Act to pay a penalty on the sale-deed, the Judge ordered that the decree should not be drawn up until that penalty had been paid. By various orders from time to time the period for paying penalty was extended and the decree was prepared and signed on the 21st November 1913, the date on which the penalty was eventually paid.

The appeal was filed on 17th February 1914, and is, therefore, time-barred unless plaintiff is entitled to treat this latter date as the starting point for limitation.

The cases cited in argument refer to section 12 of the Limitation Act. A party is not entitled to an allowance for the interval between the delivery of judgment and the signing of the decree under that section, unless the delay in obtaining copies was due to decree not being prepared or signed. This was the decision in the case of *Topandas v. Manager, Encumbered Estates* (1). So also if the plaintiff has not applied in time for copies of judgment and decree, he will not be excused on the ground that the decree was not in existence at the date of his application, for the decree relates back to the date of judgment and he must make application for a copy of decree in reference to that date, and if he does not do so, the delay is not due to time requisite for obtaining a copy. This was so decided in the case of *Lakhoomal v. Jomromal* (2).

But the present case rests on grounds quite distinct from section 12 or indeed section 5 of the Limitation Act. The delay in the preparation of the decree was not an administrative delay due to the laches of the officer of the Court—but the Court by its own order directed that the decree should not be drawn up on the day that it gave judgment. Now the decree as pointed out in *Ranjit Singh v. Ilahi Bakhsh* (3) is "in substance as well as in form the mouthpiece of the suit in its immediate result and without it the dispute between the parties would not be intelligible." When, therefore, the Court gave a judgment but refused to give a decree,

the Court postponed the decision of the suit. It said in effect, I am prepared to decide the suit in accordance with this judgment but I shall not do so until you have paid the penalty under the Stamp Act. The effect of this order was to make the judgment delivered on the 11th August 1913 a provisional judgment, which did not become an operative judgment until the 21st November 1913 when preparation of the decree was ordered. We think the latter date is the date of the judgment as well as of the decree from which limitation runs and that the appeal is, therefore, in time.

On the merits the case is a very simple one. The lower Court imposed upon the plaintiff the condition that he should pay Rs. 150 damages before the mutation of names was effected. The covenant in the sale-deed as to mutation of names imposes no other condition than that the balance of the purchase-money should be first paid. The case for the condition to damages rests solely on an alleged oral agreement, but we think that evidence of this oral agreement was wrongly admitted by the lower Court for it is excluded by section 92 of the Indian Evidence Act.

Mr. Rewachand attempts to apply one or the other of the first three provisos to that section. The first proviso refers to proof of any fact which would invalidate any document but this is not the case here, for the defendant had admitted the validity of the deed and seeks to vary it. The second proviso refers to separate oral agreements as to any matter on which a document is silent, and which is not inconsistent with its terms. Now the covenant as to mutation of names may be something separate and distinct from the transaction of sale. But granting this the fact remains that there is a covenant as to mutation of names in the document and so the document is not silent on the point and the condition pleaded is inconsistent with that covenant. Then as to proviso three there can be no question of a condition precedent for the defendant would not have signed the deed if the payment of damages was a condition precedent.

There is a covenant in the sale-deed as to mutation of names and it is not, therefore, open to the defendant to vary the terms of

(1) 10 Ind. Cas. 210; 5 S. L. R. 47.

(2) 1 S. L. R. 71.

(3) 5 A. 520; A. W. N. (1883) 151.

NURI MIAH v. AMBICA SINGH.

it by ■ oral agreement. The appeal must, therefore, succeed.

We vary the decree of the lower Court by granting the plaintiff ■ injunction requiring defendant to effect mutation of names on payment of the purchase-money of Rs. 300 only.

The order of the lower Court ■ to costs must also be varied. We direct that the defendant should pay costs of the plaintiff both in the lower Court and in this appeal.

Appeal allowed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1107 OF 1914.

CIVIL RULE NO. 326 OF 1916.*

May 11, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

NURI MIAH—DEFENDANT NO. 1—
APPELLANT—PETITIONER

versus

AMBICA SINGH AND ANOTHER—PLAINTIFF
AND DEFENDANT NO. 2—RESPONDENTS
—OPPOSITE PARTY.

Muhammadan Law—Pre-emption, right of, if extinguishable by subsequent events—Right, existence of, till decree—Partition during pendency of pre-emption suit, effect of, on co-sharer's right of pre-emption—Plea raised for first time in final Court of Appeal, when can be entertained—Suit, circumstances after institution of, when to be taken into consideration by Court.

A plaintiff in ■ suit for pre-emption is bound to establish not only that the pre-emptive right claimed by him existed at the date of the sale and at the date of the institution of the suit, but also that it existed up to and at the date of the decree of the primary Court. [p. 870, col. 2; p. 874, col. 1.]

Therefore, where before the date of the decree in a suit for pre-emption instituted by a co-sharer in a joint property, the property is partitioned in partition proceedings which were pending, the suit cannot be decreed in favour of the plaintiff. [p. 871, col. 2; p. 874, col. 2.]

Rai Charan Mandal v. Bishwanath Mandal, 26 Ind. Cas. 410; 20 C. L. J. 107, followed.

Ram Gopal v. Piari Lal, 21 A. 441; A. W. N. (1899) 63; *Tafazul Husain v. Than Singh*, 6 Ind. Cas. 426; 32 A. 567; 7 A. L. J. 715; *Samrat Das v. Gur Parshad*, 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909, approved.

Faiz Baksh v. Ramjidas, 34 P. R. 1875, not approved.

*This Rule was obtained to review the decision of Sharfuddin and Roe, JJ., who originally heard the appeal and dismissed it, vide 32 Ind. Cas. 893—Ed.

Per Mookerjee, J.—When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. [p. 872, cols. 1 & 2.]

Connecticut Fire Insurance Co. v. Kavanagh, (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21, referred to.

Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application. Where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. [p. 873, col. 1.]

The right of pre-emption, which arises from the moment the sale is effected by ■ co-sharer, is not always enforceable as it stands at the time of its origin, it is liable to be extinguished by events subsequent. [p. 874, col. 1.]

In order that ■ right of pre-emption may be enforced by a suit, the right must exist and retain its enforceable character when the decree is made by the primary Court. [p. 874, col. 1.]

Appeal against the decree of the District Judge, Saran, dated the 7th of April 1914, reversing that of the Subordinate Judge, 2nd Court of that District, dated the 16th of January 1914.

FACTS material to the report appear from the judgment of Mookerjee, J.

Maulvi Khurshed Husain (with him Mr. A. S. M. Akram), for the Petitioner.—The Subordinate Judge dismissed the suit on 16th January 1914 and the District Judge reversed the decision and decreed the suit on the 7th April 1914. But before the date of these decisions, on the 2nd September 1913, the partition proceedings were completed. Consequently before the decision of the Qazi, the plaintiff ceased to be ■ co-sharer and hence could not get ■ decree of pre-emption. Refers to *Ram Gopal v. Piari Lal* (1), *Tafazul Husain v. Than Singh* (2).

Babu Sarat Chandra Roy Chowdhury, for the Opposite Party.—The point has been taken for the first in this application for review. I submit the cases of *Ram Gopal v. Piari Lal* (1) and *Tafazul Husain v.*

(1) 21 A. 441; A. W. N. (1899) 63.

(2) 6 Ind. Cas. 426; 32 A. 567; 7 A. L. J. 715.

NURI MIAH v. AMBICA SINGH.

Than Singh (2) are of questionable authority. There is no case either in *Hedaya* or in *Durr-ul-Mukhtar* which lays down that the fact of partition being complete after the institution of a suit for pre-emption would extinguish the right of pre-emption. The right of pre-emption which accrues on the sale of the joint property, if subsisting up to the date of the institution of the suit for pre-emption, is sufficient for giving a decree for pre-emption. Otherwise the result would cause hardship; for example, if a suit for pre-emption is carried up to the Privy Council and lasts for a number of years, it would be difficult to get any suit of pre-emption decreed, if in the meantime a partition proceeding is instituted at the instance of the co-sharer who sold his share to an outsider. Then, again, the decree ought generally to refer to events as they existed at the date of the institution of the suit and not events that subsequently took place. Refers to *Sakina Bibi v. Amiran* (3); *Rohan Singh v. Bhao Lal* (4); *Janki Prasad v. Ishar Das* (5).

JUDGMENT.

RULE No. 326 of 1916.

SANDERSON, C. J.—In this case the action was for pre-emption. The suit was dismissed by the Court of first instance on the 16th of January 1914. But on appeal to the District Judge, that decision was reversed, and the District Judge decreed the suit, holding as a matter of fact that the ceremonies had been duly performed, that the defendant-purchaser was not a co-sharer and that the property was joint property at the time of the institution of the suit. From that, the defendant appealed to the High Court, and that appeal was dismissed by the two learned Judges who constituted the Bench on that occasion*. Then a Rule was obtained by the defendant calling upon the plaintiff to show cause why that judgment should not be reviewed upon three grounds, the main ground being that the conditions which were necessary to give a right to the plaintiff to pre-

emption did not exist at the date of the decree, and that is the point which has been mainly argued, and, if I may say so, very well argued by the learned Vakil for the plaintiff on this occasion. In order to appreciate the point it is necessary to state three or four facts. One Bansidhar sold his interest in the property on the 12th of July 1912 to the 1st defendant whose name was Nuri Miah, and at that time there were partition proceedings pending. On the 8th of October 1912, the plaintiff instituted the present suit to assert his right of pre-emption. The partition proceedings were completed on the 2nd of December 1913, by reason of the issue of the notice under section 92 of Estates Partition Act. The first decree in this suit, as I have already mentioned, was on the 16th of January 1914, after the date when the partition proceedings were completed. In that decree the defendants succeeded and it was not until the 7th of April 1914, when the District Judge's decision was given that the plaintiff got his decree for pre-emption. I do not think it matters which of the dates is taken, whether the 16th of January 1914, or the 7th of April 1914, because both of them are subsequent to the 2nd of December 1913, when the partition proceedings were completed.

Now, the point taken by the learned Vakil on behalf of the defendants is that in such a case as this, namely, in a suit for pre-emption, the right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit and finally up to and at the date of the decree. The principle is thus stated in Sir R. K. Wilson's Digest of Anglo-Muhammadan Law, at page 400: "The co-sharer-ship participation in appendages, or ownership of contiguous property, as the case may be"—this being a case of co-sharership—"must not only exist at the time of the sale which gives rise to the claim of pre-emption, but must continue to exist down to the time when the suit is instituted, and (it seems) even down to the decree." Of course, that is not an authority, and I do not refer to it as authority, but I only

(3) 10 A. 472; A. W. N. (1888) 177.

(4) 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699.

(5) 21 A. 374; A. W. N. (1899) 126.

*See 32 Ind. Cas. 893—Ed.

NURI MIAH v. AMBICA SINGH.

refer to it for the purpose of stating what is considered by the text writers ■ the principle. The question remains whether that principle is right.

Now, both on the ground of principle and also by reason of the authorities to which M. Roy Chowdhury has very rightly drawn our attention, although some of them are, in my opinion, directly against him, I think this Rule must be made absolute. The principle, I think, cannot be better stated than it is in the case of *Tafazul Husain v. Than Singh* (2), where the judgment was given at page 570*. That was a case in which partition proceedings had taken place, and at the time of the decree the property was no longer a joint property. The learned Judges said there: "We think that the decisions of the Courts below were correct. The plaintiff's right was based upon the fact that he was partner with the vendor. To quote Hamilton's Translation of the Hedaya, *shafa* relates to ■ thing held in joint property and which has not been divided off. The right of *shafa* is founded on ■ precept of the Prophet who had said, 'the right of *shafa* holds in ■ partner who has not divided off and taken separately.'" I pause there to say, that I think that is the principle which applies to this case; the plaintiff's right was based upon the fact that he was a partner with the vendor; at the time of the sale he was a partner with the vendor; at the time of the institution of the suit he was a partner with the vendor; but at the time the decree was made, in 1914, the joint property had ceased to exist, for the property had been divided into different shares which had become the separate property of the individuals who were entitled to the shares under the partition proceedings; and it seems to me it would be impossible to make ■ decree upon the basis upon which the plaintiff's claim was put forward in this action. Then the learned Judges went on to say: "Having regard to what has happened, the plaintiff's property has been divided off. He is no longer ■ partner with the vendor. It is argued that inasmuch as the plaintiff was ■ partner at the time of the institution of the suit, it, therefore, does not matter that

■ partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the Hedaya, Chapter IV, Book 38, that it is ■ condition that the property of the *shafi* remain firm until the decree of the *Qazi* be passed; and for this reason if the *shafi* previous to the decree of the *Qazi* sell the house from which he derives his right of *shafa* the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was ■ partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore, the reasons or grounds of his right had been extinguished before the decree of the Court, and, therefore, the right itself is also extinguished." I think that those words apply distinctly to this case, and I propose to follow the decision in that case and also to say that in my judgment that decision is based upon sound reason and principle, and, therefore, I think this Rule must be made absolute.

APPEAL NO. 1107 OF 1914.

This is now to be taken as the hearing of the appeal, and I would like to say this about that matter to show that I have not overlooked the point taken by the learned Vakil for the plaintiff. It was clearly within our jurisdiction to hear the Rule, and the hearing of the appeal is ■ natural consequence under the Rule ■ was mentioned by my learned brother Mr. Justice Mookerjee and of the fact that we made the Rule absolute. In my opinion, we have jurisdiction to hear it, but if there ■ any doubt about it, I give direction under the second proviso of clause 39 of the Letters Patent of the Patna High Court that this appeal should be heard in this Court.

With regard to the costs we have considered the matter carefully, and we think that the proper order to make is that the appeal will be allowed and the judgment of the Court of first instance, by which the

* Page of 32 A.—Ed.

suit was dismissed will be restored. The plaintiff will pay the defendant's costs incurred in the Court of first instance and in the first Appellate Court, but there will be no costs with regard to the proceedings in the High Court either with regard to the appeal or with regard to the Rule, with the exception that we think that the plaintiff should pay the Court-fee which was paid on the memorandum of appeal, which we understand is Rs. 150.

The money deposited by the plaintiff will be returned to him.

MOOKERJEE, J.—I agree that this Rule issued on the application for review, which raises an important question of law of first impression so far as this Court is concerned, must be made absolute.

The plaintiff seeks to enforce his right of pre-emption under the Muhammadan Law in respect of shares in three villages sold on the 12th July 1912 by his co-sharer, the second defendant, to the first defendant. He instituted this suit on the 5th October 1912 on the allegation that he had performed all the ceremonies requisite under the Muhammadan Law. The Subordinate Judge dismissed the suit on the 16th January 1914. Upon appeal the District Judge gave the plaintiff a decree on the 7th April 1914. An appeal from the decree of the District Judge was dismissed by this Court (Sharfuddin and Roe, JJ.) on the 17th January 1916, and this is the judgment we are now invited to review.

The ground on which the application for review is made was admittedly not taken at any stage of the proceeding, and it has been argued on behalf of the opposite party that the petitioner should not be allowed to base his application on a ground never taken before. In my opinion there is no force in this contention. In the *first* place, as was pointed out by the Judicial Committee in the case of *Connecticut Fire Insurance Company v. Kavanagh* (6): "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient,

in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below." Here the ground assigned in support of the application for review raises a pure question of law, and its determination does not depend upon the investigation of new facts. In the *second* place, the alleged error, if it be an error, is apparent on the face of the record. The petitioner contends that the suit should not have been decreed, inasmuch as the right of pre-emption had been lost before the date of the decision of the Subordinate Judge in the Court of first instance. This argument is based on admitted facts. The case was decided by the Subordinate Judge on the 16th January 1914. The District Judge made his decree on the 7th April 1914; that decree may by a fiction be deemed to have been made as early as the 16th January 1914, inasmuch as the District Judge only made that decree which, in his opinion, should have been made by the Trial Court. The property was the subject of the proceeding for partition under the Estates Partition Act, 1897, instituted before the Collector on the 15th May 1909. The partition proceedings were completed on the 2nd September 1913, and consequently on that date, the subject-matter of the litigation ceased to be joint property. The petitioner contends in essence that the plaintiff ceased to be a co-sharer in the joint property, on the 2nd September 1913, his right of pre-emption was extinguished on that date and consequently no decree for pre-emption could be made thereafter on the 16th January 1914. If this argument is well founded on principle the error assigned is apparent on the face of the record. I hold accordingly that the application for review must be entertained and considered on its merits.

The substance of the argument for the petitioner is, that any person who seeks the assistance of a Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of the sale, at the date of the institution

(6) (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21.

NURI MIAH v. AMBICA SINGH.

of the suit and also at the date of the decree of the Trial Court. In support of this contention reliance has been placed upon the decisions in *Ram Gopal v. Piari Lal* (1) and *Tafazul Husain v. Than Singh* (2). On behalf of the opposite party the correctness of these decisions has been called in question, and we have been invited to apply the Rule that the decree in a suit should conform to the rights of the parties as they stood at the date of its institution. Now, it may be conceded that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application and in a long series of decisions, which will be found reviewed in the case of *Rai Charan Mandal v. Biswanath Mandal* (7), the doctrine has been recognised that there are cases where it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In my opinion, the case before us falls within this exception to the general rule, and the decree herein should be made in accordance with the circumstances as they stood at the date of the decree of the Trial Court, because otherwise the decree if made in conformity with the prayers in the plaint would be inappropriate and would not do complete justice between the parties. This may be well illustrated by a reference to the prayer in the plaint itself. The plaintiff seeks a declaration of his title to specified shares in the three villages mentioned in the schedule and prays that he may be placed by the Court in possession of such shares. The decree of the District Judge is in strict conformity with these prayers in the plaint. But it has not been seriously disputed that the decree so awarded to the plaintiff is incapable of exe-

cution by reason of events which have happened since the institution of the suit. The joint property has, during the pendency of the litigation in the Trial Court, become transformed into several separate estates and it is impossible in execution of the decree awarded to the plaintiff to place him in possession of a share in the joint property as claimed by him in the plaint. It was, indeed, faintly suggested on his behalf that the decree might be modified so as to entitle him to recover possession of the allotment made in favour of the first defendant. The obvious answer is that such relief, if awarded, would be inconsistent with the prayer in the plaint and with the fundamental notion of pre-emption which lies at the root of that prayer. This, then, is obviously a case where a decree cannot be made in favour of the plaintiff in strict accord with the terms of the prayer in the plaint. The question, consequently, arises what decree should be made in favour of the plaintiff, is he entitled to the specific relief claimed by him or to any substituted relief. In my opinion, the answer must be in the negative.

The true foundation of the right of pre-emption is explained in two passages in Book XXXVIII of the Hedaya. The first of these passages is in these terms: "Shaffa", in the language of the law, signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed 'shaffa', because the root from which shaffa is derived signifies conjunction, and the lands sold are here conjoined to the land of the shafi or person claiming the right of pre-emption." This indicates that the right of pre-emption is a right of substitution. The plaintiff complains that his co-sharer has transferred his share in the joint property to a stranger, and claims to be substituted in the place of the purchaser of the share of the joint property. If, before this can be effected, the property ceased to be joint property, it is obvious that the foundation of the right of pre-emption disappears. This view is fortified by the second passage which is in these terms: "It is an express condition of shaffa that a man be firmly possessed of the property from which he derives his right of shaffa, all the time when the subject of it is sold, a condition which does not hold on the

(7) 26 Ind. Cas. 410; 20 C. L. J. 107.

NURI MIAH v. AMBICA SINGH.

part of his heirs." (The author here deals with a case where the person claiming the right of pre-emption has died before a decree is made in his favour by the Qazi.) "It is moreover a condition that the property of the shafi remains firm until the decree of the Qazi be passed; and, as this does not hold on the part of the deceased shafi, the shaffa is, therefore, not established with respect to any one of his descendants, because of the failure of its conditions." It has not been seriously disputed by the plaintiff that the right of pre-emption, in order that it may be enforced by a Court, must not only arise on the sale, but be also existent at the date of the institution of the suit, for it is unquestionable upon the authorities that if a person who claims a right of pre-emption, ceases to be interested in the joint property before the institution of the suit, he cannot obtain assistance from the Court. Consequently, the view cannot be maintained that the right of pre-emption which arises from the moment the sale is effected by the co-sharer is enforceable as it stands at the time of its origin; it is liable to be extinguished by events subsequent. The only point of difference between the plaintiff and the defendants is, whether the point of time with reference to which the existence of the right is to be determined is the date of the institution of the suit or the date of the decree by the Trial Court. In my opinion, for the reasons already assigned, it is plain that the right must exist and retain its enforceable character when the decree is made by the primary Court. This view was adopted in *Ram Gopal v. Piari Lal* (1) and *Tafazul Husain v. Than Singh* (2); these decisions are mentioned without dissent by well-known text writers such as Ameer Ali, Tyabji and Wilson. It is also worthy of note that the Chief Court of the Punjab has accepted the same view in *Sanwal Das v. Gur Parshad* (8), though a contrary view had been adopted in an earlier case, *Faiz Baksh v. Ramjidas* (9). In the case just mentioned, which was decided by a Full Bench of eight Judges, the nature of the right of pre-emption was fully analysed by

Chief Justice Clark and Mr. Justice Chatterjee. Mr. Justice Chatterjee observes as follows: "A pre-emptor is bound to show that he was clothed with the right at the date of sale and also at the date of suit and up to the time of the final decree or should have his claim dismissed. If the pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control his suit fails. The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end." Chief Justice Clark added that "conceding that the plaintiff pre-emptor must retain the prior right up to the time of institution of suit and even up to decree, a plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action and if he loses that property either voluntarily or involuntarily before decree his suit must fail." This is obviously consistent with sound sense; for if the contrary opinion were accepted, the result would follow that relief by way of pre-emption may be awarded to a person who, according to the altered circumstances as they exist at the date of the decree, can show no reason whatever why he should be placed in that position of advantage.

Accordingly I agree that this Rule must be made absolute, and the decree of this Court discharged. I also concur in the order which the Chief Justice proposes to make in the appeal and in respect of the costs of the Rule and the appeal.

Rule made absolute; Appeal allowed.

(8) 4 Ind. Cas. 179; 147 P. L. R. 1909; 90 P. R. 1909; 159 P. W. R. 1909.

(9) 34 P. R. 1875.

RAGHUBHUSHANA U. VIDIAVARIDHI.

MADRAS HIGH COURT.

CIVIL APPEAL No. 221 OF 1910.

February 29, 1916.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Phillips.RAGHUBHUSHANA TIRTHASWAMI
AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VIDIAVARIDHI TIRTHASWAMI AND
ANOTHER—DEFENDANTS—RESPONDENTS.

Mutt, headship of—Right of nomination—Ceremonies—Custom, proof of, where instances occur rarely—Dwandwa Mutts in South Canara—Ordination as sanyasi and appointment to office to be contemporaneous—Evidence Act (I of 1872), ss. 32, 33—Facts in issue, whether relevant facts—Statements of deceased persons as to facts in issue, admissibility of—Depositions of deceased witnesses in prior litigation, when admissible.

There is no rule of law pertaining to succession to headships of mutts generally. The rule must be made out in the case of each particular mutt by proof of custom. [p. 882, col. 1; p. 888, col. 1.]

As to the nature or quantum of proof required in any case, the Court would not insist on the same proof when the custom or usage set up is not at variance with any law as in a case where the custom is completely opposed to existing law. Again, proof of numerous instances of the custom or the exercise of the alleged right will not be required when such instances, in the nature of things, are of rare occurrence. Even if the right alleged was exercised on one solitary occasion it will be presumed, in the absence of suggestions of other methods, that that particular method of exercising the right was the customary one. The existence of the custom is also rendered probable by the adoption of similar methods in neighbouring mutts. [p. 882, cols. 1 & 2; p. 887, col. 2.]

In the case of Dwandwa Mutts in South Canara, i.e., the two mutts affiliated to each other, the Swami of one has the right to appoint a successor to the Swami of the sister mutt, when the latter dies without making the appointment himself. [p. 882, col. 2; p. 888, col. 1.]

The conditions requisite for a valid appointment, in such contingency are (1) the person to be appointed Swami must be a sanyasi, that is, one who has renounced all worldly ties and has been initiated into the brotherhood by a person competent to make the nomination, (2) he must be initiated into the sanyasam when he is a bala brahmachari, i.e., a bachelor below the age of 16, (3) the initiation into the sanyasam and the ordination to the mutt must be contemporaneous. The initiation at the time of an appointment which afterwards turns out to be invalid, will not enure to validate a subsequent appointment where the ceremonial was not gone through. [p. 882, col. 2; p. 883, col. 1; p. 884, col. 1; p. 889, col. 1.]

Facts in issue are relevant facts within the meaning of section 32 of the Evidence Act, and statements made by deceased persons about facts in issue are admissible under the section. [p. 880, col. 2; p. 890, col. 1.]

Patel Vandruvan Jekisan v. Patel Manilal Chunilal, 15 B. 565, disapproved.

Tottempudi Venkataratnam v. Tottempudi Seshamma, 27 M. 228, referred to.

Depositions of deceased witnesses in prior litigation are admissible under section 33 of the Evidence Act only when not only the questions in issue are substantially the same in the two proceedings, but the proceedings have been between the same parties or their representatives-in-interest. [p. 881, col. 1; p. 889, col. 2.]

Patinharkuru Vallaban Chattan Rajah Avergal v. Raman Varma, 24 Ind. Cas. 519; 28 M. L. J. 669, distinguished.

Per Abdur Rahim, J.—Under section 32, clause (4), of the Evidence Act, the inconvenience and expense to be taken into account must be with respect to individual witnesses and not arising merely from the number of witnesses which a party wishes to call. [p. 880, col. 2.]

A fact in issue is always a relevant fact, and there is no reason for excluding from the operation of clause (4) of section 32 statements relating to facts in issue. If they are to be excluded, much valuable evidence would be unavailable as will be apparent from the illustrations to section 32 and also from the definitions of facts in issue and relevant facts. [p. 880, col. 2.]

Ordinarily, the Court requires proof of at least more than one instance in which an alleged customary right has been exercised, but there is no hard and fast rule to that effect. [p. 892, col. 1.]

Per Phillips, J.—Facts in issue are facts about which there is a question in issue between the parties, and although all relevant facts are not necessarily facts in issue, the facts that are in issue cannot be other than relevant to the determination of the suit. Facts must be either relevant or irrelevant and there is no separate third class of facts in issue. [p. 890, col. 1.]

It is impossible to frame a definite rule of the nature or class of evidence requisite to prove a custom which will cover all cases, for as in other cases in which the exact amount of evidence necessary to prove a particular fact cannot be laid down with certainty, so in proving a custom it is impossible to say that a certain defined amount of evidence is requisite. In appreciating evidence each case must be dealt with by itself, and in appreciating evidence of custom no general rule applicable to all cases can be laid down other than that the custom must be proved by clear and cogent evidence. [p. 887, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, South Canara, in Original Suit No. 2 of 1909.

Messrs. T. Rangachariar, K. U. Shama Rau and K. Y. Adiga, for the Appellants.

The Hon'ble Mr. S. Srinivasa Aiyangar, Advocate-General (with him Messrs. B. Sitarama Rao, T. R. Ramachandra Aiyar, K. N. Aiya and K. Sadasiva Rao), for the Respondents.

This appeal coming on for hearing on the 8th, 9th, 10th and 11th February 1916 and having stood over for consideration till this day, the Court delivered the following

RAGHUBHUSHANA V. VIDIAVARIDHI.

JUDGMENT.

ABDUR RAHIM, J.—The 1st appellant (1st plaintiff in the suit) is the Swami of a mutt called the Bhimanakattai and the 2nd appellant (the 2nd plaintiff) was nominated by him to the headship of another mutt called the Bhandarikere. The 1st defendant in the suit is a person who claims to have been nominated Swami of the Bhandarikere Mutt by the 2nd defendant who is described as the Pariyaya Swami. The suit was instituted in order to obtain a declaration that the head of the Bhimanakattai Mutt for the time being is entitled to appoint a Swami to the Bhandarikere Mutt in default of any appointment by the last Swami of the latter mutt during his lifetime and that the Pariyaya Swami of the Krishna temple at Udipi, which is the office held by the 2nd defendant, has no right to appoint a Swami to the Bhandarikere Mutt in case of such vacancy. The next important prayer in the plaint is that the 2nd plaintiff may be declared to have been lawfully appointed to the Bhandarikere Mutt and that he may be put in possession of that mutt and its properties. The learned Subordinate Judge has found against the claims of the 1st and the 2nd plaintiffs. He also found that the Pariyaya Swami has no right to make any appointment to the Bhandarikere Mutt. In the result he dismissed the suit. The plaintiffs have preferred this appeal against the decision of the Subordinate Judge.

Bhandarikere Mutt is situated in the district of South Canara and the Bhimanakattai Mutt, which is also called Bhimasethu Mutt, lies in the territory of Mysore but is only about 40 or 50 miles distant from Bhandarikere. Both these are Madhava Mutts, that is, devoted to the teachings of Madhwa Chariar. In the Udipi Taluk where the Bhandarikere Mutt is, there are also eight other Madhava Mutts belonging to the sect founded by Madhava Chariar. Madhava Chariar apparently flourished in the 13th or 14th century. There can be no doubt but that the two mutts concerned in this suit as well as the eight other mutts at Udipi are very ancient institutions. The earliest history of these institutions is involved in considerable obscurity and it is not possible upon the evidence adduced in the case to

assign exact dates of their origin. All that can be said with any degree of certainty is that they must be several centuries old. The office of Pariyaya Swami is held in rotation by the Swamis of the eight Udipi Mutts, the office-holder for the time being being distinguished from the others by having in his charge the Krishna temple. The Pariyaya Swami admittedly has certain honours and privileges above those enjoyed by the Swamis of the seven remaining Udipi mutts.

One Vidyanidhi was the last Swami of the Bhandarikere Mutt. He died on the 19th November 1901. He had been a lunatic since 1896. Before he became a lunatic, he had nominated his successor one Vidyasamudra; but that man died in 1898. In the same year, while Vidyanidhi was still living, the 1st plaintiff nominated the 2nd plaintiff to the headship of the Bhandarikere Mutt, proceeding on the basis that owing to the lunacy of Vidyanidhi, the office had become vacant. But this claim of the 1st plaintiff was resisted by the guardian of the lunatic Swami. A suit was then instituted by the present 2nd plaintiff—Original Suit No. 39 of 1899 on the file of the Mangalore Sub-Court—to establish his right. The 1st defendant in that suit was Vidyanidhi through his guardian *ad litem* the 2nd defendant, who was also appointed manager of the properties belonging to the mutt by the District Court. The other defendants in that suit were impleaded as they were in possession of some of the idols belonging to the mutt. The Trial Judge dismissed that suit, finding against the plaintiff the allegations on which he based his right. On appeal to the High Court, the decree was confirmed, but only on the ground that there was no vacancy in the office of the Swami of Bhandarikere Mutt by reason of the lunacy of the then office-holder Vidyanidhi and, therefore, the appointment of 2nd plaintiff in the present suit was invalid. The other questions raised in the suit were not decided by the High Court. After Vidyanidhi died in 1901, the 2nd plaintiff was again appointed by the 1st plaintiff to the Bhandarikere Mutt. The 1st plaintiff, the Swami of the Bhimasethu Mutt, based his right to appoint on two grounds. The first ground is (1) that his

RAGHUBHUSHANA V. VIDIAVARIDHI.

mutt and the Bhandarikere Mutt are what is called Dwandwa Mutts, the principal incident of which is that one of them or rather the head of one of them has the right of ordination to the other *mutt* in case the Swami of that *mutt* dies without having nominated his successor. The next ground on which the learned Vakil for the appellant bases the claim of the Swami of the Bhimanakattai Mutt is that that *mutt* is the parent or *moola mutt*, ■ it is called, with reference to the Bhandarikere Mutt, which is its branch or *cowle mutt* and that by virtue of this relationship between the two *mutts*, the Swami for the time being of the Bhimanakattai Mutt is entitled in the case of a vacancy to appoint a Swami to the Bhandarikere Mutt. The claim to the Pariyaya Swami is founded on the allegations that he ranks highest among the Swamis of the eight Udipi Mutts and that as the eight *mutts* were founded by Madhava Chariar who also converted the original *mutt* which was the common ancestor of both Bhimanakattai and Bhandarikere Mutts into a Madhava Mutt, the Pariyaya Swami is in the direct line of spiritual succession to Madhava Chariar and has the authority, therefore, not only over the eight Udipi Mutts but also in ■ case of necessity like the present over both Bhandarikere and Bhimanakattai Mutts. Whether the Swami of Bhimanakattai Mutt, i.e., the 1st plaintiff, or the Pariyaya Swami, the 2nd defendant, has the right of nomination or not, it is contended by the defendants on the one side that the nomination or ordination of the 2nd plaintiff was not according to law and usage, and, therefore, invalid and on the other side the plaintiffs contend that the appointment of the 1st defendant is similarly invalid. The learned Subordinate Judge has found that none of the claims put forward on either side have been established.

As regards the case of the plaintiffs, so far as it is based on the allegation that the Bhimanakattai Mutt is the parent *mutt* and as such its Swami has a right to appoint to the Bhandarikere Mutt, it can very easily be disposed of. The entire evidence of the plaintiff was adduced to prove the *dwandwa* relationship between the two *mutts* in question. That is to say, the Swami of either of them in a contingency such as this has a right to appoint the Swami of the sister

mutt and not that the Bhimanakattai Mutt possessed any predominant right, by virtue of being the original *mutt*, of appointing to the Bhandarikere Mutt. The connection between ■ *moola mutt* and the branch or *cowle mutt* presupposes a certain amount of controlling authority and superiority of position in the one and of subordination in the other; while the idea of Dwandwa Mutts is that they are both of co-ordinate and independent authority, but that in cases of urgency, the Swami of each has a right to appoint the Swami of the allied *mutt*. This is very well established by the evidence with regard to the eight Udipi Mutts which are grouped into twos with the *dwandwa* right existing *inter se*. Of these Dwandwa Mutts no one has authority of any sort over the other, and it is only the Pariyaya Swami who, being the custodian of the Krishna temple, has a certain superior authority over all the eight *mutts*. It is not even suggested that the Swami of Bhimanakattai Mutt is entitled to any special honours from the Bhandarikere Mutt or that he exercises any kind of control, supervision or privilege over it. What is claimed on behalf of the Bhimanakattai Mutt is that this was the original *mutt* founded by the sage Durvasa whose name appears on the top of the pedigree, and that Bhimanakattai was the Samasthanam of Visvamurti who was the last Swami of the original *mutt* before division. Visvamurti had two disciples: Visvapathi and Gadadhara. Visvapathi was ordained successor to Visvamurthi in the original *mutt* and Gadadhara was placed in charge of ■ branch *mutt* which was then established. All this is ■ matter merely of tradition and cannot be said to be proved by any evidence. It is alleged that Bhimanakattai Mutt is proved at least to be an older *mutt* than the other and in support of that contention, ■ copper plate inscription marked ■ Exhibit JJ is relied on. If this document could be said to be genuine, there would be good ground for holding that Bhimanakattai Mutt is the more ancient of the two. It is a grant alleged to have been made in the era of Yudhishtira 89 by Janamejaya, the great-grandson of Yudhishtira himself. That would take the matter back to about 3,000 B. C. It is pointed out by Mr. Rice that having regard to the fact that the writing is

RAGHUBHUSHANA v. VIDIAVARIDHI.

modern Canarese and also other facts mentioned by him, the copper plate inscription, to say the least, is of doubtful authenticity. The learned Subordinate Judge seems to think that though the date 89 Yudhishtira era cannot be correct, the grant itself is not fabricated and that it can be safely attributed to 14th century. He, however, fails to notice that the grant purports to be by the great-grandson of Yudhishtira himself who is said to have lived about 3,012 B. C. I think the Subordinate Judge was wrong in placing any reliance at all on Exhibit JJ. Similarly I am not inclined to attach any importance to the claim that the sage Durvasa worshipped at Bhimanakattai, alleged to be his hermitage. It is wholly founded on a vague tradition of a non-historical character. The Subordinate Judge has also attached significance to the letter (Exhibit DD) written in 1837 by the Swami of Bhandarikere Mutt to the Swami of Bhimanakattai Mutt, asking the latter to find out if there were any old accounts and documents in his possession which might be useful in connection with certain suits relating to the land of Bhandarikere. It appears that sometime about 1705 (Exhibit CC) there was partition between the two *mutts* of certain jewels, books, brass and copper vessels, and other articles of worship and that apparently explains why the Swami of Bhandarikere Mutt who wrote Exhibit DD thought that the Swami of Bhimanakattai Mutt might have some papers which would throw light in the suits relating to the properties of his *mutt*. Nor does the conclusion of the lower Court, that Gopinath is the principal deity worshipped in the Bhandarikere Mutt while Ramadeva is the original deity worshipped in the Bhimanakattai Mutt, seem to be warranted by the evidence. There is ample evidence corroborated by the statements of witnesses on the plaintiffs' side to show that the images of Rama, Lakshmana and Sita, singly or together, form a principal object of worship in the Bhandarikere Mutt as well. There is, however, the undoubted fact that the grants recorded in the stone inscriptions M, N, O, P, all made in the 16th century are in favour of the deity Gopinath. But admittedly more than one deity is worshipped in these *mutts* and it is likely that a particular devotee of a particular deity should make endowments for his

worship. It is argued by Mr. Ranga Chariar, the learned Vakil for the 1st appellant, that as the grants to the *mutts* are generally made at the time of their foundation, it is to be presumed from the stone inscriptions that Bhandarikere is more or less a recent *mutt*. But he does not dispute in fact that the Bhandarikere Mutt dates back much earlier than the 16th century. It would not, therefore, be safe to draw any inference either from the dates of the stone inscriptions or the mention of Gopinath therein. Reliance is placed by the lower Court on the ■■■■ of Bhimanakattai Mutt, its full name being Bhimasethu Muniverenda Mutt. That, we are told at the Bar, means the *mutt* of ■ collection of sages at the bridge over the Bhima river; the name of the Bhandarikere *mutt* on the other hand is only derived from the village of that name. Having regard to the fact that there exists considerable rivalry between these *mutts*, the people connected with each *mutt* being anxious to claim greater prestige and antiquity for their own *mutt* as is apparent from the evidence in this case, it will not be safe to draw any inference merely from the names. The Bhandarikere Mutt, on the other hand, claims to be the parent *mutt* treating Bhimanakattai as its branch. The Subordinate Judge has pronounced the important evidence relied on in this connection and furnished by the three letters Exhibits I to III as fabrications; and there can be no doubt that his finding on this point is correct. If we leave them aside, all that we are left with, is practically the stone inscriptions M, N, O, and P, which do not take us back further than the 16th century. My conclusion is that it is not possible to come to any reliable conclusion upon the materials available to us as to which is the parent *mutt* and which is the *cowle mutt* or which is the more ancient of the two. Apart from that, even if it were proved that one of these *mutts* was derived from the other, they have certainly been independent of each other for some centuries, one not acknowledging any superior authority in the other as would have been the case if the relationship of the parent and the *cowle mutts* existed between the two. And as has already been pointed out, the claim of the Swami of the Bhimanakattai Mutt based on the *dwandwa* right presupposes an equal status of each of these two *mutts*, and not the

RAGHUBHUSHANA V. VIDIAVARIDHI.

subordination of one to the other.

On the question of the *dwandwa* right we have certain admitted facts. Such a right does exist among the eight Udipi Mutts which are also Madhava Mutts. We have also one undoubted instance of an appointment made by the Swami of Bhandarikere Mutt to the headship of the Bhimankattai Mutt. This instance was admitted on the defendants' side before the learned Subordinate Judge, as would appear from the judgment. The Swami so appointed was Raghu Pravira Tirtta, the 35th in the list of Bhimankattai Swamis; and the Swami of Bhandarikere who appointed him was Vidyasagar, the predecessor of the lunatic Vidyanidhi. No doubt an attempt was made before us to show that what the Bhandarikere Swami did was merely to perform the ceremony of ordination, the nominee in fact being designated by the Swami of Bhimanakattai Mutt during his lifetime. But apparently the suggested distinction between ordination and selection, so far as the particular case is concerned, is an afterthought and was not sought to be drawn before the lower Court. The suggestion is based on the reading of Exhibit FF, which is a document produced to support the case of the plaintiff and which has been found by the Subordinate Judge to be a fabrication, a finding strenuously supported by the learned Advocate-General himself who appeared for the 2nd defendant.

I may here conveniently deal with the question whether the finding of the Subordinate Judge regarding Exhibits FF, GG, EE is correct. Exhibit FF is a letter purporting to be written by some villagers of a place called Halesige in the Bombay Presidency to one Anantha Battar who, at that time, that is, in 1821, was the agent of Bhimanakattai Mutt, informing him that Raghunath Thirta, the Swami of that mutt, died of small pox in Halesige village, that before death, he desired the writers of the letter to write to Anantha Battar to the effect that he should request the Swami of Bhandarikere which was *dwandwa* to the Bhimanakattai to give *asram* to the eldest son of Anantha Batta, that is, or, ain him to the Samasthanam or office of the Swami of the Bhimanakattai Mutt. This letter refers to the case which, as I have

already mentioned, did undoubtedly occur. Exhibit FF was produced first in 1899 and as mentioned in the judgment of the Subordinate Judge who tried the previous suit, it was produced at a late stage of that suit and the present Subordinate Judge was justified in relying on this fact in considering the question of genuineness of the document. It is perfectly true that Raghunatha Thirta Swami of Bhimankattai died in Halesige where his tomb is and is worshipped by his devotees. But the Subordinate Judge remarks that it is hardly likely that there should not have been with him some responsible agent or officer of the Samasthanam and that he should have been under the necessity of entrusting his personal effects and an important message to men who must have been more or less strangers. It is also pointed out that Exhibit FF contains statements which are not true or at least are not likely to be inserted in a *bona fide* document; for instance the statement that the mutts were *dwandwa* and that the writers were interested in the Samasthanam of the deceased Swami from former times. The latter statement is apparently not proved by any evidence, although the descendants of the alleged writers, that is, plaintiffs' witnesses Nos. 7, 8, 9 and 10 have been examined. On the other hand, plaintiffs' 10th witness, who alone among these witnesses identifies the signature of one of the signatories to FF as that of his great-grandfather, belonged to the Utharathi Mutt and is not a follower of the Bhimanakattai Mutt. Plaintiffs' witnesses Nos. 7, 8 and 9 do not prove the writing or signatures of their ancestors in Exhibit FF. The cross-examination of plaintiffs' 10th witness shows that he is hardly a reliable witness. He is a mendicant and makes statements in support of the plaintiffs' case, which, having regard to the fact that he is a follower of Utharathi Mutt, would not ordinarily be within his personal knowledge. I am unable to say that the Subordinate Judge's finding that Exhibit FF is not genuine is wrong. The same with Exhibit GG. That is a peculiar document and though it is extremely likely that it was in existence in the Bhimanakattai Mutt, the entries could easily be rubbed out and other entries substituted in their place. The

RAGHUBHUSHANA v. VIDIAVARIDHI.

entries are made on folded pieces of cloth stitched together in the form of a book and blackened with charcoal dust. One has only to put fresh charcoal dust on and write again with a piece of steel or something like that and nobody could tell the difference between that writing and the older writing. The lower Court has also held that Exhibit EE, by which it is sought to prove a case of appointment of a Swami to the Bhandarikere Mutt by a Swami of the Bhimanakattai Mutt, is not genuine. It is a very long letter purporting to be written sometime in 1776 and in it there occurs a statement of persons who are alleged to be the servants of the Bhimanakattai Mutt, to the effect that the then Swami Raghuvaria Thirta of that mutt had ordained the then Swami of Bhandarikere. The Subordinate Judge points out that the name of the Swami of Bhandarikere is not mentioned and urges that this shows that the men who concocted the document were not certain who was in fact the Swami of Bhandarikere Mutt in 1776. There is no independent evidence to corroborate any of the other statements made in this letter or to show that these men were actually connected with Bhimanakattai. Exhibit EE was also produced in the last suit at a very late stage and I am unable to say that the Subordinate Judge in not accepting the genuineness of it has come to a wrong conclusion. As for the other documents relied on in support of the *dwandwa* right claimed by the plaintiffs, they resolve themselves into two classes. To the first class belong statements by persons who are now dead, made on a previous occasion when no dispute existed with reference to the *dwandwa* right between the two mutts in question. To this category belong Exhibits LL and Y. The other class of documents contain statements made after the disputes had arisen and most of them in the previous suit, such as Exhibits RR, NN and OO. All these statements are objected to on the ground that they relate to the fact in issue, namely, the existence of *dwandwa* right and not to a relevant fact and are, therefore, not admissible under section 32 of clause 4 of the Evidence Act, which makes the statements of relevant facts made by persons who are dead admissible in

evidence if such statements give the opinions of such persons as to the existence of any public right or custom or matter of public or general interest. In support of this contention reliance is placed on a decision in *Patel Vandravan Jekisan v. Patel Manilal Chunilal* (1) of the learned Chief Justice Sir Charles Sargent and Mr. Justice Candy of the Bombay High Court. They ruled that being inadmissible a statement signed by a large number of persons who were not examined in the case as to the existence of a custom debarring a widow of a certain caste from adopting without the express authority of her husband, on the ground that the existence of the alleged custom was a fact in issue and not merely a relevant fact and could not, therefore, be proved under clause 4 of section 32. It appears from the facts of that case that the statement in question was admitted by the lower Court, because it held that it would be unreasonable to oblige the party relying upon it to incur the expenses of procuring the attendance of such a large number of witnesses. That obviously was not a proper case under section 32, clause 4; for the inconvenience and expense to be taken into account must be with respect to individual witnesses and not arising merely from the number of witnesses which a party wishes to call. But when the learned Judges observe that the statement was inadmissible because it was required to prove a fact in issue, and not merely a relevant fact, I venture to think with all deference that it is not a sound distinction to draw. A fact in issue is always a relevant fact, and I can see no reason for excluding from the operation of clause 4 of section 32 statements relating to facts in issue. If they were to be excluded, much valuable evidence hitherto considered admissible would be unavailable as will be apparent from the illustrations to section 32 and also to the definitions of facts in issue and relevant facts. It is next argued that the *dwandwa* right alleged to exist between the two mutts is not a public right or custom or a matter of general or public interest within the meaning of section 32. I do not think that this is a tenable objection; for the question relating to the mode of appointment of Swamis of the two

RAGHUBHUSHANA v. VIDIAVARIDHI.

important Madhava Mutts is certainly one in which the Hindus or a large section of them would be interested. As for the statements in Exhibits RR, NN and OO, which are depositions in the previous suit of persons who are now dead, they are not admissible under section 32 of the Evidence Act inasmuch as they were made after the controversy ■ regards the right of nomination to the Bhandarikere Mutt had arisen. Section 32 does not, therefore, apply and the statements are not admissible under section 33 since the previous suit was not between the same parties or their representatives-in-interest. Reliance was placed on *Patinharkuru Vallabhan Chattan Rajah Avergal v. Rama Varma*(2), where the learned Judges have laid down that the term "representative-in-interest" "is not confined to persons who derive title from another but comprises all persons whose rights are litigated *bona fide* by ■ person virtually on behalf of ■ class, though they themselves are not co-plaintiffs on the record." We are not concerned with the question how far this proposition was applicable to the facts of that case. But it is clear that it would not apply to the present case—even supposing that the proposition is sound, upon which I express no opinion—since the rights of neither the Pariyaya Swami nor those of his nominee, the 1st defendant, were in question in the previous suit. To say that, because the *dwandwa* right claimed in this suit was also in litigation in the previous suit, that alone would make the depositions of the witnesses in that suit admissible under section 33, is to ignore the proviso to the section requiring that the proceeding must have been between the same parties or their representatives-in-interest in addition to the condition that the questions in issue should have been substantially the same in the first as well as in the second proceeding. Exhibit Y is, however, strictly speaking, admissible in evidence. It is ■ statement made by a person who deposed in the previous suit and whose deposition is marked as Exhibit RR. That man, however, was interested in supporting the claim of the 1st plaintiff and the date of Exhibit Y shows that the statement was made not very

long before the institution of the previous suit.

Exhibit LL is ■ document undoubtedly of ■ different category. It is ■ statement made in ■ suit of 1879, that is, long before the present dispute arose and was made by a disciple of the Bhimanakattai Swami. He states that if the Swami of his *mutt* committed any reprehensible or immoral action, the *guruji* of the Bhandarikere Mutt should make an enquiry and also that the one *mutt* was *dwandwa* to the other. Apparently in that suit, one of the subject-matters of the enquiry was the alleged misconduct of the then Swami of the Puttige Mutt which is one of the eight Udipi Mutts. The statement is Exhibit LL was evidently ■ *bona fide* statement made by a person who was likely to know whether there was any tradition as to the *dwandwa* relationship between the two *mutts* in question. As regards the oral evidence in the case, the learned Subordinate Judge has been unable to place any reliance upon it. Both the parties in the suit adduced much documentary evidence of a spurious character and none of the witnesses on either side can be said to be disinterested or impervious to the influence of the litigating parties. None of them speak from personal knowledge of any instance of succession and in a matter involving so much religious and sectarian zeal, it would be obviously unsafe to rely upon the evidence of the witnesses on either side when they advance their opinion in support of the case of one Swami or the other, except so far as it is strongly corroborated by independent evidence or by undoubted facts.

The case of the plaintiffs rests mainly on what inference is to be drawn from the proved instance of an appointment made by the Swami of Bhandarikere to the Bhimanakattai Mutt and from the statement contained in Exhibit LL, which records the opinion of an adherent of the Bhimanakattai Mutt in favour of the *dwandwa* right expressed in 1879, that is, nearly 10 years before the controversy had arisen. There is also in support of the plaintiffs' case the very significant fact that the *dwandwa* right has undoubtedly existed among the eight Udipi Mutts, though there is in their case the distinguishing fact that they were

(2) 24 Ind. 519; 28 M. L. J. 669,

RAGHUBHUSHANA v. VIDIAVARIDHI.

established by one and the same person and about the same time and are so interconnected that the Swami of one of them, by becoming the Pariyaya Swami, exercises certain permanent authority over the rest. It is also to be borne in mind that the rule of *dwandwa* is apparently a convenient mode of conducting the business of these *mutts* in cases of emergency, for instance, where the Swami dies without appointing his successor as is likely sometimes to happen, or the conduct of the Swami of one *mutt* of a particular sect requires investigation as happened in 1870. It is also the case of both the parties that the *mutts* were originally one; and it was only in 1795, the date of Exhibit DD, that the division so far as certain jewels and brass and other vessels are concerned was completed. It is, therefore, contended by the learned Vakil for the appellant that the admitted instance of an appointment by the Bhandarikere Swami to the Bhimanakattai Mutt, in the absence of any explanation to the contrary, is to be attributed to *dwandwa* relationship of these two *mutts*. But apart from any other evidence, the statements in Exhibit LL show the consciousness of persons interested in those institutions was that such connection existed. It is, on the other hand, argued by the learned Advocate General for the respondent that a single instance should not be accepted as sufficient proof of the *dwandwa* right, which must be based on the usage of the particular institution in question and is not a matter to be inferred from the usage of other, though similar, institutions. However reasonable the *dwandwa* right may be, it is not a general rule of law relating to *mutts* and must, therefore, be made out in each particular case by proof of custom. In the absence of such proof it is for the Court or the Sovereign to make appointment. Ordinarily no doubt, the Court requires proof of at least more than one instance in which the alleged customary right has been exercised; but there is no hard and fast rule to that effect. The usage or custom set up in this case is not in antagonism to or in variance of any general rule of Hindu Law. In fact there is no general rule of law to be found on the point. The custom set up on the other hand, if proved, would supply a rule for the proper management of these

two *mutts* in certain contingencies, which though infrequent are likely to occur at times. In such a case, the Court would not insist upon such strict proof when a custom or usage is set up in derogation of the general law. It is not possible to say how many vacancies did actually happen since these two *mutts* became separated, owing to the last Swami having failed to nominate his successor in the ordinary way; but that more than one instance did occur in the course of several centuries during which these *mutts* have been in existence may well be presumed. In these circumstances the belief prevalent among persons who were likely to know that these two were *Dwandwa* Mutts, may not unreasonably be held to be founded on the actual practice of the institutions concerned. This inference receives corroboration from the fact that no other mode of filling such vacancies has been suggested, such selection by a number of disciples, a procedure prevailing in *mutts* belonging to other denominations. No doubt, the Pariyaya Swami has put forward a claim in his own right but that claim, as I will show, is unfounded. I think the evidence of the witnesses for the plaintiffs who speak to the existence of the *dwandwa* right, though if it stood alone, would be of very little value, finds strong corroboration from the instance that has been proved, from the statement in Exhibit Y, from the fact that there has been no other provision to meet such contingencies and from the fact of a similar practice obtaining in the eight Udipi Mutts. I would, therefore, hold that the Bhimanakattai and Bhandarikere Mutts are *Dwandwa* Mutts.

The next question for decision is whether the 2nd plaintiff was validly appointed Swami of the Bhandarikere Mutt by the 1st plaintiff. The contention on behalf of the appellants is that what is required by the law and usage of the Madhava Mutts is that the person to be appointed Swami of a *mutt* must be *sanyasi*, that is, a person who has renounced all worldly ties and has been initiated into the brotherhood by a person competent to make the nomination. It is also necessary that the *sanyasi* to be appointed must have received initiation in the *sanyasam* when he was a *bala brahmachari*, that is, a bachelor below the age of 16. The

RAGHUBHUSANA V. VIDYAVARIDHI.

2nd plaintiff was, as has been stated, ordained *sanyasi* in 1893, with a view to appointment to the Bhandarikere Mutt at a time when the Swami of that *mutt* was still alive, though in a lunatic condition. The 2nd plaintiff then satisfied the condition of *bala brahmachari*. His appointment, however, to the Bhandarikere Mutt was found to be invalid, as, in the opinion of this Court, no vacancy arose in the office by reason of the lunacy of Vidyavidhi. After the High Court so decided, the 1st plaintiff re-appointed the 2nd plaintiff in 1905 when Vidyavidhi died. Admittedly there could be no further initiation of the 2nd plaintiff into the *sanyasam* as it had already taken place, and what was done in 1905 was merely a secular act of appointment ■ evidenced by Exhibit UU. The contention of the respondent, on the other hand, is, that according to the usage of the Madhava Mutts the person to be appointed must be *bala brahmachari* at the time of the appointment and the ceremony of conferring *Asram* or initiation into the *sanyasam* must be performed at the time of the appointment. The theory is that the Swami appointed becomes spiritually affiliated to the *mutt* to which he is appointed or rather to the previous *gurus* of that *mutt*. It is by right of this affiliation, which is analogous to that of an adoption in an ordinary Hindu family, that he succeeds to the *samasthanam* and the properties of the *mutt*. If the head of ■ *mutt* nominates ■ successor in his own lifetime, the nominee becomes affiliated at once to the *mutt* and becomes ■ disciple of the Swami who nominated him, though he does not succeed to the Headship until after the Swami's death. Whatever may be the juristic strength of the theory of affiliation, there can be no doubt upon the evidence that ■ person to be appointed in a vacancy in the absence of any person ordained by the last Swami in his lifetime must be *bala brahmachari* at the time, and the ceremony of giving the *Asram* must be performed with a view to appointing to the vacant Swamiship. That is the view held by the Subordinate Judge which I have no hesitation in confirming. It is borne out by statements elicited from the witnesses of the plaintiffs themselves. The

1st plaintiff himself says in cross-examination: "In the *mutt* which has *dwandwa* right, if the Swami died, the *Asrama* and power are given at one and the same time. If he is alive *Asrama* is given once and afterwards power is given," though no doubt he attempts to modify that position in re-examination. Plaintiffs' 4th witness says: "In the Udipi Ashta Mutts ■ well as in the Bhimanakattai and Bhandarikere Mutts only *brahmacharis* could be appointed as successors to the *guru* and not those who have become *sanyasis* already." The plaintiffs have examined the 2nd defendant as their 1st witness and he explains the nature of the ceremony of ordination which consists in offering the *phala mantraksheta* (cocoanut and coloured rice) to him and enjoining him as the Head of the *mutts* to look after the *Achara Vichara* of its disciples, to perform the *pūja* of the *mutt* and to do all things necessary for the welfare of the *mutt*. It is not disputed that this description is correct. It shows that the ordination has to be made with reference to ■ particular *mutt*. It is on the completion of this ceremony which takes three days that the nominated person becomes invested with the rights and duties of the Swami of the *mutt* to which he has been ordained. The Swami of each of these Madhava Mutts is ■ person who had been ordained in this way. When a Swami of a *mutt* himself nominates his own successor, he initiates him into *sanyasam* while he is ■ *bala brahmachari* but the other ceremony of ordination is gone through when the disciple actually assumes office on the death of his *guru*. In these Madhava Mutts there is only one disciple, that is, the person who has been nominated as successor and it appears from the evidence that it is not the practice for the Swamis to have *sanyasis* as disciples without having in view their appointment in succession to themselves in their own *mutts*. If the Swami of the Bhimanakattai Mutt was entitled, as is the case of the appellants, to nominate a successor for the Swamiship of the Bhandarikere Mutt, before the office became vacant, it would follow that there would be two authorities to regulate the succession to the latter *mutt* at one and the same time, namely, the Swami of the Bhimanakattai Mutt and the Swami of the Bhandarikere Mutt; for *ex-consensus* the

RAGHUBHUSHANA v. VIDIAVARIDHI.

Swami of the Bhandarikere Mutt has the right to nominate his own successor. This is *prima facie* an untenable position; unless it be said that such a right exists in the Swami of the Bhimanakattai Mutt, when the Swami of the Bhandarikere Mutt has become incapacitated by reason of lunacy, the exact case in question, or by such like cause. There is no such case put forward and there is nothing in the evidence to support it. The other result of giving effect to the appellants' contention would be to hold that any *sanyasi* whom the Swami of Bhimanakattai Mutt chooses to initiate into *sanyasam* might be appointed by him to the Bhandarikere Mutt any time the vacancy may occur. That is not only opposed to the opinion of the general body of witnesses examined in the case but to the actual practice of the eight Udipi Mutts. It may be difficult to say what exactly the spiritual loss would be in the case of appointments by virtue of *dwandwa* right, if the initiation into the *sanyasam* and the ceremony of ordination to the *mutt* were not performed at the same time. But these are matters of usage founded on more or less esoteric doctrines and the only safe guide for the Courts to go upon is to have regard to the practice prevailing in a particular institution or class of institutions. I agree with the Subordinate Judge that the 2nd appellant's appointment to the Bhandarikere Mutt is invalid.

The claim of the Pariyaya Swami can be briefly disposed of. It is founded on his supposed direct spiritual succession to Madhava Chari, who it is said succeeded to the Samasthanam of Achuta Prekshaya Chariya and ordained Satyatirtha as his successor. The appellants claim that one Purushotham succeeded Achuta Prekshaya Chariya and not Madhava Chariar, who although he was also one of Achuta Prekshaya's disciples did not concern himself with the management of the secular affairs of a *mutt*. As the Subordinate Judge points out, it is not possible to determine upon the available materials who succeeded Achuta Prekshaya, nor is it clear why the head of one of eight Udipi Mutts founded by Madhava Chariar should be entitled to nominate to the original Samasthanam of the preceptor. He also observes with great force that this claim of

the Pariyaya Swami is quite a new idea and was not conceived until long after the institution of the suit of 1889. I hold that the claim of the 2nd defendant, the Pariyaya Swami has not been made out.

In the result the appeal succeeds in part. There should be a decree declaring that the Bhimanakattai and the Bhandarikere Mutts are Dwandwa Mutts and the 1st plaintiff a Swami for the time being of the former is entitled to appoint a proper person a Swami to the latter *mutt* in the present vacancy and that the 2nd defendant, the present Pariyaya Swami, has no such right. To this extent the decree of the Subordinate Judge will be modified. The respondents will pay the 1st plaintiff half the costs incurred by him both in this and in the lower Court. In other respects let each party bear his own costs.

PHILLIPS, J.—First plaintiff (1st appellant) is the Swami of Bhimanakattai Mutt and the suit relates to the office of Swami of Bhandarikere Mutt. The late Swami of Bhandarikere became a lunatic in 1896, and the successor appointed by him died a minor in 1898 without nominating a successor. 1st plaintiff then appointed 2nd plaintiff as Swami, and the latter sued to recover possession in original Suit No. 59 of 1899 (South Canara), but his suit was dismissed on the ground that the appointment was not valid being made during the lunatic Swami's lifetime [*Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami* (3)] but 1st plaintiff's right to make the appointment was left undecided. This suit was not disposed of until January 1904. The lunatic died in November 1901, and 2nd defendant, in assertion of his rights as Pariyaya Swami of the eight Udipi Mutts, appointed 1st defendant Swami of Bhandarikere Mutt. In 1905 1st plaintiff again nominated 2nd plaintiff as Swami, and this suit is brought against defendants Nos. 1 and 2 for recovery of the *mutt* and for a declaration of 1st plaintiff's right to appoint a Swami of Bhandarikere Mutt on the death of the Swami of that *mutt* without appointment of a successor. The two questions for determination in this appeal are:—

(1) the right of 1st plaintiff to make the appointment and

(3) 27 M. 435; 14 M. L. J. 105,

RAGHUBHUSHANA v. VIDIAVARIDHI.

(2) the validity of 2nd plaintiff's appointment if such right exists.

The right of appointment is based on two grounds. One is that the Swami of Bhimanakattai Mutt has the right of appointment to Bhandarikere Mutt, because the latter is a branch *mutt* of the former, which is the parent *mutt*, and the other is that the two *mutts* are what is called "Dwandwa" Mutts, i.e., that the head of each *mutt* has the right of appointment to the other *mutt* when a vacancy occurs. The ordinary mode of succession in these two *mutts* is for the Swami of the *mutt* to appoint a successor before he dies, and such nominee succeeds on his death and a similar custom apparently exists in most if not all of the neighbouring Madhwa Mutts. It is only occasionally that a Swami fails to appoint a successor and consequently the occasions for the exercise of the alleged right of 1st plaintiff arise very rarely.

So far as the right is based on the fact that the Bhimanakattai Mutt is the parent *mutt* of Bhandarikere, I think the question can be dealt with briefly. This particular right is not specified in the plaint, nor was it alleged by 1st plaintiff in his evidence, but is based on the evidence of defence witnesses who asserted that Bhandarikere is the parent *mutt* of Bhimanakattai, and that the former has the right to appoint the Swami of the latter, and on the statement of witnesses that there is a right known as "Mula Kavalu" right, i.e., the right of a parent *mutt* to appoint the Swami of a branch *mutt*, and a few instances of such *mutts* are given. There is, however, no evidence to show that in all cases of parent and branch *mutts* does this right exist and consequently no inference as to such a custom can be drawn from its existence in certain specified parent and branch *mutts*. There is, no doubt, evidence of the converse of plaintiffs' proposition, but none at all of the proposition itself. It is, therefore, unnecessary to decide whether Bhimankattai or Bhandarikere is the older *mutt*, a question which has been discussed at great length by the Subordinate Judge, but about which there is considerable conflict of evidence. Even if Bhandarikere Mutt is an offshoot of Bhimanakattai, it by no means follows that the latter

has the power of appointment to the former, and in the absence of evidence to that effect plaintiffs' claim so far as it is based on this ground must be rejected.

We then have to consider the *dwandwa* right alleged. This is a right appertaining to two *mutts* called Dwandwa Mutts, according to which the Swami of one has the right to appoint a successor to the Swami of the other when that Swami dies without appointing his successor. It is the common case of both parties that Bhimanakattai and Bhandarikere Mutts were originally one *mutt* which existed as long ago as the 14th or 15th century or even earlier. Subsequently they became divided, and for two hundred years or more have existed as separate institutions. It is thus not disputed that the two *mutts* are connected with each other, but the question that is in dispute is whether they are Dwandwa Mutts. As pointed out above, the occasions for the exercise of the *dwandwa* rights can only be very rare and in the present case there is only one such occasion which is admitted on both sides, i.e., in 1821. On that occasion the Swami of Bhimanakattai Mutt died while absent on tour in the Bombay Presidency and his successor Raghupravira was appointed by the head of the Bhandarikere Mutt. This instance is opposed to the Mula Kavalu right which was urged in appeal, but might well be an instance of the exercise of the *dwandwa* right set up. The other evidence upon which plaintiffs mainly rely, apart from the oral evidence in the case, consists of the documents Exhibits EE, FF, GG, LL and Y. Exhibit EE is of the year 1776 and is a letter addressed to the Swami of Bhimanakattai by some persons who appear from the contents of the letter to be servants or dependants of that *mutt*, and in it there is a reference to "the Swami of Bhandarikere Mutt to whom you gave Ashrama," i.e., whom you ordained, Exhibit FF is a letter from some villagers of Halasige in the Bombay Presidency, where Swami Raghunatha Tirtha of Bhimanakattai died in 1821, reciting his death and forwarding to the manager of the *mutt* his dying instructions. In it is a reference to the Swami of "our Dwandwa Samastan Bhandarikere Mutt." Exhibit GG is an account book of Bhimanakattai Mutt containing an entry of the expenses incurred in the appointment of

RAGHUBHUSHANA v. VIDIAVARIDHI.

Raghunatha Tirtha's successor by the Swami of Bhandarikere. If these three documents are genuine they afford very strong evidence of the existence of the *dwandwa* right, but they have been rejected as forgeries by the Subordinate Judge. They were produced in Original Suit No. 39 of 1899 along with other documents including Exhibits CC and DD, which are apparently genuine, by 1st plaintiff as a witness in that suit. Second plaintiff, who was plaintiff in that suit, was then under the protection of 1st plaintiff and the documents might have been produced at an earlier stage of the suit, but the comparatively late production is not a very serious argument against their genuineness, and in this suit 1st plaintiff has not been asked to explain the late production, as he should have been if defendants wished to lay stress on this point. There are, however, other suspicious circumstances; the appearance of Exhibits EE and FF is not good, and the insertion of the phrase "Dwandwa" Mutt in the latter is somewhat uncalled for. Unless Exhibit FF is genuine no reliance can be placed on Exhibit GG, for it is of such a nature that any entry in it can be rubbed out and re-written without difficulty. The book itself is probably the original book kept in the *mutt*, but it would be difficult to rely on any particular entry in it without corroboration. A witness (plaintiff's witness No. 10) has been called to prove the signature of his grandfather in Exhibit FF and has been very briefly cross-examined on the point, but his evidence is not very valuable. While, therefore, I am not prepared to hold definitely that these three documents are undoubted forgeries I think that there is a certain amount of suspicion attaching to them, especially to Exhibits FF and GG, and it would be unsafe to base any finding on them alone, but I will consider Exhibit EE again later. Exhibit LL is a statement by one Anantakrishnachar, 1st plaintiff's uncle, made in 1880 and he says that Bhandarikere Mutt is *dwandwa* to Bhimanakattai Mutt. In the document the name is given as Bhandardara, but that must be a mistake in the copy as it is not suggested that there is any *mutt* so called. Objection is taken now to the admissibility of Exhibit LL as it is a copy prepared in Mysore State and does not comply with the provisions of section 78 (6) of the Evidence Act. This objection

was not taken in the lower Court, where the defect could easily have been remedied by the party and cannot be allowed now. Exhibit Y is a petition presented in 1896 to the South Canara District Court by the nephew of the late lunatic Swami's father, in which he refers to Bhimanakattai Mutt as the Dwandwa Mutt of Bhandarikere Mutt. The statements in Exhibits LL and Y were both made before the present dispute as to *dwandwa* right arose, and are consequently of considerable weight. In addition to these documents we have the evidence of plaintiffs' witnesses Nos. 11, 12, 13, 15, and 18 that the *dwandwa* right exists and also a document of 11th October 1898 (Exhibit HH) which is a letter sent by plaintiffs' witness No. 15 and others to the Bhimanakattai Swami asking him to appoint a successor to the minor Swami of Bhandarikere who had just died. Although it may be said that the dispute about the *dwandwa* right had then arisen, Exhibit HH shows that the right was asserted at the very earliest opportunity. There are also depositions in the prior suit of 1899, but they are of no more value than the present oral evidence, as they were given after the dispute had arisen (Exhibits NN, OO, PP, RR, R, S).

First plaintiff bases his right on custom, and on an examination of the above evidence we find that (excluding Exhibit EE) only one instance of the exercise of the right has been proved, but we also have evidence that the existence of that right was present to the consciousness of persons who would be likely to know of it—as is shown by Exhibits LL, HH, Y, and L. One solitary instance of the exercise of a right can hardly be held to prove a right arising out of custom, unless the evidence is such that an inference can be drawn that the custom was followed when other occasions for exercising the right had arisen. In the present case the custom alleged is not opposed to any law nor is there any evidence that the right of appointment, to which the custom is alleged, was ever exercised in any way other than the one alleged to be customary. It is practically certain that there must be some method of filling up vacancies occurring in the office of head of the *plaint mutt*, when owing to the sudden death of the existing Swami or other such cause, the ordinary method of appoint-

RAGHUBHUSHANA V. VIDIAVARIDHI.

ment by the incumbent during his lifetime cannot be followed. In different *mutts* different procedure is adopted: in some the Swami is elected by the disciples or Sishyas, in some the power of appointment is vested in the Swami of the parent *mutt*, and in others that power vests in the Swami of a sister or Dwandwa Mutt. The first procedure is not suggested by either party, nor in this case is there any evidence that the second procedure has ever been followed. No doubt 2nd defendant alleges power in himself as Pariyaya Swami of the eight *mutts* of Udipi, but there is no evidence to support his claim, except the oral evidence of himself and others very much interested in asserting the claim and some documents which are clearly not genuine, and the claim is a very improbable one, for it is admitted that he has not this power in respect of the eight *mutts* with which he is most intimately connected. In fact those eight *mutts* are divided into four groups of two *mutts*, each group having the *dwandwa* right *inter se*. These eight *mutts* are Madhwa Mutts said to have been founded by Madhwacharya, with whom Bhimanakattai and Bhandarikere Mutts are also connected. We have then the fact that there is no evidence worth the name that any custom other than the one alleged by plaintiffs has ever existed and that the existence of this latter custom is rendered probable by the fact that the similar *mutts* in the same neighbourhood follow the same custom. We have been referred to a number of cases containing observations as to the nature of the proof required to prove a custom, *Rahimatbai v. Hirbai* (4), *Basava v. Lingangauda* (5), *Durga Charan Mahto v. Raghunath Mahto* (6), *Lahar Puri v. Puran Nath* (7) and *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty* (8), and it is argued by the learned Advocate-General that numerous instances must be proved in order to establish a custom. This would be manifestly impossible in the present case, where the instances are only likely to occur once in fifty or hundred years or

(4) 3 B. 34.

(5) 19 B. 423.

(6) 20 Ind. Cas. 810; 18 C. L. J. 559; 18 C. W. N. 55.

(7) 29 Ind. Cas. 724; 37 A. 298; 19 C. W. N. 718; 21 C. L. J. 499; 17 Bom. L. R. 475; 18 M. L. T. 39; 29 M. L. J. 75; 2 L. W. 589; (1915) M. W. N. 526; 42 I. A. 115.

(8) 1 M. 235; 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382.

at any rate very rarely. It is, however, impossible to frame a definite rule which will cover all cases, for as in other cases, in which the exact amount of evidence necessary to prove a particular fact cannot be laid down with certainty, so in proving a custom it is impossible to say that a certain defined amount of evidence is requisite. In appreciating evidence each case must be dealt with by itself; and in appreciating evidence as to custom I do not think that any general rule applicable to all cases can be laid down other than that the custom must be proved by clear and cogent evidence. It would be unfair to demand exactly the same *quantum* of proof in a case where the custom alleged is not at variance with any law, as in a case where the custom is completely opposed to the existing law. In the present case we have the fact that upon the only admitted occasion which has arisen for the exercise of the alleged right it was exercised in the alleged customary manner. In addition to this we have Exhibit EE, a document which can be differentiated from Exhibits FF and GG in that its language does not suggest a concoction, for the reference in it to the Bhandarikere Swami "to whom you (i.e., the Bhimanakattai Swami) gave Ashramam" hardly supports the plaintiffs' case of *dwandwa* right to such an extent as to justify the concoction of such a lengthy and circumstantial document, and, therefore, I think that Exhibit EE must be classed with Exhibits CC and DD as a genuine document. This being so, it is evidence of the alleged customary right being exercised on a second occasion 140 years ago. When a right is exercised in a certain way upon the only two occasions on which it is known to have arisen during the last 150 years and these two occasions are separated by an interval of 45 years, there is strong evidence to support the theory that that particular method of exercising the right is the customary one. It is also impossible to ignore tradition in a case like this, and Exhibits LL, Y and also Exhibit L afford strong evidence of the existence of that tradition for if that tradition had not been handed down from generation to generation, there is no reason why the persons who made the above statements should have referred to the existence of

RAGHUBHUSHANA v. VIDIAVARIDHI.

the customary right. The very fact that 1st plaintiff asserted the right and took action in accordance with it by the appointment of 2nd plaintiff as soon as the occasion arose, is also strong evidence that the exercise was based upon the consciousness of an existing right. Otherwise there was no reason why 1st plaintiff should have asserted such a right, the more especially as he asserted it prematurely, as was found by this Court in *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami* (3).

It is in the highest degree probable that some one possessed the right of appointment to the plaint *mutt* in case of a vacancy occurring, and as there is no universal law relating to such a right, the right must be determined by past custom or usage. There is no evidence worth the name to support any custom other than that set up by plaintiffs, and consequently in these circumstances I would find that the evidence is sufficient to prove the right alleged, for the evidence as to the custom is such as will, in my opinion, raise a presumption that the same custom was observed on the previous occasions on which an opportunity for its observance occurred.

The next question for determination is whether 2nd plaintiff has been validly appointed. It is alleged by plaintiffs that the person to be appointed Swami must be a *bala brahmachari*, i.e., a bachelor below the age of sixteen years, and when he is appointed, he is ordained a *sanyasi*. It is not disputed that 2nd plaintiff possessed the necessary qualifications and underwent the necessary ceremonies when he was appointed in 1898, but that appointment was invalid. At the time of the second appointment in 1905, no ceremonies were performed, but a letter of appointment (Exhibit UU) was given by 1st plaintiff to 2nd plaintiff reciting what had taken place previously and adding that now Pattakanika had been given to the latter. It is contended by Mr. Rangachariar for appellants that there are two essential ingredients in the appointment of a new Swami, one secular and the other religious. The religious portion consists of ordination as *sanyasi* and more particularly as *sanyasi* dedicated to the particular *mutt* of which he is to be

Swami, and the secular portion is the mere nomination to the office. It is contended in this case that the religious portion was duly carried out in 1898 and the secular portion in 1905. The learned Advocate-General, however, goes so far as to contend that the appointment in 1898 being invalid, all the ceremonies then performed must be deemed to be invalid, and that consequently 2nd plaintiff's initiation as *sanyasi* is also invalid. Reliance is placed on the judgment in *Parvatibayamma v. Ramakrishna Rau* (9), where Justice Muthusami Aiyar at page 152 observes that when the *upanayanam* of a boy was performed by persons not entitled to perform the whole ceremony it is inefficacious and invalid. It is, however, admitted that in this case 1st plaintiff was qualified to initiate 2nd plaintiff as a *sanyasi*, although in 1898 he had not power to appoint him to the plaint *mutt*, and 2nd defendant as P. W. No. 1 says that the ceremonies for ordination of a *sanyasi* are in the main the same as for ordination of a Swami of the plaint *mutt*. It would, therefore, be difficult to hold that the ceremony of 1898 was wholly invalid and that 2nd plaintiff is not a *sanyasi*, especially when defendants also object to his appointment on the ground that in him a *sanyasi* and not a *bala brahmachari* has been appointed. When one considers that in ordinary cases of appointment the ordination ceremony may take place years before the appointment actually takes effect on the death of the Swami who ordained, it is difficult for one not versed in the spirit of the Hindu religion to understand in what respect 2nd plaintiff's religious qualifications fall short of those required for a Swami of the plaint *mutt*, but it is quite possible that in the eyes of his fellows there may be a cloud on his title sufficient to disqualify him for the office of Swami, and in this connection the Court must be guided by the evidence. P. W. No. 3, Swami of Kaniyoor Mutt, says that he got his right in the Kaniyoor Mutt by virtue of being given 'Ashramam' and not on account of Pattakanikas being given. The giving of Ashramam is the ceremony necessary for the ordination of a *sanyasi*. P. W. No. 4, another of the Swamis of the eight *mutts*, says that only

RAGHUBHUSHANA v. VIDYANIDHI.

sanyasis must perform the worship in the *plamt mutt* and that when a *sanyasi* is ordained he is given a name peculiar to the *mutt* in which he is ordained. P. W. No. 11 says: "It is when the candidate is a *balyavastha brahmachari* that he is appointed Swami of Bhimanakattai Mutt," and P. W. No. 12, "*bala brahmachari* should be appointed to these *mutts*. He must be given *sanyasa* then." P. W. No. 13 (1st plaintiff) gives much the same evidence, i.e., "persons who become *sanyasis*..... should be *balyavastha brahmacharis*," but he also says "*sanyasis* after taking *asramam* give *dandodaka* to their *gurus*. They pronounce the names of the genealogy of their *gurus*..... persons taking *asramam* take their names according to the pedigree of the *guru* of their *mutt*..... Vidyaniidhi being alive Vidyapurna (i.e., 2nd plaintiff) has not been giving *dandodaka* having taken the name of Vidyasamudra." Again 1st plaintiff says: "in the *mutt* which has *dwandwa* right if the Swami died the *asrama* and power are given at one and the same time. If he is alive *asrama* is given once and afterwards power is given." P. W. No. 18 says: "The appointment to the *mutt* must have been made on the day when Mantropadesa was done. All this evidence shows clearly that the witnesses are conscious that the appointment of a Swami must be contemporaneous with his ordination as *sanyasi* and that such ordination must be made with reference to his nomination as successor to the Swami of the particular *mutt*, and not as a mere unattached *sanyasi*. If 1st plaintiff had held the power of appointment in 1898 nothing could have been said against 2nd plaintiff's appointment, but as that appointment was invalid the effect of it was either nil, as contended by the learned Advocate-General, or else it had merely the effect of making 2nd plaintiff *sanyasi*. If the former be the case no fresh ordination has been held and, therefore, plaintiff has not been properly appointed: if the latter, plaintiff being already a *sanyasi* is not eligible for appointment. I, therefore, agree that 2nd plaintiff's appointment is invalid.

Objection has been taken to the admissibility of certain depositions in evidence, (1) statements of deceased persons to facts in issue, (2) depositions of deceased

witnesses in the prior litigation of 1899. This objection as regards the second class of documents, which have been admitted under section 33, Evidence Act, must prevail, as 2nd defendant was not a party to the prior case and cannot be deemed to be representative-in-interest of any of the parties there and I have not relied upon any of them in coming to a conclusion. The other objection is based on *Patel Vandravan Jekisan v. Patel Manilal Chunilal* (1) and it is contended that "facts in issue" are not "relevant facts" within the meaning of section 32, Evidence Act, and that any statements as to facts in issue are inadmissible in evidence under section 32. There is one sentence in Sargent, C. J.'s judgment which supports this proposition, i.e., "But that section (i.e., section 32) is not applicable to a case like the present when the evidence was required to prove a fact in issue and not merely a relevant fact: and the above statement was, therefore, inadmissible to prove the custom as alleged." The statement in that case was one signed by over hundred persons, and it was sought to be proved in evidence in order to avoid the expense and difficulty of procuring the attendance of the persons who made it, and consequently there were good grounds for refusing to receive such evidence. The question of whether "facts in issue" are not relevant facts within the meaning of section 32 was not discussed in the judgment, and consequently I am not prepared to say that this question was meant to be decided by the sentence above quoted. If that was the intention I must venture, with all respect, to differ. This ruling has been referred to in *Tottempudi Venkataratnam v. Tottempudi Sehamma* (10), in which case a District Judge had rejected a statement made in a Will on the strength of the ruling in *Patel Vandravan Jekisan v. Patel Manilal Chunilal* (1) on the ground that facts in issue were not relevant facts within the meaning of section 32. This Court in appeal did not discuss this question but remarked "the statement in the Will that the property was self-acquired is not evidence of the fact that it was self-acquired." Undoubtedly the statement in the Will could

SOBHANMAL POHUMAL V. BACHAL.

be of very little value as evidence, and possibly what was meant by "is not evidence" was "is not evidence upon which a Court could act," but in the absence of any express finding that such a statement is inadmissible in evidence because it refers to a fact in issue, I do not think it can be said that this question was meant to be decided. If a fact is in issue it is undoubtedly a fact relevant to the case or proceeding. Facts must be either relevant or irrelevant and I am not prepared to uphold the learned Advocate-General's contention that there are 3 separate classes of facts, i.e., relevant, irrelevant, and facts in issue. To hold that facts in issue are not relevant facts within the meaning of section 32, and I cannot see that the meaning in that section can be different to the meaning in other portions of the Evidence Act, would lead to startling results. Dying declarations as to the deceased's murderer would be inadmissible in evidence, for undoubtedly the identity of the murderer is a fact in issue in a trial for murder. A Court could also shut out most important evidence by framing issues as regards all the relevant facts. These facts would then become facts in issue and all statements relating to them would at once be inadmissible. This cannot have been the intention of the Legislature. Facts in issue are facts about which there is a question in issue between the parties, and although all relevant facts are not necessarily facts in issue, I cannot understand how the facts that are in issue can be other than relevant to the determination of the suit, and this, I think, is clear from the language of section 6, which says: "Facts, which though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant," thus implying that facts in issue must be relevant. I, therefore, think that the objection cannot be sustained.

I accordingly agree with the order proposed.

Appeal partly allowed; Decree modified.

V.R.P.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 of 1914
November 25, 1915.

Present:—Mr. Crouch, A. J. C., and
Mr. Hayward, A. J. C.

SOBHANMAL POHUMAL—PLAINTIFF—
APPELLANT
versus

BACHAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Vendor and purchaser—Vendor pleading minority at execution—Burden of proof—Estoppel—Transfer of Property Act (IV of 1882), s. 55—Evidence Act (I of 1872), s. 115.

When a person transfers immoveable property, or makes a sale of goods, he thereby represents to the purchaser that he has authority to transfer or sell. [p. 891, col. 1.]

If in any suit on a transfer of immoveable property or a contract of sale, the execution of the deed of transfer or the contract of sale, the case may be, is admitted but infancy at the time of execution is set up as a defence, the defendant is *prima facie* estopped from denying his authority under section 115 of the Evidence Act. Before the defendant can overcome the bar of estoppel, he must prove his minority. [p. 891, cols. 1 & 2.]

Virupakshappa v. Shidappa, 26 B. 109 at p. 116; 3 Bom. L. R. 565, followed.

Manilal v. Kavasji, ■ Ind. Cas. 124; 4 S. L. R. 250, distinguished.

Appeal against the decree of the Joint Judge, Hyderabad (Sind).

Mr. Kimatrai Bhojraj, for the Appellant.

Mr. Mulchand Maganmal, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—By a sale-deed bearing date the 9th May 1912, Bachal *walad* Alibux purported to transfer to plaintiff Sobhanmal Pohumal the right, title and interest of himself and his sister Musammatt Menan, defendant No. 2, who was represented ■ being a minor. The present suit was filed for an injunction ordering Bachal and his sister Musammatt Menan to effect mutation of names in the Government Register.

The defence set up was, *inter alia*, that defendant No. 1 Bachal was minor at the time of executing the sale-deed and his sister No. 2 was then a major and that consequently the sale-deed did not transfer the right, title or interest of either.

The original Court framed several issues but decided on the 1st and 5th only, viz., (1) whether defendant No. 1 was a major at the time of the execution of the deed and

SOHBANMAL POHUMAL V. BACHAL.

(5) whether defendant No. 2 was a major or a minor at that time. The Court held that defendant No. 2 was a major in May 1912. This finding was not contested in the lower Appellate Court and has been accepted for the purposes of the present appeal.

With regard to the age of Bachal the original Court discredited all the evidence adduced except that of the Sub-Assistant Surgeon, who stated that in his opinion he was between the ages of 18 and 20 at the date of the trial. Relying on this evidence the Court took the mean between the two figures, and held that he was then 19. On this computation he was a minor at the time the deed was executed. The learned Judge consequently rejected the claim of the plaintiff with costs. The lower Appellate Court agreed with the original Court that the oral evidence was not convincing but pointed out that there was no warrant for taking the mean of the two figures given by the Sub-Assistant Surgeon as Bachal's actual age. In the absence of any reliable evidence as to the age it had to consider which side lay the burden of proof, and held, on the authority of *Manilal v. Karasji* (1), that the onus of proof lay on the plaintiff, and dismissed the appeal with costs.

Now in the case of *Manilal v. Karasji* (1) Leggatt, A. J. C., sitting on the original side stated: "Ordinarily the Court will presume that they were competent, for, in the ordinary course of business, contracting parties usually are competent to contract; but the plaintiff must either prove this or induce the Court to presume it. Where, however, for any reason whatsoever a question as to the competency of the parties arises, the Court may refuse to make such a presumption, leaving the plaintiff to establish the fact by proper proofs." We consider that the rule of evidence as to the onus of minority can be defined within much closer limits.

When a person transfers immoveable property, or makes a sale of goods, he thereby represents to the purchaser that he has authority to transfer or sell. If in any suit on the transfer, or the contract of sale, the execution of the deed of transfer,

or the contract of sale, as the case may be, is admitted but infancy is set up as a defence, the defendant is *prima facie* estopped from denying his authority, under section 115, Evidence Act. In the case of transfer of immoveable property, the vendor is deemed to positively warrant his power to transfer (section 55, Transfer of Property Act) and it is obvious a plaintiff cannot be called on to prove the truth of a representation which the defendant has, admittedly, warranted to be true. Before the defendant can overcome the bar of estoppel, before he can be permitted to even assert that he had no authority to make the transfer, he must prove his minority. For the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence; section 104, Evidence Act. Thus we arrive at the general rule declared by Chandavarkar J., in the case of *Virupakshappa v. Shidappa* (2) that it is for the party who comes into Court and pleads minority to make out his case before the adverse party can be required to rebut it.

As the defendant in this case has failed to give any reliable evidence of minority, the presumption that he was a major at the time of the execution of the deed holds good. The finding on the first issue must be in the affirmative.

I would reverse the decree of the lower Court, and under Order XLI, rule 23, remand the case for trial of the remaining issues, as between plaintiff and defendant No. 1. The matters in dispute as between plaintiff and defendant No. 2 have been conclusively determined by the finding on the 5th issue, a finding which has been accepted by the plaintiff. Costs as between plaintiff and defendant No. 1 to be costs in the cause. *Mussammatt Menan* against whom no relief was sought will bear her own costs of this appeal.

HAYWARD, A. J. C.—I concur. The original Court appears to have discarded all the evidence in this suit as unreliable with the exception of that of the Sub-Assistant Surgeon. The Appeal Court seems to have discarded the evidence of that witness also, as being too vague to lead to any definite

(1) 9 Ind. Cas. 124; 4 S. L. R. 250.

(2) 26 B. 109 at p. 116; 3 Bom. L. R. 565.

BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY.

conclusion. The result was that all the evidence adduced on either side on the question now at issue relating to the minority or majority of the first defendant was discarded as unreliable. The case was, therefore, correctly treated as one depending on the burden of proof in the Appeal Court.

That Court has held that the burden of proof lay on the plaintiff as decided in the case of *Manilal v. Karasji* (1). But it appears to me that that case is not a real guide here as it was decided on its own particular facts. Moreover if closely examined, it discloses the contrary general proposition to that adopted by the lower Appeal Court, namely, that the burden of any fact lies upon the person asserting that fact, which is the general proposition contained in section 103 of the Indian Evidence Act, and was applied under circumstance similar to those before the lower Appeal Court by Chandavarkar, J., in the case of *Virupakshappa v. Shidappa* (2).

The decree, therefore, must, in my opinion, be reversed so far as it directed the dismissal of the suit against defendant No. 1. Costs so far as that defendant is concerned to be costs in the cause. This will not affect the dismissal of the suit as against defendant No. 2, or the costs awarded in favour of defendant No. 2. There is no necessity to make an order as to costs in the case of defendant No. 2 here as she has not been represented by a separate Pleader in this second appeal.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

November 15, 1915.

Present:—Viscount Haldane, Lord Parmoor,
Lord Wrenbury, Sir John Edge and
Mr. Ameer Ali.

BHUPENDRA KRISHNA GHOSE AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMARENDRA NATH DEY AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Hindu Law—Dayabhaga School—Will—Construction

—*Executory gift over—Period of distribution—*
Succession Act (X of 1865), s. 111.

Under the Dayabhaga School of Hindu Law a testator can attach, to an authority given by his Will to his widow to adopt a son to him, a direction that her estate should not be interfered with or divested during her life. [p. 896, col. 1.]

Section 111 of the Indian Succession Act (X of 1865) embodies the rule of construction of Wills enunciated in *Edwards v. Edwards*, (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 434. The rule has been considerably modified by later English decisions, and although the said Act has given it statutory force, the rule should be applied only to cases strictly coming within its scope and does not apply to a case where the testator mentions in his Will the event on the occurrence of which the distribution is to take place. [p. 896, col. 2.]

The Will of a Hindu governed by the Dayabhaga School of Hindu Law, after revoking all prior testamentary writings and appointing his wife as the sole executrix thereof, proceeded as follows: "I hereby authorise my said wife to adopt Dattaka Putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dassi who may be living at the time of my death."

There were two sons of the testator's sister living at his death. His widow, who had obtained Probate of the Will, adopted a son who predeceased her unmarried, and she herself died shortly thereafter:

Held, that the testator's estate vested in his widow as his legal representative and remained in her possession until her death; that the estate, which vested in the widow during her life, could pass only to the adopted son who survived her or in case of his death during her lifetime to his male issue if he left any; and that on her death the gift over (which was expressly declared to take effect after her death) to the testator's nephews took effect and his estate passed to them. [p. 896, cols. 1 & 2.]

Held, also, that the event on the occurrence of which the distribution was to take place was distinctly mentioned as being the death of the widow and the gift over to the nephews was not affected by section 111 of the Indian Succession Act. [p. 896, col. 2.]

Bhupendra Kumar Ghosh v. Amarendra Nath Dey, 24 Ind. Cas. 458; 41 C. 642; 18 C. W. N. 360, affirmed.

Appeal from the a decree of the High Court of Judicature at Fort William, in Bengal, dated the 28th November 1913, reported as 24 Ind. Cas. 458, confirming that of a single Judge of the said High Court, dated the 19th June 1912.

FACTS.—The principal question in the appeal related to the validity of a bequest in favour of the respondents contained in the Will of one Herambo Nath Ghose, a Hindu governed by the Dayabhaga School of

BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY.

Hindu Law (hereinafter called the testator), who died on the 10th November 1907, leaving ■ his sole heir his widow, Paritoshini Dassi.

By his Will the testator, after appointing the said Paritoshini Dassi his executrix and authorizing her to adopt, provided for the devolution of his estate (subject to certain minor provisions) in the following terms:—

"If my said wife dies without adopting ■ son, or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dassi, who may be living at the time of my death."

On the testator's death his widow applied for and obtained Probate of the Will. On the 3rd August 1909, she adopted one Hem Chunder, who died on the 11th March 1910 an infant, unmarried and intestate. The widow died on the 16th March 1910.

The respondents were the sons of the said Benodini Dassi and were living at the time of the testator's death.

Immediately after the death of the widow, the suit out of which the present appeal arose was instituted on the Original Side of the said High Court by Srimati Kisorimoni Dassi, the mother (by adoption) of the testator, claiming the said estate as the next heir of the said Hem Chunder and praying that the Will might be construed and the rights of all parties thereunder ascertained and declared, and for other reliefs.

The said Kisorimoni Dassi died on or about the 26th September 1910, and one Trailokya Nath Ghose, who claimed to be the next reversionary heir of the said Hem Chunder, was substituted in her place.

The suit came on for trial before Mr. Justice Fletcher, who, without recording evidence as to the alleged adoption, dismissed it with costs, holding that the bequest in favour of the respondents was ■ valid one in law and would not be displaced or affected by such adoption if established. He was of opinion that it was perfectly competent to a Hindu testator to regulate the course of devolution of his estate after his death, provided he kept within

the limits laid down by law; that the creation of such an interest ■ was given by the said Will to the respondents was not in any way repugnant to Hindu Law; and that it did not offend against the provisions of section 111 of the Indian Succession Act, and was expressly authorized by section 107 of the said Act, both the said sections being applicable to Hindus under the provisions of section ■ of the Hindu Wills Act (XXI of 1870).

The said Trailokya Nath Ghose appealed against the said decree, but his appeal was dismissed. The learned Judges of the Appellate Court were of opinion that the bequest in favour of the respondents was valid; that its effect was not to divest an estate which had already vested in the said adopted son but that he took in effect only ■ limited estate subject to the gift over to the respondents; and that there was nothing in the law by which the parties were governed which made the bequest of a legacy or of an estate on a future contingent event invalid. For a full report of the judgments of the Courts below see *Bhupendra Kumar Ghosh v. Amarendra Nath Dey* (1). On the death of Trailokya Nath Ghose the appellants were brought on the record as his representatives.

Sir Robert Finlay, K. C., Mr. Upjohn, K. C., Sir William Garth and Mr. Dunne, for the Appellants. — The Courts in India have relied upon *Sreemuttu Soorjeemoney Dossee v. Denobundoo Mullick* (2) where an executory gift over by a Hindu was upheld, and have imported in considering the present case the English Law as to executory bequests. But that case does not decide that all incidents of the English Law of executory bequests are applicable to Hindu Wills: *Musammatt Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (3). A Hindu has testamentary powers within the limits which the Hindu Law prescribes to alienate by gift *inter vivos*, and, therefore, to support a gift *in futuro* under a Will there must be ■ gift *in presenti* thereunder: *Baboo Beer Pertab Sahee v. Maharajah*

(1) 24 Ind. Cas. 458; 41 C. 642; 18 C. W. N. 360.

(2) 9 M. I. A. 123; 4 W. R. 114 (P. C.); 1 Sar. P. C. J. 837; 19 E. R. 688.

(3) 10 M. I. A. 279 at pp. 308, 311; 3 W. R. (P. C.) 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY.

Rajender Pertab Sahee (4); *Jatindra Mohan Tagore v. Ganendra Mchan Tagore* (5); *Amrito Lall Dutt v. Surnomoni Dasi* (6); and Mayne's Hindu Law, 8th Edition, page 509, paragraph 376.

[VISCOUNT HALDANE referred to paragraph 196, page 258, of Mayne's Hindu Law.]

Here there is no gift by implication or otherwise to either the widow or the adopted son, and the succession vests immediately upon the death of the last owner and cannot remain in abeyance, the gift over to the testator's nephews is unknown to Hindu Law and inoperative and void: *Bai Motivahoo v. Bai Mamobai* (7) and *Gordhandas v. Bai Ramcoovar* (8). The adopted son here took the testator's estate by inheritance and not by devise, and the adopted son's estate could not subsequently be divested and must go on his death to his heirs, the present appellants: *Musammatt Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (3) and *Kally Prosonno Ghose v. Gocool Chunder Mitter* (9). The vesting of the estate in the widow as the executrix for administrative purposes could not affect its devolution according to law or validate the contingent executory bequest to the nephews, and in any case the widow's right as executrix ceased when she made the adoption.

The bequest to the nephews is bad under section 111 of the Indian Succession Act, 1865, inasmuch as it was intended to take effect, if at all, on the happening of two specified uncertain events, namely, the death of the widow (a) without having adopted or (b) after the death of the adopted son without leaving male issue, and no time is mentioned in the Will for the occurrence of these events and neither of them happened before the period when the fund was distributable, namely, the death of the testator or the time of the adoption: *Narendra Nath Sircar v. Kamal-*

basini Dasi (10) and *Manikyamala Bose v. Nand Kumar Bose* (11) and Trevelyan's Hindu Law, page 118.

[LORD WRENBURY.—The period of distribution in the Will is the death of the widow and when such a period is mentioned by the testator section 111 does not apply].

Yes, it would: see illustration (d) to that section. Reference was also made to Mayne's Hindu Law, 8th Edition, page 869, paragraph 624; and section 112 of the Indian Succession Act, 1865.

Mr. De Gruyther, K. C. (with him Mr. Dube), for the Respondents.—(Their Lordships asked Counsel to deal first with the argument under section 111 of the Succession Act.) That section puts in statutory form the decision in *Edwards v. Edwards* (12), which was considered in *O'Mahoney v. Burdett* (13) and has been considerably modified. It is simply a rule of construction. The section does not lay down any positive law and imposes no restriction on the testator's power to mention the period of distribution. When a testator mentions such a period, as in the present case, the section has no application. He referred to section 107, illustrations (f) and (g), of the Indian Succession Act, 1865, and *Radha Prosad Mullick v. Ranimoni Dassi* (14) and *Chunilal Parvatishankar v. Bai Samrath* (15). In the case of *Narendra Nath Sircar v. Kamalbasini Dasi* (10) the Will was exactly in the words of illustration (b) of section 111 of the Succession Act. (He was stopped on this point and asked to construe the Will.)

If the Will had some such words as "my adopted son would take the estate," it is admitted that the gift over would be valid. But in dealing with Hindu Wills a Hindu must be taken to know Hindu Law, and

(4) 12 M. L. A. 1 at pp. 37 & 38; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

(5) (1872) L. R. I. A. Sup. Vol. 47 at pp. 66 & 67; 9 B. L. R. (P. C.) 377, 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

(6) 25 C. 662 at pp. 690 & 691; 2 C. W. N. 389.

(7) 24 I. A. 93 at pp. 104 & 105; 21 B. 709; 1 C. W. N. 566.

(8) 26 B. 49 at p. 467; 3 Bom. L. R. 857.

(9) 2 C. 295.

(10) 23 I. A. 18; 23 C. 563.

(11) 33 C. 1306; 4 C. L. J. 357; 11 C. W. N. 12.

(12) (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 464.

(13) (1874) 7 H. L. 368; 31 L. T. 705; 23 W. R. 361.

(14) 35 I. A. 118; 35 C. 896; 12 C. W. N. 729; 8 C. L. J. 48; 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23.

(15) 23 Ind. Cas. 645; 38 B. 399; 16 M. L. T. 59; 18 C. W. N. 544; 26 M. L. J. 647; 19 C. L. J. 563; 16 Bom. L. R. 366; 1 L. W. 762; 12 A. L. J. 742; (1914) M. W. N. 441.

BHUPENDRA KRISHNA GHOSE V. AMARENDRA NATH DEY.

the testator must have known that ■ ■ ■ would be adopted to him under the power given by the Will, the adopted son would take the estate under the Will. It is contended that there must be a gift *in presenti* to support a gift *in futuro*, but ■ Hindu has been held to have a power of appointment under a Will: *Bai Motivahco v. Bai Mamobai* (7). He also referred to *Kalidas Mullick v. Kanhaya Lal Pundit* (16), and was then stopped.

Sir Robert Finlay, K. C., replied, referring to Mayne's Hindu Law, 8th Edition, page 512, paragraph 377, and distinguishing the case of *Bai Motivahco v. Bai Mamobai* (7).

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the Will of one Herumbo Nath Ghose, a Hindu inhabitant of the town of Calcutta subject to the Dayabhaga School, who died on the 10th of November 1907.

The material portion of the Will, which bears date the 26th June 1898, is in the following terms:

"This is the last Will and Testament of me Herumbo Nath Ghose of No. 45 Pathuriaghat Street, Calcutta, son of Girindra Chunder Ghose, deceased *zemindar*. I revoke all prior testamentary writings and appoint my wife Srimati Paritoshini Dassi to be the sole executrix of this my Will. I hereby authorize my said wife to adopt *dattaka putra*. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dassi who may be living at the time of my death."

On the testator's death his widow Paritoshini Dassi applied for and obtained Probate of the Will. The estate of Herumbo accordingly vested in her as his legal representative and remained in her pos-

session until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910, which was followed by the death of Paritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissori Moni Dassi, the adoptive mother of Herumbo, against the two sons of Benodini Dassi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissori Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem, was substituted in her place. Trailokya has died since the trial; and the present appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Paritoshini of the infant Hem was denied by the respondents, but the question has not been tried. Both the Courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff; and, on the construction of the Will, have held that the adopted son died without leaving male issue, on the death of the widow the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds; *firstly*, it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindu Law of inheritance, that he took it in his capacity of son and not as devisee under the Will, and on his death the property devolved on his heirs. Consequently, it is contended, the executory devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of section 114 of the Indian Succession Act (X of 1865) which has been made applicable to Hindus by the Hindu Wills Act (XXI of 1870).

It is to be observed that the Will in this case does not infringe the rules which lay

(16) 11 I. A. 218; 11 C. 121.

BEUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY.

down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindu Law. Before proceeding to examine the Will in order to discover the intentions of the testator, their Lordships desire to make one further observation, *viz.*, that under the Dayabhaga, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after-life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life-estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix, she would have taken merely a widow's interest which would have become divested on her adopting a son. It is clear, however, from the language of the Will that the testator was anxious that there being no natural-born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindu system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second, or a third, fourth, or fifth, in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive until the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life; the gift over is expressly

declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the Will and of the consequences resulting from the contention advanced on behalf of the appellants, is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the Will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of section 111 of the Indian Succession Act the bequest to them is void. That section runs as follows:

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

Section 111 embodies the rule enunciated in *Edwards v. Edwards* (12). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindus, its application is confined to special tracts such as the territories subject to the Lieutenant Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by section 111 and must take effect.

Their Lordships are of opinion that the judgments of the Courts in India are correct

BANKEY BEHARY LAL v. BHAGWAN DAS MARWARI.

and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for the Appellants: Mr. G. C. Farr.

Solicitors for the Respondents: Messrs. Watkins and Hunter.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1307 OF 1915.

May 16, 1916.

Present:—Mr. Justice Mullick.

BANKEY BEHARY LAL—DEFENDANT—
APPELLANT

versus

BHAGWANDAS MARWARI—PLAINTIFF—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 138, 142—Mortgage-decree—Execution sale—Purchase by decree-holder—Suit for possession—Decree fraudulent, whether can be pleaded in defence—Claim based on possession and subsequent dispossession—Finding against plaintiff's possession within 12 years of suit—Dismissal of suit under Art. 142—Appeal—Limitation, new point of—No bar from date of confirmation under Art. 138—Estoppel for inconsistent positions, rule of, applicability of.

When a suit for possession by a purchaser at a sale in execution of a mortgage-decree, based on the allegation that soon after obtaining possession he was dispossessed by the judgment-debtor, is dismissed on the finding that he was never in possession within 12 years of suit and that his claim was barred under Article 142 of the Limitation Act, it is open to the plaintiff to urge in appeal that his suit was within time, computing it from the date of confirmation of sale under Article 138. [p. 897, col. 2.]

The principle of estoppel by reason of inconsistent positions does not apply to such a case. The plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove. [p. 897, col. 2.]

The point of limitation can be taken at any stage. [p. 897, col. 2.]

The judgment-debtor can resist such a suit on the ground that the decree in execution of which the plaintiff became the purchaser was fraudulent, where the decree-holder himself purchased the property, and the Court is bound to go into that question. [p. 898, col. 1.]

Dr. Dwarka Nath Mitter and Babu Debendra Nath Mandal, for the Appellant.

JUDGMENT.—The plaintiff's case is that on the 15th of February 1900, he sold 11-gandas pukhta share of Mauza Rampur in execution of his mortgage-

decree, purchased it himself, obtained possession in 1901, and was dispossessed six months later by the defendant mortgagor. He brought the present suit on the 13th of March 1912, for declaration of title and recovery of possession. The Munsif found, *firstly*, that the mortgage decree was fraudulent and, *secondly*, that, the plaintiff never obtained possession and was never dispossessed, the suit was barred by limitation. He accordingly dismissed the suit.

On appeal by the plaintiff the learned District Judge has found that Article 138 of Schedule I of the Limitation Act applies and that the suit was in time having been brought within 12 years from the date of the confirmation of the sale, namely, the 21st March 1900. He has also found that it was not open to the defendant in this suit to invite the Court to go into the allegation that the plaintiff had obtained a fraudulent mortgage-decree by causing the Court to give him a decree for 11-gandas pakka share when the mortgage deed conveyed only eleven-gandas kutcha share. The learned District Judge decreed the suit and ordered delivery of possession to the plaintiff: hence this second appeal by the defendant.

The plaintiff bases his suit under Article 142 of the Limitation Act and the Munsif finds that as he never was in possession within twelve years of the suit his claim is barred. But the learned Munsif has also found that the plaintiff never obtained delivery of possession, and the learned District Judge, accepting that finding, has correctly applied Article 138. It is urged by the learned Vakil for the appellant that the plaintiff cannot be allowed to make a new case in the Appellate Court when in his plaint he asserted that he was dispossessed after obtaining possession. In my opinion the principle of estoppel by reason of inconsistent positions does not apply here. The plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove. The point of limitation can be taken at any stage and I agree with the learned District Judge that the suit was within time. It is true that section 66 of the Civil Procedure Code vests title with the auction-purchaser from the date of

DINVAHI LAKSHMIPATI v. PINGALI NARASIMHAM.

sale, but that does not relieve him from the duty of obtaining delivery of possession if he wishes to take the benefit of Article 142 or 144. But the learned District Judge is clearly wrong in refusing to go into the questions of fraud and maintainability of the suit. He must decide all the remaining issues necessary for the disposal of the case. His decree will be set aside and the case remanded for disposal in accordance with the observations herein made. Costs will abide the result.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2288 TO 2291
OF 1914 AND 322 OF 1915.

April 18, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Phillips.

DINVAHI LAKSHMIPATI AND ANOTHER—
APPELLANTS IN S. A. NOS. 2288 TO 2291 OF
1914 AND RESPONDENTS IN S. A.
No. 322 OF 1915.

versus

PINGALI NARASIMHAM AND OTHERS—
RESPONDENTS IN S. A. NOS. 2288 TO 2291
OF 1914 AND APPELLANTS IN S. A.
No. 322 OF 1915.

*Limitation Act (IX of 1908), s. 28—Unenfranchised
inam attached to village office—Adverse possession—
Prescriptive title, acquisition of.*

If an inam granted for service is trespassed upon by a stranger before its enfranchisement and held adversely for the statutory period, the holder acquires a title to it by prescription under section 28 of the Limitation Act.

Bhaiji Thakur v. Jharula Das, 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1020; 27 M. L. J. 103; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845, distinguished.

Second appeals against the decrees of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Suits Nos. 134, 209 and 231 of 1912, 502 of 1911 and 209 of 1912, respectively, preferred against those of the Additional District Munsif, Tanuku, in Original Suits Nos. 69, 75, 72, 74 and 75 of 1910, respectively.

Messrs. P. Nagabushanam and P. Soma-sundaram, for the Appellants.

Mr. P. Narayanamurthi for the Respondents.

JUDGMENT.—It was held in *Gunnaiyan v. Kamakchi Ayyar* (1) that an inam granted for service became the hereditary property of the grantee and that the conditions restraining alienation applied only between him and the Crown. Consequently, if the property in suit before its enfranchisement was trespassed upon by a stranger, the latter would acquire a title to it by prescription under section 28 of the Limitation Act, against the person entitled to its possession.

Mr. Nagabushnam, relying upon *Bhaiji Thakur v. Jharula Das* (2), contended that as the property appertained to the office, adverse holding of it would not give a right to it as against the office-holder entitled to possession. The answer to this contention is that the inam, although it was originally granted for service, was not attached to the office in the sense in which lands granted for performing a religious service in a temple are attached to the service. The Government by express legislation declared that by enfranchising the inam in favour of a village office-holder, they are not conferring a title to the property which formed the emoluments of the office at one time. In this view, the decisions following *Bhaiji Thakur v. Jharula Das* (2) do not affect the present question. The lower Appellate Court is right, and these second appeals are dismissed with costs.

As regards the memo. of objections the Sub-Judge is wrong in directing the plaintiffs to file a separate suit. The decrees of the Courts below must be modified by declaring that future mesne profits should be ascertained in execution.

There will be no costs. Second Appeal No. 322 of 1915 must be allowed and there will be no order as to costs in this appeal also.

Second Appeal No. 322 allowed; Others dismissed with costs.

V.R.P.

(1) 26 M. 339.

(2) 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1020; 27 M. L. J. 103; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845.

BRIJ KUMAR LAL V. MUNSHI SAHAI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 98 OF 1915.

May 29, 1916.

Present:—Justice Sir John Woodroffe,
Kt., and Mr. Justice Chaudhuri.Munshi BRIJ KUMAR LAL AND OTHERS
DEFENDANTS—APPELLANTS

versus

Munshi MAJLIS SAHAI AND OTHERS—
PLAINTIFFS—RESPONDENTS.*Mortgage—Accounts, settlement of, between mortgagor
and mortgagee—Mortgagee in possession—Rests.*

Where in a mortgage transaction there was an express agreement between the parties set forth in the mortgage-bond that the principal would be paid in a lump sum after the expiry of the term of the mortgage and the mortgagee had to pay a certain sum of money annually to the mortgagor, but the mortgagee never paid that sum:

Held, that, according to the nature and spirit of the agreement entered into between the parties, the effect of keeping the money, which should have been paid by the mortgagee to the mortgagor, was that that money must go in, an adjustment of accounts between the parties, to discharge the principal due at the time. [p. 900, col. 1.]

Appeal against the following judgment of Mr. Justice Chapman, dated the 20th of May 1915, in Appeal from Appellate Decree No. 22 of 1913:

"The plaintiffs borrowed Rs. 950 from the defendants in the year 1293 and executed a *zarpeshgi ticca patta* in their favour, under which the defendants were admitted into possession of certain lands. The plaintiffs' case was that under the arrangements made in the *patta* the debt had been reduced in the year 1317 to such an extent that only Rs. 67 odd remained due. The plaintiffs offered this sum to the defendants. It was refused. The plaintiffs thereupon took possession of the land and brought this suit for a declaration that by a payment by them of this sum of Rs. 67 odd the debt will be discharged. Both Courts have decreed the plaintiffs' suit. The defendants appeal.

The only question raised is in regard to the method of the account. It was agreed in the *zarpeshgi patta* that the principal debt of Rs. 950 should bear interest at the rate of twelve per cent. The land was leased to the defendants at a rental of Rs. 126-9-9. Of this sum annually payable to the plaintiffs, the defendants were to retain Rs. 114 to discharge the interest on the loan. They were also to retain Rs. 6 on account of

collection charges and pay the remainder, namely, Rs. 6-9-9, to the plaintiffs. This annual payment of Rs. 6-9-9 was never made. The contention of the plaintiffs is that this sum of Rs. 6-9-9 annually retained by the defendants should be annually set in part discharge of the principal sum of Rs. 950. The principal sum and the interest thereupon would thus be annually reduced. The defendants contend on the other hand that the account must not be made annually, the total sum due at the end of the period an account of the annual rent of Rs. 6-9-9 with interest must be taken and this total must then be set off against the principal of Rs. 950. Speaking in the terms of English Law, the question is whether the account against the mortgagee in possession should be taken with rests or not. The defendants rely on the agreement in the *zarpeshgi patta* to repay the principal in a lump sum. But this agreement is with reference only to what is to happen on the expiry of the *patta*. Nothing is said as to the method of accounting in the event of failure to pay the annual sum of Rs. 6-9-9. It was in the contemplation of the parties that the mortgagee would annually receive more than was sufficient to cover his expenditure and the sum due to him for interest. The amount of this excess was assessed by them at Rs. 6-9-9. There is no reason either in the circumstances of the case or in the terms of the contract between the parties why the account should not be with rests.

It was contended that the plaintiffs were entitled to only three sums of Rs. 6-9-9 as they could not have recovered more by suit. The contention cannot prevail.

The decision was correct. The appeal is dismissed with costs.

Babu Jogesh Chandra Roy, for the Appellant.

Babu Rajendra Chandra Guha, for the Respondents.

JUDGMENT.—In this case Mr. Justice Chapman has confirmed the decision of the Subordinate Judge.

The contention that has been raised before us is, as there was an express agreement between the parties set forth in the mortgage-bond that the principal would be paid to the plaintiffs in a lump sum after the expiry of the term of the mortgage-bond, Mr. Justice Chapman has erred in dismissing

VISWANATHAN v. BRAHMANADHAN.

the appeal after deducting the rent and interest with rests from the principal every year. The appellants who raised this contention did not themselves keep the term of their contract, and what has in effect been done is to adjust the rights of the rival parties according to the nature and spirit of the agreement entered into between them. What was the effect of keeping the money which should have been repaid? The answer is, we think, that that money must go to discharge the principal due at the time. That must be taken to be done which should have been done. If the appellants have withheld payment, they must be taken therefore to have applied such sum towards the discharge of their own dues on the security.

We see no sufficient ground for disturbing the decision under appeal, and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL NO. 59 OF 1915.

March 9, 1916.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

P. VISWANATHAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

P. BRAHMANADHAN, MINOR, BY HIS
GUARDIAN MR. R. SUBRAMANIA AIYER—
PLAINTIFF—RESPONDENT.

*Trusts Act (II of 1882), s. 23 (f)—Trust, breach of—
Employment of trust moneys in private trade or business—
Liability of trustee—Interest in excess of statutory
rate, award of.*

Under section 23 (f) of the Trusts Act, a trustee charged with employing trust moneys in his own private trade or business cannot be directed to pay interest exceeding six per cent. per annum, even though he admits liability at a higher rate.

Appeal from the decree of the High Court in the exercise of its ordinary original civil jurisdiction, in Civil Suit No. 71 of 1913.

The Hon'ble Mr. S. Srinivasa Aiyangar, Advocate-General, and Messrs. V. V. Srinivasa Aiyangar and T. G. Raghavachariar, for the Appellants.

RAM NARAYAN SINGH v. ADHINDRA NATH.

Mr. R. Subramania Aiyar, for the Respondent.

JUDGMENT.—We agree with the learned Judge that, as stated at the beginning of his judgment, the appellants may be guilty of a breach of trust and bound to replace the minor's money and to account for any profits made therewith.

He is, however, liable under section 23 (6) of the Indian Trusts Act at the option of the beneficiary either to account with compound interest at six per cent. with half-yearly rests or to account for the net profits made by the employment of the minor's money. The respondent in this case does not want the net profits and, therefore, he is only entitled to compound interest at this rate, and not at twelve per cent. as awarded by the learned Judge. It is said, however, for the respondent that the defendants have admitted their liability for interest at $7\frac{1}{2}$ per cent., but that was merely as debtors all conjointly with the other members of the firm, and affords no sufficient ground for not applying the statutory provision as to the rate of interest payable in respect of their breach of trust. That decree must be modified accordingly, and further the counter-interest at $7\frac{1}{2}$ per cent. allowed to the appellants on moneys expended by them for the minor must be reduced to 6 per cent. The decree must be varied accordingly and the appeal allowed with costs. Costs of the next friend will be paid out of the estate.

Appeal allowed; Decree modified.

V.R.P.

PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

May 12, 1916.

Present:—Lord Shaw, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Maharaja RAM NARAYAN SINGH

SINCE DECEASED, NOW REPRESENTED BY
Maharajkumar LACHMI NARAIN SINGH

—DEFENDANT—APPELLANT

versus

ADHINDRA NATH MUKHURJI AND

OTHERS — PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 59, 67,

RAM NARAYAN SINGH v. ADHINDRA NATH.

100—Mortgage - Advance, recital of—Covenant for possession and discharge of debt by profits of usufruct—Document inoperative in law—Personal covenant—Charge.

A deed of mortgage provided (1) that the mortgagee was to remain in possession of the properties mortgaged for a term of seven years and to repay himself the money advanced on the security by collecting the rents and cesses thereof; (2) that the mortgagor was to be liable for any decrease in the *jumma* of the village with interest and for any collection made by himself or his heirs contrary to the terms of the document. The mortgage-deed was not attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The mortgagees remained in possession for the agreed term and, not being able to satisfy the debt from the profits of the mortgaged properties, they instituted the present suit to recover the balance due from the properties or, in the alternative, for a decree for money against the mortgagor personally.

Held, (1) that the document was a usufructuary mortgage within the meaning of section 67 (a) of the Transfer of Property Act, which could not be enforced as a mortgage by its not conforming to the provisions of section 59 of the Act; [p. 902, col. 2.]

(2) that the document did not create a charge within the meaning of section 100 of the Transfer of Property Act; [p. 903, col. 1.]

(3) that it could not be inferred from the recital of the advance that the parties intended that the mortgagor was to be personally liable and that, except to the extent and in one or other of the events mentioned in the document, the mortgagor was not personally liable for re-payment of the debt. [p. 903, col. 2.]

Appeal heard *ex parte* by special leave from a judgment and decree of the High Court, Calcutta, dated August 30, 1911, reported as 13 Ind. Cas. 440, varying those of the Court of the Subordinate Judge of Hazaribagh, dated June 30, 1910.

FACTS are sufficiently set forth in their Lordships' judgment.

Mr. De Gruyther, K. C. (with him Mr. Dube), for the Appellant.—There was no personal covenant to pay the loan. There was no personal liability to repay the amount borrowed. The real contract was that the sum was to be realised in a specified manner. The mortgagees remained in possession for the stipulated period and must be taken to have realised the amount out of the mesne profits. This point was decided in *Narotam Dass v. Sheo Pargash Singh* (1) and *Kalka Singh v. Paras Ram* (2). Reference was also made to the Bengal Tenancy Act (VIII of 1885), section 66.

The Respondent did not appear.

(1) 11 I. A. 83; 10 C. 740; 8 Ind. Jur. 275; 4 Sar. P. C. J. 522; *Ralique & Jackson's P. C.* No. 78.

(2) 22 I. A. 68; 22 C. 434.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from an order of the High Court at Calcutta, dated the 30th August 1911,* which set aside a preliminary decree of the Subordinate Judge of Hazaribagh, dated the 30th June 1910, in a suit brought upon a mortgage, and remanded the case to the Court of the Subordinate Judge to be dealt with in accordance with the directions contained in the judgment of the High Court. The respondents, who are the plaintiffs, have not appeared.

The deed upon which the suit was brought was made on the 14th April 1896 by Maharaja Nam Narayan Singh in favour of Rai Babu Jadu Nath Mukhurji, a Government Pleader who had been employed as a Pleader by the Maharaja. The consideration was Rs. 1,30,000, which were advanced by Jadu Nath Mukhurji to Maharaja Nam Narayan Singh. The principal moneys, together with interest, at the rate of 10 annas per centum per mensem were to be repaid, as provided by the deed, by and out of the rents and cesses of certain *mokurari* villages of Maharaja Nam Narayan Singh, which were mortgaged with possession to Jadu Nath Mukhurji. A schedule to the deeds shows how the repayment with interest was to be effected, and that on the determination, on the 14th January 1903, of the period for which the mortgage was granted, it was contemplated that the debt with interest would be satisfied, and a balance of Rs. 230-11-3 would be payable to the Maharaja by Jadu Nath Mukhurji. The total period for which the mortgage was granted was from the *Sambat* year 1953 to the *Sambat* year 1959, that is, from A. D. 1896 to the 14th January 1903, and the times when possession of the different *mokurari* villages was to be given to Jadu Nath Mukhurji were specified.

Having regard to the claim which has been made in this suit, the following extracts from the deed appear to their Lordships to be of importance:—

"It is desired that the said Pleader *zarbarnadar* should realise in full his dues, principal with interest, by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof. The details of

* See 13 Ind. Cas. 440—Ed.

RAM NARAYAN SINGH v. ADHINDRA NATH.

the time when and the manner in which the principal and interest will be realised by the said Pleader *zarbarnadar* are given at the foot of this deed. The specifications of the villages with *jummabandis*, *pergunnahs*, stations, sub-registry, district registry, and *zillahs* wherein the said villages lie are given herein below. The said Pleader *zarbarnadar* should realise year after year from the *elakadars* and tenants mentioned in this deed in accordance with the above specifications. If any *elakadars* or tenants mentioned in this deed put off paying the rents, &c., then it is and will be in the power of the said Pleader *zarbarnadar* to realise the same with interest, damages, and costs by instituting suits in Court in his own name as *zarbarnadar* plaintiff, with prayer for ejectment or in any other proper way. In case of ejectment, the said Pleader *zarbarnadar* will realise the *zarbarnadar* money from the *kham tahsil* or from *thikadar* of such village, and any amount of excess *jumma* resulting from the *kham jumma* or *thikadari jumma* in respect of the resumed villages over the *jumma* mentioned in the bond, whatever it may be, shall be paid on taking receipt by the said *zarbarnadar* or his heirs to me, the executant, or my heirs, year after year. I, the executant, will give the *thicca pottah* of the resumed villages. The *zarbarnadar* shall have no right to grant the *thicca pottah* of such villages. If, for any reason, the *jumma* of any village as mentioned in the bond decreases, the said *zarbarnadar* shall be entitled to get from me, the executant, the amount of decrease with interest at the above-mentioned rate. After the expiry of the term of the *zarbarna*, I, the executant, shall have the right to take possession of the resumed villages as well as of the other villages mentioned in this bond on account of the expiry of the term and redemption of mortgage, and the said Pleader *zarbarnadar* shall have no right whatever to the same.

"During the term of the *zarbarna*, I, the executant, or my heirs and representatives, shall on no account collect the rents with cesses of the *zarbarna* properties mentioned in this bond.

"If by mistake I, the executant, or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate to

the said Pleader *zarbarnadar*. Except in such a case for no other reason and on no other account, the *zarbarnadar* has and shall have any claim whatever against me, the executant, or my heirs and representatives, on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void. The said Pleader *zarbarnadar* shall not be in any way liable for the Government revenue, Road and Public Works cesses or any other public demand. These things shall concern me, the executant. The sum of Rs. 230-11-3, the excess amount payable by the *zarbarnadar* to me, the executant, in 1959, as stated in the account mentioned in this deed, shall be paid to me, the executant, on taking receipt by the said *zarbarnadar* in *Pous* of the said year. In case of default on the due date aforesaid, interest at the above rate up to the date of realisation shall be paid on the excess amount by the *zarbarnadar*."

The mortgage was in their Lordships' opinion an usufructuary mortgage within the meaning of section 67 (a) of the Transfer of Property Act, 1882, but as it was not attested by at least two witnesses, as required by section 59 of that Act, it was not enforceable as a mortgage. However, possession of the respective *mokurari* villages was at the time specified in the mortgage given to Jadu Nath Mukhurji. Except in the events mentioned in the extracts which have been set out above, Maharaja Nam Narayan Singh did not bind himself personally to repay the mortgage-money or any of it. The clear intention of the parties, to be inferred from the deed, was that the mortgage-money should be repayable from the usufruct and not personally by the Maharaja. On the termination of the mortgage period possession of the *mokurari* villages which had been mortgaged, was given to the Maharaja or his representatives. Jadu Nath Mukhurji died in 1902.

On the 13th January 1909, this suit was instituted against Raja Ram Narayan Singh, son of Maharaja Nam Narayan Singh who had died. The plaintiffs, who claim to represent Jadu Nath Mukhurji, alleged in their plaint that Rs. 55,272-14-9 only had been realised under the deed, and prayed for the following reliefs;—

RAM NARAYAN SINGH v. ADHINDRA NATH.

"(a) That a decree be passed for Rs. 1,57,985-5-3, or a decree be passed ordering, according to Order XXXIV, rule 4, of the Code of Civil Procedure, 1908, that (1) an account be taken of what will be due to the plaintiffs for principal and interest on the bond (the mortgage-deed) and for cost of the suit; that (2) defendant do pay into Court the amount so due on a day within six months from the date of the decree; that (3) in default of payment aforesaid the charged properties, as per Schedule B, or a sufficient part thereof be sold and the sale-proceeds be applied in payment of what is declared due to the plaintiffs as aforesaid, together with subsequent interest and subsequent cost.

"(b) That if in the opinion of the Court the plaintiffs be not entitled to a decree under Order XXXIV, rule 4, a simple money-decree for the amount of Rs. 1,57,985-5-3, or whatever may be due with cost and subsequent interest be passed against the defendant, to be realised out of the properties which devolved on him after his father's death."

In order to understand the object and meaning of these alternative claims it must be mentioned that the plaintiffs' case was that the deed of 14th April 1896 was not a usufructuary mortgage, but that it had created a charge within the meaning of section 100 of the Transfer of Property Act, 1882, upon the *mokurari* villages. It had, however, been treated by Maharaja Nam Narayan Singh and Jadu Nath Mukhurji as a usufructuary mortgage, and under it Jadu Nath Mukhurji obtained and held possession of the *mokurari* villages, and it contained the terms upon which the Rs. 1,30,000 were advanced and the terms upon which that advance was to be repaid. That document certainly did not create a charge within the meaning of section 100 of the Transfer of Property Act, 1882; it was a usufructuary mortgage, which could not be enforced as a mortgage. Even if it could be regarded as an enforceable usufructuary mortgage the plaintiffs could not, by reason of section 67 (a), institute a suit for sale based upon it.

Their Lordships are in this appeal placed in a disadvantageous position by reason of the respondents not having appeared, but it is necessary for them to consider whether the plaintiffs have in their plaint stated any

cause of action which is shown by their plaint to be maintainable and not barred by limitation, and for this purpose it is necessary to consider the causes of action which are alleged in the plaint and the agreement upon which the Rs. 1,30,000 were advanced, which is to be found in the document of the 14th April 1896. The Subordinate Judge and the High Court have assumed, from the mention in that document that the Rs. 1,30,000 had been advanced, that it might be inferred that it was the intention of the parties that the Maharaja Nam Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Nam Narayan Singh did not intend that he should be personally liable for the repayment of any portion of the money advanced, except to the extent and in one or other of the events mentioned in the extracts which have been already given, and that Jadu Nath Mukhurji was, in advancing the Rs. 1,30,000, content to rely upon the security of a usufructuary mortgage of the *mokurari* villages. Although the document of the 14th April 1896 was, by reason of its not having been attested as required by the Transfer of Property Act, 1882, not enforceable as a mortgage, Jadu Nath Mukhurji got possession under it of the *mokurari* villages, and held possession for the agreed period.

The case, which the plaintiffs attempted to make in the Courts below, was substantially based upon the existence of a personal liability in debt on the part of the mortgagor even after the determination of the period of the usufructuary mortgage and arising by implication from its terms. Since in their opinion this case fails, their Lordships think it unnecessary to discuss the other causes of action pleaded, which, though possibly capable of being sustained in other suits if brought within the periods of limitation, are not established in the present suit. It is enough to add that their Lordships are not satisfied that any of these alleged causes of action, even if they were otherwise maintainable, were not barred by limitation when this suit was instituted.

An examination of the schedule attached to the plaint shows that the amount claimed is to a considerable extent composed of

SOHNA MAL V. NANAK CHAND.

charges in respect of collection expenses, of costs of suits, of interest upon such collection expenses and costs, and of compound interest.

Lokendra Nath Mukhurji, a son of Jadu Nath Mukhurji, in his evidence stated that when his father died in 1902 all his books were with him, and they were not found after his death, and admitted in cross-examination that in a previous suit he had deposed that the *zabdharna* (usufructuary mortgage) account was in a state of confusion, "and that was sometime in 1906." This may account for the vague nature of the allegations in the plaint, and for the delay in instituting the suit.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the order of the High Court and the preliminary decree of the Subordinate Judge should be set aside and the suit should be dismissed with costs throughout.

The respondents must pay the costs of the appeal.

Appeal allowed; Suit dismissed.

Solicitors for the Appellant: Messrs. Barrow, Rogers and Neville.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2318 OF 1913.

July 30, 1915.

Present:—Mr. Justice Shadi Lal and

Mr. Justice LeRossignol.

SOHNA MAL—PLAINTIFF—APPELLANT

versus

NANAK CHAND—DEFENDANT—

RESPONDENT.

Punjab Courts Act (III of 1914), s. 41 (1), (3)—Point of custom overlooked or neglected by lower Court—Appeal, second, whether competent without certificate—Remand.

Though under section 41 (1) and (3) of the Punjab Courts Act, the Chief Court has no jurisdiction, in the absence of a certificate, to decide the 'existence or validity' of a custom, it is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected by the lower Court. [p. 905, col. 1.]

Second appeal from the decree of the Divisional Judge, Gujranwala, at Lahore, dated the 11th July 1913.

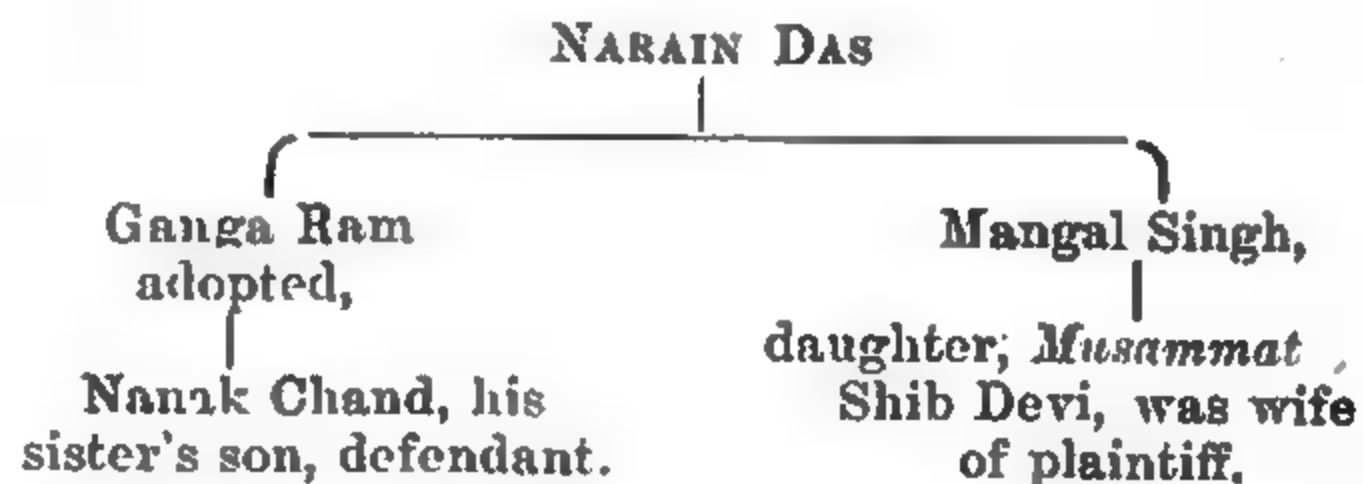
Messrs. Fazl-i-Hussain and Gokal Chand Narang, for the Appellant.

Messrs. Nanak Chand, Hukam Chand and Mehr Chand, for the Respondent.

JUDGMENT.

LeROSSIGNOL.—In this appeal a preliminary objection that no appeal lies in the absence of a certificate is raised by the respondent.

The facts concisely put are as follows:—



Mangal Singh died in 1907, bequeathing all his property to his daughter. On her death in 1911, mutation was made in defendant's favour and in this suit plaintiff claims her property. The first Court framed an issue on the power of Mangal Singh to execute a Will in his daughter's favour, and on the results flowing from the bequest, if found to be valid, and another general issue, whether plaintiff was his wife's heir *qua* the property bequeathed.

The first Court found that the parties were governed by custom and that Mangal Singh had no power to bequeath his ancestral immoveable property to the detriment of his reversioners. The first Court further held that an adopted son could succeed collaterally and it quoted the *riwaj-i-am* as its authority.

The plaintiff's suit was accordingly dismissed and an appeal was preferred to the Divisional Judge who dismissed it, holding that collaterals excluded daughters, but giving no finding on the point of collateral succession by an adopted son.

This second appeal was then preferred to this Court and in it the whole question of custom is challenged including the right of an adopted son to succeed collaterally.

Now if the phrase "an appeal regarding the existence or validity of a custom" be taken in its ordinary sense, this is an appeal regarding the existence or validity of custom.

But it is argued that though it is an appeal regarding a custom in one sense, it is not so in another sense, inasmuch as this Court is not asked in the appeal to adjudicate on the existence or validity of the alleged custom but is asked merely

NAG NARAIN v. JUNG BAHADUR SAHAI.

to order the lower Court to come to a finding on those points.

The natural meaning of section 41 (1) and 41 (3) of the Punjab Courts Act appears to be—

1(a) Even though the decision on custom by the lower Appellate Court is wrong,

1(b) Even though the lower Appellate Court has failed to determine a material point of custom,

1(c) Even though the lower Appellate Court's procedure is marred by grave irregularities,

still this Court shall not interfere unless the certificate has issued.

But the section is susceptible of another construction, viz., though the lower Appellate Court has committed all the above detailed errors still, unless the certificate was issued, this Court shall not decide the question of custom, i.e., have the final word in the matter, but short of interference on the question of custom, shall not be debarred from exercising its general power of control.

The possibility of the first Court of Appeal's entire failure to decide a point of custom furnishing the aggrieved party with no means of redress can hardly have been contemplated by the Legislature, consequently we feel justified in interpreting the section to mean that though this Court has no jurisdiction, in the absence of a certificate, to decide the existence or validity of a custom, it is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected.

In this case, therefore, we accept the appeal, set aside the decree of the lower Appellate Court and remand the case for re-disposal after decision on the question whether an adopted son among the parties succeeds such to his adoptive father's collaterals.

Costs to follow final event. Stamps on appeal to be refunded.

Appeal accepted; Case remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 45 of 1914.

May 17, 1916.

Present:—Mr. Justice Atkinson.

Lala NAG NARAIN—DEFENDANT
—APPELLANT

versus

Lala JUNG BAHADUR SAHAI AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 65—Non-transferable holding—Assignment of proprietary right—Sale in execution of rent-decrees by assignee and assignor—Delivery to purchaser at assignee's sale before institution of assignor's suit, effect of.

The plaintiff and his co-sharers leased their proprietary right in a holding to the Cawnpore Factory. The latter brought a suit to recover arrears of rent due from the tenant after the lease and obtained a decree. In execution of the decree they purchased the holding. Subsequently plaintiff brought a suit to recover arrears of rent due to him and the other co-sharers prior to the lease and he obtained a decree in execution whereof he purchased the same holding.

Held, that, the interest of the tenant having been extinguished and eliminated in the course of the execution of the decree obtained by the Cawnpore Factory, there was no subject-matter in existence on which the plaintiff's decree could operate to effectually vest in the plaintiff any interest whatsoever. [p. 906, col. 1.]

Second appeal from a decision of the District Judge, Saran, dated the 3rd May 1913, confirming that of the Munsif, Chapra, dated the 31st August 1912.

Mr. Muhammad Mustafa Khan, for the Appellant.

Messrs. Nirsu Narain Singh and Harnarain Persad, for the Respondents.

JUDGMENT.—The facts of this case are very peculiar and require to be stated with some little care.

The action was brought by Lala Jung Bahadur Sahai for a declaration of title and for confirmation of possession of a certain holding which formerly was occupied by a tenant of his and other co-sharers in this property.

It appears that the plaintiff and his other three co-sharers leased their proprietary right in this holding to a corporate body called the Cawnpore Factory, and as lessees they became entitled to claim the rent from the occupying *ryot*, and in pursuance of the title which they acquired they proceeded in default of payment of the rent to recover from the *ryot* in a rent suit a decree for the arrears due; and they obtain.

PUTHENPURAYIL V. KANDIYAL.

ed a decree for the amount of the rent claimed. The holding is a non-transferable holding, and of that there is no dispute upon either side. Accordingly in the rent suit instituted by the Cawnpore Factory against the tenant the Cawnpore Factory in the process of execution purchased all the estate and interest of the tenant in that holding. The rent that was sued for was the rent that accrued due after the date of the lease. It appears that the Cawnpore Factory, in pursuance of the purchase which they made in the execution proceedings in the rent suit, obtained on the 3rd of October 1909 possession of the holding, and neither the plaintiff nor his other co-sharers although aware of this sale and purchase offered any objection; and they appear to have acquiesced in the arrangement. The plaintiff as one co-sharer subsequently brought an action against the tenant of the same holding to recover an arrear of rent due to him and his other co-sharers in respect of rent due prior to the granting of the lease to the Cawnpore Factory and he obtained a decree in respect of his share and interest in the rent of this holding; and in the course of that proceeding he is alleged to have become on the 24th of January 1910 the purchaser of the tenant's interest in the holding, which was antecedently sold in pursuance of the decree obtained by the Cawnpore Factory, and the plaintiff claims on the 20th of August 1910 to have got possession of the holding under his purchase in execution of the rent-decree obtained by him. In the view I take of this case, I may be right or I may be wrong, the Cawnpore Factory purchased all the estate and interest of the tenant in the holding on the 20th of July 1908. I fail to see what interest there was in that tenant's holding upon which the decree obtained by the plaintiff in this action in January 1908 could in any way operate whatsoever. The interest of the tenant had been extinguished and eliminated in the course of the execution and there was no subject-matter in existence on which the decree could operate to effectually vest in the plaintiff any interest whatsoever.

The Cawnpore Factory no doubt on the 22nd of October 1910 contracted and agreed

to sell and conveyed and gave delivery of possession to the present appellant, the defendant in this suit, of the holding which they had purchased. Therefore having regard to the view I take of this case, the plaintiff acquired no interest whatsoever in the holding which he is alleged to have purchased. And it appears to me that section 65 of the Bengal Tenancy Act does not afford the plaintiff the right to pursue his remedy by way of sale of the holding for arrears of rent due prior to the lease to the Cawnpore Factory, when the property has passed to a purchaser in pursuance of the execution of the decree obtained by the Cawnpore Company. Consequently his action for title cannot be maintained and it follows that this action must fail. No doubt if the landlords or the co-sharers had taken proper steps as provided by the Bengal Tenancy Act they might have safeguarded their interests. They have thought fit to embark upon a proceeding which, in my opinion, has made all their efforts entirely abortive. I regret that I must state that I received no assistance during the course of the argument from the Vakil on behalf of the plaintiff. Not being myself very familiar with the decisions in India on this land Code, I arrived at the conclusion I did upon what appeared to me to be legal principle mingled with a little common sense.

I shall, therefore, allow this appeal and dismiss the action with costs in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1044 OF 1914.

March 22, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

PUTHENPURAYIL PARKUM CHATHU
CHOYICHIMKANDIYAL PARKUM
POOVAMULLA—DEFENDANT No. 2

—APPELLANT

versus

KANDIYAL KOOVAN VENGADAM
PAKKIRI AND ANOTHER—DEFENDANT No. 1

AND PLAINTIFF—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27, illus. (3)—Trans.

PUTHENPURAYIL V. KANDIYAL.

fer of Property Act (IV of 1882), ss. 3, 40, 54—Vendor and purchaser—Contract for sale of land to mortgagee in possession—Specific performance against subsequent purchaser—Constructive notice of rights and equities of party in possession.

A constructive notice, under section 3 of the Transfer of Property Act, includes cases of gross negligence in making further enquiry about facts of which a person has actual notice and a wilful abstention from enquiry for the very purpose of avoiding notice. [p. 907, col. 2.]

Jones v. Smith, 1 Hare 43 at p. 62; 11 L. J. Ch. 83; 6 Jur. 8; 58 R. R. 22; 66 E. R. 943, affirmed, 1 Ph. 244; 12 L. J. Ch. 381; 7 Jur. 431; 41 E. R. 624, referred to.

The fact that a person other than the vendor is in possession of the property is sufficient to put a purchaser on enquiry as to the nature and extent of his interest, and if that enquiry is not pursued, the purchaser will be affected with notice of the title, if any, under which possession is enjoyed or of any contract the person in possession may have entered into for the purchase of the property. [p. 908, col. 1.]

A mortgagee in possession who has entered into an agreement to purchase the mortgaged property can enforce it as against a subsequent purchaser. The purchaser is affected with constructive notice of the contract on the principle above laid down, and cannot, in a suit for specific performance, be heard to say in defence that he was entitled to assume that the mortgagee continued in possession as mortgagee and had not acquired any other title. [p. 907, col. 2.]

Barnhart v. Greenshields, 9 Moore P. C. 18; 105 R. R. 1; 14 E. R. 204; *Magu Brahma v. Bholi Das*, 20 Ind. Cas. 195; 19 C. L. J. 352; 18 C. W. N. 657; *Daniels v. Davison*, 10 R. R. 171; 16 Ves. 249; 33 E. R. 978; *Kondiba v. Nana Shidrao*, 27 B. 408; 5 Bom. L. R. 269; *Baburam Bag v. Madhab Chandra Pallay*, 19 Ind. Cas. 9; 40 C. 665; 18 C. W. N. 741; *Nandli Reddy v. Thimmakka*, 22 Ind. Cas. 250; 14 M. L. T. 477, referred to.

A contract for the sale of immoveable property, though it does not create a charge on or interest in the property under the last paragraph of section 54 of the Transfer of Property Act, gives the obligee the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property under paragraph 2 of section 40, and the obligation to execute a conveyance may be enforced against a transferee with notice of that obligation. [p. 908, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Malabar, in Appeal Suit No. 99 of 1912, preferred against that of the District Munsif, Kuthuparamba, in Original Suit No. 918 of 1910.

Mr. J. L. Rosario, for the Appellant.

Mr. T. Eroman Unni (with him Mr. C. V. Ananthakrishna Ayyar), for the Respondents.

JUDGMENT.—This is an appeal by the 2nd defendant in the suit which was brought for the specific performance of a contract of sale entered into by the 1st defendant

with the plaintiff on 4th July 1910. The first defendant is the Jenmi of the property which was held on *kanom* by the plaintiff. The plaintiff's case was that the 1st defendant agreed to sell the property to him for Rs. 400. The 2nd defendant resisted the suit on the ground that he had purchased the property on 4th September 1910 from the 1st defendant without notice of the alleged agreement for sale. The lower Courts have found that the agreement set up by the plaintiff is true, and this finding cannot be questioned in second appeal. The Subordinate Judge held that there was no satisfactory evidence to show that the 2nd defendant had actual notice of the agreement to sell but that he must be deemed to have had constructive notice of the agreement since, although he was aware of the plaintiff's possession, he had abstained from making such enquiry of the plaintiff as he was bound to do. It appears that there was a proposal to sell the property to a man named Kunhali but the transaction fell through. The 2nd defendant in his evidence admitted "that he knew that the plaintiff was the *kanomdar* (mortgagee) of the plaintiff property; and that he did not ask plaintiff or Kunhali why they did not want to purchase the property, as he was afraid that, if he did so, he would not get the property.

The argument advanced by Mr. Rosario for the appellant, if we understand it correctly, was that the appellant was not bound to make any further enquiry and that he was entitled to assume that the plaintiff continued in possession as mortgagee and had not acquired any other title. We do not think that this contention can be upheld. The question for decision is whether the appellant can claim to be a transferee without notice. Section 3 of the Transfer of Property Act enacts that a "person is said to have 'notice' of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it." In *Jones v. Smith* (1), Wigram, V. C., classified the cases of constructive notice as follows: *First*, cases in which the party charged had actual

(1) 1 Hare 43 at p. 62; 11 L. J. Ch. 83; 6 Jur. 8; 58 R. R. 22; 66 E. R. 943, affirmed, 1 Ph. 244; 12 L. J. Ch. 381; 7 Jur. 431; 41 E. R. 624.

PUTHENPURATHIL V. KANDIYAL.

notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to ■ knowledge of which he would have been led by an enquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice: and, *secondly*, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice. Illustration 3 to clause (b), section 27, of the Specific Relief Act is in these terms:—"A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no enquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C." It has been held that the fact that another person is in possession is sufficient to put a purchaser on enquiry as to the nature and extent of his interest and if that enquiry is not pursued, the purchaser will be affected with notice of the title, if any, under which possession is enjoyed or of any contract the person in possession may have entered into for the purchase of the property. See *Barnhart v. Greenshields* (2). If a person purchases and takes ■ conveyance of an estate which he knows to be in the occupation of a person other than the vendor, he is bound by all the equities which the person in such occupation may have in the land: for possession is *prima facie* seisin and the purchaser had actual notice of a fact by which the property was affected and he is bound to ascertain the truth. As observed by Justice Mookerjee in *Magu Brahma v. Bholi Das* (3): "The extreme length to which this doctrine has been carried is illustrated by the decision of Eldon, L. C., in *Daniels v. Davison* (4) where it was ruled that the purchaser has constructive notice, not merely of the title of the tenant in occupation, but also of a contract into which he had entered for the purchase of the estate." This doctrine has been applied by the

Indian Courts in the cases of *Kondiba v. Nana Shidrao* (5); *Baburam Bag v. Madhab Chandra Pallay* (6); *Magu Brahma v. Bholi Das* (3) and *Nandi Reddy v. Thimmakka* (7), which were cited at the hearing by the Respondents' Vakil. In *Magu Brahma v. Bholi Das* (3) it was held that "when a person purchases property, where a visible state of things exists, which could not legally exist unless the property were subject to some burden, he is taken to have notice of the extent and nature of that burden. And thus if a person other than the vendor is in possession, it is sufficient to put ■ purchaser on enquiry as to the nature and extent of his interest and the purchaser is bound by all the equities which the person in such occupation may have in the land." In *Nandi Reddy v. Thimmakka* (7) Benson and Sundara Aiyar, JJ., held that where a lessee is in possession of the land, this in law is sufficient notice of the rights therein and the purchaser is bound to enquire of him regarding the nature of his right. Some arguments were addressed to ■ by the appellant's learned Vakil based on the provision in the last sentence in section 54 of the Transfer of Property Act, which enacts that a contract for the sale of land does not, of itself, create any interest or charge on the land. Such a contract, however, gives the obligee (contracting purchaser) "the benefit of an obligation arising out of contract and annexed to the ownership of immovable property" "though not amounting to an interest therein" (see section 40 of the Transfer of Property Act) and the obligation (in this case the obligation to execute ■ conveyance) may be enforced against ■ transferee with notice of that obligation.

We think that the decision of the lower Court was right and that the appellant must be deemed to have purchased the property with notice of the agreement to sell and cannot resist the plaintiff's suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) 27 B. 408; 5 Bom. L. R. 269.

(6) 19 Ind. Cas. 9; 40 C. 565; 18 C. W. N. 341.

(7) 22 Ind. Cas. 250; 14 M. L. T. 477.

(2) 9 Moore P. C. 18; 105 R. R. 1; 14 E. R. 204.
(3) 20 Ind. Cas. 195; 19 C. L. J. 352; 18 C. W. N. 657.

(4) 10 R. R. 171; 16 Ves. 249; 33 E. R. 978.

RAMTAHAL V. GANOO SAHU.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3103 OF 1914.

April 25, 1916.

Present:—Mr. Justice Mullick.

RAMTAHAL SAHU—PLAINTIFF—

APPELLANT

versus

GANOO SAHU—DEFENDANT 2ND PARTY—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Claim for cancellation of document and damages—Appeal, second—Abandonment of prayer for cancellation—Damages, claim for, less than Rs. 500—Jurisdiction.

The plaintiff sued for cancellation of a *kabuliyat* as against defendant No. 1 and for damages to the extent of Rs. 250 ■ against defendants Nos. 1 and 2. In second appeal the plaintiff abandoned his claim as against defendant No. 1:

Held, that no second appeal lay as against defendant No. ■ alone, as the claim against him was a matter cognizable by a Court of Small Causes exclusively.

Mr. Gaur Chandra Pal, for the Appellant.

Mr. Susil Madhav Mullick, for the Respondent.

JUDGMENT.—The plaintiff is a person who states that he has executed a *kabuliyat* in favour of defendant No. 1, who is the *mokuraridar* of a certain *hat*, giving him the right to realise ■ certain cess or toll from persons who come to sell their produce at the *hat*.

Defendant No. 2 is a person who is alleged to have executed another *kabuliyat* in favour of defendant No. 1 in respect of the same right.

The plaintiff sues defendant No. 1 for cancellation of his *kabuliyat* for breach of condition and defendants Nos. 1 and 2 for damages.

The learned District Judge finds that the cess is illegal and has dismissed the whole suit. The present second appeal is preferred by the plaintiff.

It is to be noted at the outset that the plaintiff has not joined in this appeal the *mokuraridar* (defendant No. 1); therefore so far as the cancellation of the *kabuliyat* given to defendant No. 1 and damages against defendant No. 1 are concerned, the plaintiff cannot get any relief.

There remains the claim so far as it concerns the defendant No. 2. Now defendant No. 2 is with regard to the plaintiff a complete stranger and the suit as against him must be treated purely as one for

SAKHAWATRAI V. PARTABRAI.

damages. Now the amount of damages claimed is Rs. 50 ■ year for five years, that is, Rs. 250, a matter cognizable by ■ Court of Small Causes exclusively, therefore, under section 102 of the Civil Procedure Code no second appeal in regard to this claim lies. The appeal, therefore, as regards defendant No. 2 is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NOS. 22 AND 29 OF 1914.

October 29, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Boyd, A. J. C.

Thakur SAKHAWATRAI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Thakur PARTABRAI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition—Family temple, mode of partition of—Right of family members to perform ordinary worship in such temple.

Under Hindu Law a place of worship, such as a private temple of a family, cannot be divided by metes and bounds so long as some of the family members desire its continuance. [p. 911, col. 1.]

Anund Moyee Chowdhrao v. Boykantnath Roy, 8 W. R. 193, referred to.

The holders of such property are in the same position as the holders of an hereditary office and the only way of subjecting such property to partition is by means of a system of management by each member in rotation. [p. 911, col. 1.]

Mancharam v. Pranshankar, ■ B. 298; *Sri Sethuramaswamy Iyer v. Sri Meruswamy Iyer*, 4 Ind. Cas. 76; 34 M. 470; 6 M. L. T. 319; 20 M. L. J. 108; *Ramanathan Chetty v. Murugappa Chetty*, 27 M. 192, referred to.

Even where the property is being enjoyed by rotation all members of the family are entitled to perform ordinary worship in the temple at any time, though it may not be their turn of management. [p. 911, col. 1.]

Damodaradas Maneklal v. Uttamram Maneklal, 17 B. 271 at p. 288, referred to.

Appeal against the decree of the Joint Judge, Larkana.

Mr. Rupchand Bilaram, for the Appellants.

Mr. Lalchand Hasomal, for the Respondents.

JUDGMENT.

BOYD, A. J. C.—The property of which plaintiffs sought partition was ■ temple, con-

SAKHAWATRAI v. PARTABRAI.

sisting of (1) a room, a verandah and a yard (the room containing 2 sacred pictures and a perennial light) and (2) a small house (quite near the temple) used as servants' quarters. The lower Appellate Court decreed partition of (2) but refused to decree partition in the usual way of (1), on the ground that it was used for a religious purpose, and ordered a simple scheme of enjoyment and management by rotation. Both sides appealed. Plaintiffs' appeal is No. 29 of 1914, which was heard with this appeal which was made by the defendants. Plaintiffs demand partition in the usual way of all the property. Defendants in their petition of appeal do not make it very clear what they do want, except that the suit should be dismissed.

In arguments, however, their Pleader has explained that he does not much object to the rotation arrangement, provided that defendants are never excluded from the temple and are always allowed to perform their devotions in it. The temple is at present used for the worship of certain river Gods.

Mr. Lilaram, the Judge of the lower Appellate Court, has gone into the question of the rights of the public or rather of those members of the public who worship the water Gods. He found that they cannot worship in this temple as of right; and he quotes *in extenso* paragraph 438 of Mayne's Hindu Law: saying that the temple is the family property of the parties who use it for a religious purpose, but may cease so to use it when they wish and may exclude or admit the public at their pleasure. Unless forced to do so, we are unwilling to decide this question although we think that it is open to us to decide it, for the *shewaks* or devotees are not parties to this suit; and it was stated in argument that they propose suing this family to establish their supposed rights. Of course no decision in this suit would bind them; but still it is inadvisable to say anything to the prejudice of either them or the present parties. And we think that the present decree (so far as it relates to rotation) can be confirmed on the hypothesis that the temple is a private temple, as the learned Judge below thought. Neither party, we note, press for a decision on the question of the rights of the *shewaks*; nor would its decision either way affect the decree which we intend to pass.

Now the important fact is that the family do use the property in suit for a religious purpose. Even the servants' quarters are so used, being required by the *pujari* for the time being. Let it be granted that the family could agree to cease using the property in this manner. But they do not so agree. Defendants wish to continue the worship of the river Gods as it is now performed. Plaintiffs do not. At least that is what their attitude amounts to; for the partition which they demand would make it utterly impossible to continue it. It would not be feasible to divide up the small room nor the pictures nor the perennial light. Plaintiffs are really trying to abolish the present practice of worship. The question is whether defendants are justified in objecting to this.

I think they are, considering the highly religious character of Hindu family sentiment. There are very few authorities on the point. For, the Hindus being a religious people, such a dispute has hardly ever arisen. Mayne (paragraph 468, page 650, Edition 1914) says: "Where part of the property consists of idols and places of worship which are valuable from the respect attaching to their possessor, the members will be decreed to hold them by turns, the period of tenure being in proportion to their shares in the *corpus* of the property." A similar dispute arose in 1866 in *Anund Moyee Chowdhraie v. Boykantnath Roy* (1). It referred to a demand for partition of buildings used for worship. It was found that to divide them would render them utterly unsuited for the purpose of worship. The learned Judges held that under the Hindu Law places of worship were not divisible. They declined to permit the object for which the buildings were erected, to be neutralised by dividing them. They left them joint, advising (though not decreeing) a system of management by rotation. In the present case there is no doubt that the temple has for the last hundred years been used for the purpose of worship. So the considerations apply, this case being rather stronger as the place of worship is so small. The above decision, which has never been dissented from, appears thoroughly consonant with

(1) 8 W. R. 193.

JIWACH RAUT v. SUMRAN MANWAR.

Hindu sentiment; and I would follow it. A number of other cases have been cited before us; but they do not bear on the present point: they deal with property subject to a trust or dedicated to an idol and do not help us; for we are assuming that there was no trust for the benefit of the public and no one contends that the suit property was dedicated to an idol.

Accordingly, I would find that the temple and its contents cannot be divided by metes and bounds, as that would mean the abolishing of the practice of worship, which cannot be abolished as long as some of the family desire its continuance. Until they agree to stop that practice, their position is on the same plane as that of the holders of a hereditary office. And it has been held in well-known cases that the only way of subjecting a hereditary office to partition is "by means of the performance of the duties of the office by different co-parceners in rotation:" per Melvill, J., in *Mancharam v. Pranshankar* (2). And the same principle was laid down by Wallis and Sankaran Nair, JJ., in *Sri Sethuramaswamy Iyer v. Sri Meruswamy Iyer* (3) following the dictum of Bhashyam Ayyangar, J., in *Ramanadhan Chetty v. Murugappa Chetty* (4). The learned Judge below has adopted this method of partition; and to this extent I would confirm his decree.

I would vary it, however, by directing that the servants' quarters also should be enjoyed by rotation and should not be divided up. They are small and seem to be required by the *pujari* for the time being. They are practically an annexe to the temple.

I would also add to the decree a declaration that all members of the family shall be entitled to perform ordinary worship in the temple at any time, though they may not officiate as priests except in their turn, according to rotation. The officiator may or may not have power to exclude members of the public. But, the temple being a family temple, it seems only right that members of the family should always be admitted. A similar declaration was made in *Damodardas Maneklal v. Uttamram Maneklal* (5).

(2) 6 B. 298.

(3) 4 Ind. Cas. 76; 34 M. 470; 6 M. L. T. 319; 20 M. L. J. 108.

(4) 27 M. 192.

(5) 17 B. 271 at p. 288.

I would propose the following order ■ to costs. Parties to bear their own costs in the first two Courts and in the present appeal (made by defendants). In the other appeal (made by plaintiffs) plaintiffs to bear costs of both sides

PRATT, J. C.—I concur.

Decree varied

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1921 OF 1914.

April 25, 1916.

Present:—Mr. Justice Mullick.

JIWACH RAUT—PLAINTIFF—APPELLANT

versus

SUMRAN MANWAR—DEFENDANT—RESPONDENT.

Sale in execution of decree—Issue of sale certificate to purchaser—Possession, suit for—Plea of fraud and irregularity in conduct of sale—Burden of proof.

Plaintiff, the assignee of a decree, brought the judgment-debtor's property to sale in execution and purchased it himself. After obtaining the sale certificate he instituted the present suit for possession against the judgment-debtor. The defendant pleaded that the decree was obtained by fraud and that the sale was held without service of the usual notice on him:

Held, that as the plaintiff had obtained a sale certificate from Court, the onus lay on the defendant of proving his allegation. [p. 912, col. 1.]

Mr. Kulwant Sahay for Mr. Lakshmi Narain Singh, for the Appellant.

Messrs. Baikunth Nath Mitter and Naresh Chandra Sinha, for the Respondent.

JUDGMENT.—One Abdul Gafoor in 1895 got a decree in the Small Cause Court against the defendant in the present suit. He assigned that decree to the plaintiff, who in 1900 caused the land which is now in suit to be sold in auction and purchased it himself for Rs. 32. On the 14th of March 1901, the plaintiff got out a sale certificate of his purchase. He did not bring the present suit till the 9th of October 1912.

The defendant pleaded that Abdul Gafoor's decree was without his knowledge and without service of summons and that the sale at which the plaintiff had purchased was brought about without service of the usual notices.

JADAB SARDAR v. GOBINDA CHANDRA.

The learned District Judge affirming the decree of the Munsif has dismissed the plaintiff's suit; hence the present second appeal by the plaintiff.

It is clear that the learned District Judge has made an error in law in making the following observations with regard to the plaintiff's case:

"It was contended for the appellant that his title is proved by the sale certificate, but in view of the defence that the execution proceedings were without the knowledge of the defendant he must prove that these proceedings were legal. The mere presumption of the regularity of official acts is not sufficient." The plaintiff having obtained a sale certificate from Court the onus was clearly upon the defendant to prove that he was not bound by the decree.

It would seem from the judgment of the learned Munsif that in that Court the finding was that the plaintiff had suppressed not only the summons but also the sale notices, that is to say, the Munsif thought that the defendant had proved that the decree had been obtained by fraud.

If the learned District Judge intends to affirm that finding, he must do so after placing the onus upon the correct shoulders. His judgment as it stands would seem to show that he has placed the onus entirely upon the plaintiff. That, of course, is wrong.

The defendant must show affirmatively that the fraud which he pleaded was committed. As to what amount of evidence is necessary to establish that fraud is a matter entirely for the Trying Judge.

The case must, therefore, go back for a re-hearing with reference to the above observations.

It has been contended by the learned Vakil for the respondent that the judgment of the Court below might be supported on the ground that the present suit is not maintainable by reason of the provisions of section 47 of the Civil Procedure Code, which requires that plaintiff should apply to the Court for delivery of possession and that he cannot be allowed to ask for possession by bringing a separate suit.

Now the authorities upon this point are conflicting and I am informed by the learned Vakil that the matter has been referred to a Full Bench of this Court. But it is sufficient

for our purposes in the present appeal to observe that although in the written statement there is a general allegation that the suit is not maintainable, this particular ground that the suit is not maintainable because of section 47, Civil Procedure Code, has never been advanced in any of the Courts below. I do not, therefore, think that in second appeal I ought to allow the parties to raise it. If at the time of re-hearing the District Judge agrees to allow the parties to raise the point they will be permitted to raise it.

The result is that the appeal will be decreed and the case sent back to the lower Appellate Court for re-hearing. Costs will abide the result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1915.

May 25, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

JADAB SARDAR AND OTHERS—DEFENDANTS
Nos. 1 AND 2—APPELLANTS

versus

GOBINDA CHANDRA MONDAL AND
OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 49, 85—
Notice—Under-raiyat getting transfer of non-transferable
holding, whether can be ejected by landlord without
notice.*

Where the sub-lease to an under-raiyat granted by the raiyat of a non-transferable occupancy holding is not valid against his landlord under section 85 of the Bengal Tenancy Act, the landlord can eject the under-raiyat without any notice under section 49 of the Act on the raiyat transferring the holding to the under-raiyat. [p. 916, col. 2.]

Badan Chandra Das v. Rajeswari Debya, 2 C. L. J. 570; *Nilkanta Chaki v. Ghatoo Sheikh*, 4 C. W. N. 667, referred to.

Lal Mahomed Sarkar v. Jagir Sheikh Mallik, 2 Ind. Cas. 654; 13 C. W. N. 913; *Amirullah Mahomed v. Nazir Mahomed*, 31 C. 932; *Amirullah Mahomed v. Nazir Mahomed*, 34 C. 104; 3 C. L. J. 155; *Ram Udar Singh v. William Cox*, 27 Ind. Cas. 564; 19 C. W. N. 268, distinguished.

JADAB SARDAR v. GOBINDA CHANDRA.

Appeal against the decree of Mr. Justice Fletcher, dated the 30th April 1915, reported ■ 29 Ind. Cas. 466 in Appeal from Appellate Decree No. 1355 of 1913

FACTS are clear from the following judgment of the District Judge in appeal:—

"In this suit the plaintiffs sought to recover possession of some land on the basis of ■ *mourasi patta* from the *lakherajdar*.

The circumstances are as follows:—The *lakherajdar* is one Nakari Chakrabarti: under him, Sital Sardar, defendant No. 4, was ■ tenant; plaintiffs held plot 1 under Sital; defendants Nos. 1, 2 and 3 held plots 4 and 5 and part of plot 3 under Sital; and third persons held plot 2 and part of plot 3 under Sital. These facts are admitted.

With regard to the nature of Sital's interest, defendants say that he had a *mokarrari mourasi* interest under ■ *patta* of 1227, B. S. Plaintiffs say that his interest was not higher than that of a *raiyyat* with occupancy rights. Whatever were Sital's rights, he parted with his interest by sale to defendants Nos. 1 and 3. The *lakherajdar*, according to plaintiffs, then settled the land with the plaintiffs by a *patta*, dated 12th *Chaitra* 1317, B. S., on receipt of *salami*.

The case for the plaintiffs is that the defendants were under-*raiyyats* under Sital, and that when he surrendered the holding by selling it, their rights as under-*raiyyats* came to an end, and they are not entitled to any notice before eviction.

On the other hand, defendants assert that Sital had a transferable interest, and that in any case they are protected from eviction without notice.

The learned Munsif found that Sital's interest was not a permanent one, and that the *patta* produced by defendants was not reliable. He also found that the defendants were not entitled to notice before eviction. On these findings he decreed the suit. Defendants Nos. 1 and 2 have preferred this appeal.

Two questions arise: *viz.*, (1) was Sital's *patta* genuine? and (2) assuming that Sital had only the interest of a *raiyyat* with occupancy rights, what is the effect of the purchase by the defendants?

With regard to the *patta*, it is strange that it has never been produced before, never even shown to any one until the defendants made their purchase.

Then it is said to have been shown to the *mohurrir* who wrote the *kabala* executed by Sital in favour of defendants, but this *mohurrir* has not been examined. More strange still is the fact that defendants have not produced that *kabala*: this is very important because if Sital really had a *mourasi mokarrari* interest supported by a *patta*, reference must have been made in the *kabala* to the *patta*. The absence of the *kabala* leads to the inference that the *kabala* said nothing about the *patta*.

I agree with the Munsif in holding that the *patta* cannot be regarded as genuine.

It follows that Sital's interest was that of a *raiyyat* with occupancy rights, and defendants Nos. 1 to 3 were under-*raiyyats* under him. There is no custom proved of the transferability of occupancy rights. For the plaintiffs it is said that Sital's sale was ■ surrender and they are entitled to possession. For defendants it is urged that the plaintiffs' rights cannot be higher than Sital's and that they must first give notice to the under-*raiyyats*.

On behalf of the appellants two cases are quoted, *viz.*, *Lal Mahomed Sarkar v. Jagir Shikhh Mallik* (1) and *Amirullah Mahomed v. Nazir Mahomed* (2). These cases, however, are clearly distinguishable. In the former, the landlord of her own free will bought the rights of the plaintiff's landlord *raiyyat*, and in the second, too, the landlord bought an occupancy *raiyyat*'s rights at a private sale. In the present case the plaintiffs do not claim by purchase from Sital, but by surrender on the part of Sital, followed by settlement on the part of the *malik*.

The respondents rely on the case of *Nilkanta Chaki v. Ghatoo Sheikh* (3), where it was held that when a *raiyyat* resigns his *jote* the under-*raiyyat* does not become the tenant of the superior landlord, and has no right to remain on the land against the will of the superior landlord. This ruling is apposite, and accordingly I find that the

(1) 2 Ind. Cas. 654; 13 C. W. N. 913.

(2) 34 C. 104; 3 C. L. J. 155.

(3) 4 C. W. N. 667.

JADAB SARDAR V. GOBINDA CHANDRA.

defendants are liable to ejectment without notice.

The appeal, therefore, fails, and I dismiss it with costs."

On appeal to the High Court Mr. Justice Fletcher confirmed the decisions of the lower Courts, whereupon defendants Nos. 1 and 2 filed this Letters Patent Appeal.

Dr. Dwarka Nath Mitter and Babu Baikuntha Nath Mitter, for the Appellants.—The principal questions for decision in this case are (1): whether on the transfer of a non-transferable occupancy holding, a suit to evict the under-*raiya*t holding the land under an oral lease from the *raiya*t can be maintained without any service of notice under section 49 of the Bengal Tenancy Act. (2) Whether the landlord can settle the land without following the procedure laid down in section 87.

As regards the first point, under section 49 of the Bengal Tenancy Act the suit cannot be maintained without a notice to quit.

[MOOKERJEE, J.—When the sale of the occupancy right is not operative, and the defendant No. 4 has disappeared and the occupancy holding has ceased to exist, then the under-*raiya*t is brought face to face with the superior landlord. In such a case can you say that the landlord is still bound to treat you as an under-*raiya*t?]

By the transfer the holding of the occupancy *raiya*t, defendant No. 4, has ceased to exist for all purposes except for the purpose of the under-lease. His transfer cannot affect the right of the under-*raiya*t who cannot be ejected without a notice to quit: *Amirullah Mahomed v. Nazir Mahomed* (2).

[MOOKERJEE, J.—Section 85 of the Bengal Tenancy Act lays down that a sub-lease by a *raiya*t made without any registered instrument shall not be valid against his landlord unless made with the landlord's consent.]

The question is whether the abandonment by the *raiya*t could affect the rights of third persons, when such persons were *bona fide* on the land and when such rights were validly created.

[MOOKERJEE, J.—If you say that the under-*raiya*t remains an under-*raiya*t after the disappearance of the occupancy *raiya*t, then he will be an under-*raiya*t under the tenure-holder. But the landlord of an under-*raiya*t

must be a *raiya*t. Section 4 which classifies different classes of tenants under the Bengal Tenancy Act defines under-*raiya*ts as tenants holding immediately or mediately under *raiya*ts. So there cannot be an under-*raiya*t under a tenure-holder.]

I submit that the occupancy holding has been extinguished for all purposes except for the purpose of the under-*raiya*t interest. In *Lal Mahomed Sarkar v. Jagir Sheikh Mollik* (1), it has been held that when the landlord purchases the interest of an occupancy *raiya*t under him he cannot eject the under-*raiya*t. There, Jenkins, C. J., observes: "Even according to English Law in such a case though the *raiya*t's interest would for all other purposes disappear, it would continue for the purposes of the under-tenure."

[MOOKERJEE, J.—The under-lease is void as against the superior landlord. It is not binding upon him under section 85.]

Notwithstanding section 85 the under-*raiya*t cannot be treated as a trespasser, and he is entitled to a notice before he can be ejected. *Vide Fazel Sheikh v. Keramuddi Sheikh* (4).

Again, by assignment or surrender the *raiya*t cannot affect the interest of the under-*raiya*t which was validly created. *Vide Ram, Udar Singh v. William Cox* (5).

The same principle ought to apply to the case of abandonment. By abandonment the holding disappeared for all purposes except for the purpose of keeping alive or serving the rights of the under-lessee created by the occupancy *raiya*t. By abandonment the occupancy *raiya*t cannot confer on the landlord any higher right with respect to the sub-lease than he himself possessed. Section 22 of the Bengal Tenancy Act also says that in case of merger the rights of third persons are not prejudicially affected.

Babu Sarat Chandra Roy Chaudhry and Satya Charan Sinha, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case I think that the appeal should be dismissed in spite of the argument which Dr. Dwarka Nath Mitter has addressed to us. The plaintiffs obtained a settlement of the land from the admitted landlord in April 1911. Defendants Nos. 1 and 2 who are appealing to this Court obtained their title to the interest, which

(4) 6 C. W. N. 916.

(5) 27 Ind. Cas. 564; 19 C. W. N. 268.

JADAB SARDAR V. GOBINDA CHANDRA.

they now have, under defendant No. 4. Defendant No. 4 was a person who had the original right of occupancy and he sublet it to defendants Nos. 1 and 2; the plaintiffs are third persons; no objection can be taken to the proceeding by defendant No. 4 in subletting which created an interest in defendants Nos. 1 and 2—the interest of an under-*raiyat*. Then defendant No. 4 sold his right of occupancy *raiyat* to defendants Nos. 1 and 2. It turns out that the occupancy right was that of a non-transferable occupancy holding which the defendant No. 4 had no power to assign to defendants Nos. 1 and 2, and Dr. Dwarka Nath Mitter does not claim on behalf of defendants Nos. 1 and 2 as transferees under that sale, but he claims on behalf of them under the sub-letting, whereby he says they became under-*raiya*s; and that, inasmuch as they became under-*raiya*s, they were entitled to notice under section 49 of the Bengal Tenancy Act, and that such notice not having been given the present suit would not lie as it is a suit which comes within section 49, being a suit by the landlord claiming to eject an under-*raiyat*. I do not think that that argument can be maintained, for two reasons. First of all, I do not think that, after the sale by defendant No. 4 of his interest to defendants Nos. 1 and 2, they were in the position of under-*raiya*s, because defendant No. 4 having transferred or having purported to transfer his interest to defendants Nos. 1 and 2 left the land and disappeared altogether. The result of that transaction was equivalent to abandonment by defendant No. 4 of the whole of his interest. Then the position was that there was the landlord and the defendants Nos. 1 and 2, and there was nobody between them. As it was put during the course of the argument the landlord and the defendants Nos. 1 and 2 were face to face. Those are the facts of the case. In spite of Dr. Dwarka Nath Mitter's ingenious argument I cannot understand how, after that transaction had taken place, defendants Nos. 1 and 2 any longer occupied the position of under-*raiya*s and I think that is sufficient reason to justify the dismissal of the appeal.

But I think there is also another reason, viz., that according to the decision in the case of *Badan Chandra Das v. Rajeswari Debya* (6)

(6) 2 C. L. J. 570.

Mr. Justice Ghose, who delivered the judgment of the Court, said at page 572, "Section 49 of the Bengal Tenancy Act which has been referred to has no application to this case. That section refers to a suit in ejectment brought by the immediate landlord of the under-*raiyat*." Now, if Dr. Dwarka Nath Mitter's argument upon the other point is to be given effect to, namely, that the intermediate tenure must be taken as being abandoned for all other purposes except for the protection of the under-*raiyat*, then this action is not brought by the *raiyat* who was the immediate landlord of the under-*raiyat*, and that is an additional reason why the notice specified by section 49 need not be given.

For these two reasons I think that the judgments, which according to the learned Vakil for the appellants, have been consistently against them, are right judgments, and this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree that the decree made by Mr. Justice Fletcher, in affirmance of the concurrent decisions of the Courts below, cannot be successfully assailed.

To bring into relief the ingenious argument addressed to us by Dr. Dwarka Nath Mitter I shall state the facts of the case stripped of superfluous details. X was the tenure-holder in respect of the disputed land. Y held under him a non-transferable *raiyati* holding. Z was the under-*raiyat* under Y. Y then transferred his interest to Z, and disappeared from the land; this transfer was clearly inoperative against X. X subsequently granted an under-tenure to A, who now sues to eject Z. The contention of Z is that he is entitled to the notice prescribed by section 49, clause (b), of the Bengal Tenancy Act. This defence has been overruled by all the Courts.

Clause (b) of section 49 provides that "An under-*raiyat* shall not be liable to be ejected by his landlord, except, when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord." To entitle Z to claim the protection of section 49, he has to establish that this is a suit for ejectment by his landlord. Now section 4, clause (c), which specifies the

MUHAMMAD ISMAIL v. GAURI PARSHAD.

different classes of tenants under the Bengal Tenancy Act, shows that an under-raiyat is a tenant holding, whether immediately or mediately, under a raiyat. Consequently the landlord of an under-raiyat is a raiyat, in other words Z must establish that he holds under a raiyat. This he cannot do, for in the events which have happened he holds now under a tenure-holder. It is thus plain that he is not entitled to the benefit of section 49. This view is in accord with that taken in the cases of *Nilkanta Chaki v. Ghatoo Sheikh* (3) and *Badan Chandra Das v. Rajeswari Debya* (6).

But it has been contended on behalf of the appellant that he is not a trespasser and his tenancy must be terminated by a notice to quit before he can be sued in ejectment. In support of this position reference has been made to an observation of Jenkins, C. J., in the case of *Lal Mahomed Sarkar v. Jagir Sheikh Mallik* (1) where it was said, in circumstances entirely different from those of the case before us, that a holding may cease to exist except for one purpose, namely, for the benefit of the under-raiyat. Reference has also been made to the decisions in *Amirullah Mahomed v. Nazir Mahomed* (7) and *Amirullah Mahomed v. Nazir Mahomed* (2). The appellant has further invoked the assistance of the principle deducible from *Ram Udar Singh v. William Cor* (5), that a person cannot, by surrender, do what he could not achieve by assignment. These cases, however, are all clearly distinguishable. Here we have neither an assignment nor a surrender, but a sale accompanied by abandonment. Y transferred his raiyati holding to Z, although he was not competent to do so. He then disappeared from the land and made no provision for the payment of rent to X. The consequence in law was that the holding was abandoned, and the tenancy ceased to exist. X was thereupon brought into direct contact with Z. The sale by Y, to which X was not a party, did not in any way affect his rights as tenure-holder; what were those rights then? Clause (1) of section 85 of the Bengal Tenancy Act provides "that if a raiyat sub-lets otherwise than by a registered

instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent." Here the oral sub-lease by Y in favour of Z was not made with the consent of X, and consequently was not valid as against X. This conclusion completely negatives the contention that although the sub-lease by Y in favour of Z, which is the root of the title of Z, is not valid as against X, yet X is bound to treat Z as an under-raiyat and is under an obligation to give him the requisite notice under section 49. From whatever point of view the case is examined, it is thus plain that X, or A who has derived title from him, is entitled to eject Z without prior notice under section 49.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2302 of 1913.

October 12, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice LeRossignol.

MUHAMMAD ISMAIL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

GAURI PARSHAD, PLAINTIFF, AND
Musammât HAIDRI BEGAM—DEFENDANT
—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 30—Suit by minor to set aside alienation by guardian—Agreement to pay interest not sanctioned by Court, whether binding on minor—Duty of minor to restore benefit received—Court's power to award compensation—Respondent, whether can claim additional relief by cross-objections.

Plaintiff sued to recover a certain sum of money with interest at 9 per cent. per annum as agreed, due on the foot of two mortgage-deeds, dated 10th August 1904 and 31st August 1905, respectively, executed by one Musammât H. B. on behalf of herself and as guardian of her two minor sons and one daughter. His claim was decreed. The said sons and daughter appealed:

Held, that 9 per cent. per annum was a reasonable rate of interest; [p. 918, col. 1.]

(2) that the guardian's agreement to pay interest and to make that interest a charge upon the property, though not sanctioned by the District Judge, was under section 30 of the Guardians and Wards Act merely voidable at the instance of the minors; but

(7) 31 C. 932.

MUHAMMAD ISMAIL V. GAURI PARSHAD.

that, inasmuch as the guardian could not have succeeded in borrowing money unless she had agreed to pay interest and the loan was in the interests and for the benefit of the minors, they could be allowed to go back upon the agreement only on the condition that they on their part restored all benefits which they had received under it, i.e., the principal amount and a reasonable interest thereon; [p. 917, col. 2.]

(3) that, notwithstanding the expiry of four years from the date when the term of the mortgage-deed of August 1904 came to an end, the Court was entitled to award reasonable interest by way of compensation or damages for at least six years after the expiry of the term of the mortgage. [p. 918, col. 1.]

Mathura Das v. Raja Narindar Bahadur, 19 A. 39 (P. C.); ■ I. A. 133; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88, followed.

Where a cross-objection was filed to the effect that the decree should have been in the form set forth in Appendix D of the 1st Schedule to the Civil Procedure Code, No. 4, the object in view being not so much to have the decree put in a proper form as to obtain a right to claim interest not merely up to the date of the judgment of the lower Court but up to the date of realisation:

Held, that the relief claimed in this indirect way could not be allowed, and that the respondents should have either applied to the lower Court to amend the decree or appealed in respect of any additional interest that they claimed. [p. 918, col. 2.]

First appeal from the decree of the Subordinate Judge, 1st Class, Delhi, dated the 9th August 1913.

Mr. Obedulla, for the Appellants.

Mehta Bahadur Chand, for the Respondents.
JUDGMENT.

RATTIGAN, J.—This is a first appeal from the order of the Subordinate Judge of the 1st class, Delhi, granting plaintiff ■ decree for Rs. 2,100 principal and Rs. 2,156-3-0 interest and costs, against the defendants and the property under mortgage. Plaintiff's claim was based on two mortgage-deeds executed on the 10th August 1904 and the 31st August 1905, respectively, by *Musammât Haidri Begam* ■ behalf of herself and as guardian of her two sons, Muhammad Ismail and Muhammad Jamil, and her daughter, Begga Begam. *Musammât Haidri Begam* has accepted the decree and the present appeal is filed by the said two sons and her daughter. The points urged before us are (1) that the District Judge did not in express terms sanction the agreement by *Musammât Haidri Begam* to pay interest on the principal amounts of the two mortgages and that as a result the appellants and their property under mortgage are not liable, except to the extent of the said principal amounts;

and (2) that in any event the mortgage of the 10th of August 1904 was merely for a period of four years and that consequently no interest can be claimed after the expiry of that period.

As regards the first point, we are inclined to accept the argument that the District Judge did not grant permission to the guardian to make any agreement regarding the payment of interest on the money borrowed by her. His orders are set forth at pages 28—30 of the record, and apparently deal merely with the question whether the guardian should be allowed to borrow sums of Rs. 2,400, Rs. 100 and Rs. 600, respectively. At the same time, it is quite clear from the statements made by *Musammât Haidri Begam* in her applications, dated the 8th February 1904 and 29th April 1904, that the family was very badly off at the time and that there was every probability of their house (the subject-matter of the mortgage) being sold unless she could borrow money to pay off ■ prior mortgagee. In those applications she further alleges (and there appears to be no reason to doubt the truth of the statement) that she had no other means of livelihood or any money to maintain the minors.

In these circumstances, and having regard to the facts that the agreement to pay interest and to make that interest a charge on the property, though not sanctioned by the District Judge, is under section 30 of the Guardians and Wards Act, 1890, merely voidable at the instance of the minors; that the guardian could not have succeeded in borrowing money unless she had agreed to pay interest; that the loan was in the interests and for the benefit of the minors; and that the rate of interest charged, viz, 9 per cent. per annum, is by no means excessive, we can accede to the prayer of the minors that they should not be held bound by their guardian's agreement, only on the condition that they on their part must restore all benefits which they have received under their guardian's contract. In other words, they must repay the principal amount and also reasonable interest thereon, the result being that to all intents and purposes we must uphold the order of the District Judge.

MIDNAPORE ZEMINDARI CO. LTD. v. JOYRAM SANTAL.

The contention that there was no liability to pay interest after the expiry of the four years which were specified as the term of the mortgage in the deed dated the 10th of August 1904, is based on the assumption that that deed automatically terminated after the expiry of that period. As a matter of fact the deed contains a provision to the effect that the mortgagor will remain bound by all the conditions of the deed until the payment of the entire principal mortgage-money and will also be liable to pay interest on the mortgage-money if, after the expiry of the said term, the mortgage remains in force "with the consent of the parties." Mr. Obedulla, for the appellants, contends that this clause means that on the expiry of the term of four years the parties were to execute another mortgage-deed, or at all events, to give their express consent to the continuance of the deed of 1904. We cannot accept this construction, and we hold that the consent of the parties could be given, as it undoubtedly was in the present case, impliedly no less than expressly.

As regards the claim for interest after 1908 (i.e., after the expiry of four years from the date when the term of the mortgage-deed of the 10th of August 1904 came to an end), the ruling of their Lordships of the Privy Council in *Mathura Das v. Raja Narindar Bahadur* (1) is sufficient authority for holding that the Court is entitled to award interest by way of compensation or damages for at least six years after the termination of the term of the mortgage, and this at such rate as the Court may think reasonable. In the present case we consider the rate agreed upon between the guardian and the mortgagee, viz., 9 per cent per annum, both reasonable and equitable. As a result of our conclusions upon the above points the appeal must fail and is hereby dismissed with costs.

Mr. Bahadur Chand, on behalf of the respondents, filed a cross-objection to the effect that the decree was not drawn up according to law and he explained that the decree should have been in the form set forth in Appendix D of the First Schedule of the Civil Procedure Code, No. 4. As a

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Scr. P. C. J. 58,

matter of fact this objection was filed some time before respondents received notice of the appeal and is not strictly a cross-objection of the kind contemplated by the Civil Procedure Code. The object which the respondents have in view is not so much to have the decree put in a proper form but to give them the right to claim interest not merely up to the date of judgment of the lower Court (as ordered by that Court) but up to the date of realisation of their money. This further relief, claimed in this indirect way, we cannot allow. The respondents, if they wished for such further relief, should have either applied to the Subordinate Judge to amend his decree or should have appealed to this Court in respect of any additional interest to which they may be entitled.

We accordingly overrule the objection and direct that the decree of the Subordinate Judge stand as framed by him.

Appeal and cross-objection dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3429 OF 1913.

April 26, 1916.

Present:—Mr. Justice Mullick.

MIDNAPORE ZEMINDARI CO., LTD.—

DEFENDANT—APPELLANT

versus

JOYRAM SANTAL—PLAINTIFF—

RESPONDENT.

Landlord and tenant—Decree for rent and ejectment on default of payment of decree amount within specified time—Accrual of right to eject—Suit for subsequent rent—Acceptance of part-payment—Acknowledgment of tenancy—Waiver of right to eject—Estoppel—Evidence Act (I of 1872), s. 115.

Defendants obtained a decree against plaintiff on 8th April 1911 for rent of the years 1314 to 1317 Amlī which directed that, in default of payment within a month, the plaintiff shall be ejected. The decree was executed and defendants were put into possession on 13th July 1911. On 30th April 1911 defendants instituted a second suit against plaintiff for rent for the year 1318 which became due in March 1911, and obtained a decree. Prior to the institution of this suit the plaintiff had made a part deposit of the latter claim in Court, which defendants accepted. Plaintiff instituted the present suit on 20th January 1912 for possession, on the ground that the defendants had waived their right to

MIDNAPORE ZEMINDARI CO., LTD. v. JOYRAM SANTAL.

eject him by the proceedings in the second rent suit by which they acknowledged him ■ their tenant to the end of the year 1318:

Held, that the defendants should be deemed to have waived the right to eject plaintiff, even though the right to eject did not actually accrue at the institution of their second suit and that it estopped the defendants from subsequently proceeding in ejectment in execution of the first rent decree. [p. 919, col. 2.]

Dubitante.—Whether having failed to plead waiver in the proceedings in execution of the ejectment decree the plaintiff could be permitted to plead it subsequently in ■ separate suit? [p. 919, col. 2.]

Mukund Harshet v. Haridas Khemji, 17 B. 23, referred to.

Second appeal from ■ decision of the District Judge, Manbhum, dated the 26th July 1913, confirming that of the Deputy Collector, Chaibasa, dated the 27th September 1912.

Babu Sitaram Banerjee, for the Appellants.

Mr. Suroshi Chandru Mitter for Mr. Bipin Ghose, for the Respondent.

JUDGMENT.—The plaintiff was the *pradhan* or headman of *Mauza Dudhpusi* and the defendants were the *ijaradars*. On the 18th of July 1910 the defendants sued the plaintiff for rent of the years 1314-1317 *Amli* and on the 8th April 1911 obtained an *ex parte* decree, which directed that if the arrears were not paid within 30th days of the tenant's becoming aware of the decree he was to be ejected. That decree was executed and possession was given to the *ijaradars* on the 13th July 1911. On the 20th January 19 2, the present suit was instituted by the plaintiff to recover possession of the *manza* on the ground that the defendants were not competent to eject the plaintiff by reason of previous waiver. The waiver is pleaded in this way. On the 30th of April 1911, the defendants instituted a suit against the plaintiff for the rent of the year 1318, which apparently began in September 1910 and ended in September 1911. Previous to the institution of the suit the plaintiff had on the 10th of April 1911 deposited Rs. 51-13-0 into Court in part payment of the rent of the year 1318, the total demand on account of which was Rs. 64 approximately. This second rent suit was decreed on the 15th July 1911.

The plaintiff's case is that the suit and the proceedings connected therewith constituted an acknowledgment by the defendants that the plaintiff was their tenant up to the end of the year 1318, *i. e.*, 16th September 1911, and that, therefore, there was a waiver of that right to eject which had accrued to

the defendants upon the plaintiff's failure to make payment of the arrears decreed in the previous suit. It is assumed by both parties before me that the right to eject accrued on the 8th of May 1911.

The defendants' reply to this is that the rents for the year 1318, which were payable in advance, became due in March 1911, so that they were perfectly competent to sue for them on the 20th of April 1911 and that as the right to eject did not accrue till the 8th of May 1911, they could not at the institution of the suit be said to have waived ■ right which they did not then possess.

Both Courts below have decided in the plaintiff's favour and held that there was ■ waiver. The defendants now prefer the present second appeal.

The sole question argued by the learned Counsel before me for the appellants is, whether the institution of the rent suits at a time when the right to eject had not accrued constituted a waiver. It is argued that there can be no waiver of ■ conditional right. I am, however, unable to accept this view. There was nothing to prevent the defendants from saying to the plaintiff:

"On the 8th of May on your failure to pay up the arrears decreed ■ right to eject you will accrue to us. By bringing this suit for the arrears of 1318 we acknowledge you as our tenant till the end of that year, namely, 16th of September 1911, and we waive the right to eject you in anticipation if it ever should arise."

This would be a perfectly valid promise and such a promise does, in my opinion, estop the promisor from subsequently proceeding in ejectment. The institution of the suit coupled with the acceptance of the money deposited for the year 1318 constituted ■ complete waiver and estopped the defendants from proceeding in ejectment in execution of the decree of the 8th of April 1911. I have some doubts as to whether, having failed to plead waiver in the proceedings in execution of the ejectment decree, the plaintiff can now be permitted to plead it in ■ separate suit; but the case of *Mukund Harshet v. Haridas Khemji* (1) is some authority in plaintiff's favour. Moreover, neither party has up to now raised the point and it need not, therefore, be decided. The appeal fails and is dismissed with costs.

(1) 17 B. 23.

Appeal dismissed.

DOST MUHAMMAD KHAN & DOST MUHAMMAD KHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2015 OF 1913.

October 28, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

DOST MUHAMMAD KHAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

DOST MUHAMMAD KHAN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 48—Oral gift of land without possession—Subsequent transfer by registered deed—Priority.

Where a proprietor made an oral gift of his land to his sons and subsequently executed and registered a deed of mortgage in favour of the plaintiff, who sued for possession on the sons' contesting his right:

Held, that section 48 of the Registration Act operated to give plaintiff's mortgage-deed preference over the oral gift which was not accompanied by delivery of possession, even though the gift preceded the mortgage.

Ram Das v. Sanwana Ram, 10 P. R. 1900; P. L. R. 1900, p. 352, followed.

Palani v. Selambara, 9 M. 267; *Shankar Das v. Ram Das*, P. L. R. 1900 p. 131, distinguished.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 14th of August 1913.

Mr. Nanak Chand, for the Appellants.

Mr. Bhagat Ram Puri, for the Respondents.

JUDGMENT.—On 27th June 1912, defendant caused the *patwari* of his village, Watta Khel, to enter up a mutation of his land, 789 *kanals* 9 *marlas*, which he said he was giving to his sons, defendants Nos. 2 to 4. Of that area some 234 *kanals* 14 *marlas* is in suit in the present case, being land already in mortgage to Gheba and Ahmad. The gift was oral. On 7th August 1912, defendant No. 1 executed and registered a deed of mortgage of 247 *kanals* 18 *marlas* in favour of plaintiffs for Rs. 3,416, part of the land being the 234 *kanals* 14 *marlas* referred to above. Defendants Nos. 2 to 4, relying on the aforesaid gift, contested plaintiffs' right: hence this suit for possession of 247 *kanals* 18 *marlas*. Pleas were put in and issues framed, and the first Court found that the mortgage to plaintiffs was for consideration and "necessity," that plaintiffs were probably not aware of the gift to defendants Nos. 2 to 4, that section 48, Registration Act, operated to give plaintiffs' mortgage-deed preference over the oral gift, which was not

accompanied by delivery of possession, and that defendant No. 1's powers of alienation could not be controlled by defendants Nos. 2 to 4.

These defendants appealed, and the lower Appellate Court upheld the first Court's judgment and decree, holding that defendant No. 1's powers of alienation were by custom unrestricted, and that the first Court's view as to the effect of section 48, Registration Act, was correct.

Their "second appeal" to this Court raises the question of custom again, but in the absence of a certificate under section 41 of the Courts Act we cannot allow this matter to be argued. It also raises other questions, of which, however, we need decide only that concerning the law of registration.

In our opinion the decision of the lower Courts on this point is clearly correct. Even taking it that the gift preceded the mortgage, the latter must be preferred. The former was an oral agreement or declaration within the meaning of section 48 of the Registration Act, and, the land in suit being in mortgage with possession to Gheba and Ahmad, possession of it could not be, and was not, delivered to defendants Nos. 2 to 4 before date of mortgage. Mr. Nanak Chand argues that in the circumstances defendant No. 1 did all he could do in the way of delivering possession in June 1912; but this is insufficient. Possession was not delivered, see *Ram Das v. Sanwana Ram* (1), a case exactly in point.

The two rulings relied upon by Mr. Nanak Chand do not help him. In *Palani v. Selambara* (2) possession was held to have been delivered because, the land being in cultivating possession of tenants, those tenants had been made to attorn to the alienees; and in *Shankar Das v. Ram Das* (3) the alienee under oral agreement had not only his agreement to rely upon but also a decree based on that agreement.

Ground 6 of the appeal has not been touched upon and may be taken to have been abandoned.

For these reasons we dismiss this appeal with costs.

Appeal dismissed.

(1) 10 P. R. 1900; P. L. R. 1900, p. 352.

(2) 9 M. 267.

(3) P. L. R. 1900 p. 131.

POOMALAI V. KARUPPA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 90 OF 1915.

April 17, 1916.

Present:—Mr. Justice Bakewell and
Mr. Justice Phillips.POOMALAI UDAYAN AND OTHERS—
DEFENDANTS—APPELLANTS*versus*KARUPPA SERVAI—PLAINTIFF—
RESPONDENT.*Registration Act (XVI of 1908), ss. 49, 17—Transfer of Property Act (IV of 1882), s. 54—Evidence—Unregistered sale-deed for less than hundred rupees—Admissibility to prove contract of sale.*

An unregistered deed of sale of immoveable property for less than one hundred rupees, though inoperative under section 54 of the Transfer of Property Act where delivery has not been made to the vendee, is admissible in evidence to prove the contract of sale.

The rule is unaffected by the provision in section 49 (c) of the Registration Act which relates only to documents compulsorily registrable under section 17 of the Act.

Muthukaruppan Samban v. Muthu Samban, 25 Ind. Cas. 772; 38 M. 1158; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497, distinguished.

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 75 of 1914, preferred against that of the Court of the District Munsif, Kallakurchi in Tirukoilur, in Original Suit No. 228 of 1913.

Mr. T. Pattabirama Aiyar, for the Appellants.

Mr. K. P. Shanmugan Pillai, for the Respondent.

JUDGMENT.—The sale-deed in question related to a sale of an interest less than Rs. 100 in value, and its registration was therefore optional (Registration Act, sections 17 and 18). Section 54 of the Transfer of Property Act, 1882, provides that a transfer of land of a value less than Rs. 100 may be made either by a registered instrument or by delivery; accordingly an unregistered instrument unaccompanied by delivery will not operate as a transfer; but no provision of law has been cited which prohibits such a document from being admitted in evidence of the contract of sale. Section 49 of the Registration Act deals only with documents required by section 17 to be registered. We think that the present case differs from that of *Muthukaruppan Samban v. Muthu Samban* (1), that there is clear evi-

(1) 25 Ind. Cas. 772; 38 M. 1158; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

LAKSHMI VENKAYYAMMA V. VENKATANARASIMHA.

dence and finding that there was an oral sale and a transfer of the property or delivery of possession, and the document was merely in corroboration thereof.

The second appeal is dismissed with costs.

V.R.P.

Appeal dismissed.

PRIVY COUNCIL.

APPEALS FROM MADRAS HIGH COURT.

May 15, 1916.

Present:—Lord Shaw, Lord Sumner,
Sir John Edge, Mr. Ameer Ali
and Sir Lawrence Jenkins.Sri Rajah Malraju LAKSHMI
VENKAYYAMMA RAO BAHADUR AND
ANOTHER—APPELLANTS*versus*Sri Rajah VENKATANARASIMHA
APPA RAO BAHADUR AND OTHERS—
RESPONDENTS.

Contract—Agreement to settle property on condition of donee living with donor—Promise—Consideration—Acceptance by actings—Part-performance by donor—Completed agreement—Right to repudiate—Locus penitentie—Specific performance, right of donee to claim—Dying declaration re-affirming original promise—Nuncupative Will.

In all cases of contracts the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention, and that true issue is, is a contract proved, and if a contract is proved, the law will not refuse to give effect to it by way of specific performance. [p. 925, col. 1.]

A contract may be constituted by a promise followed by actings by the promisee on the faith thereof, though not by an express acceptance. The question in each case is one of fact, and if the Court finds that the actings did take place on the footing of a proposal made by the promisor, and that they were known by the latter to have taken place on that footing, the objection that the contract was inchoate or incomplete cannot be maintained. [p. 926, col. 1.]

After such actings, *locus penitentie* or the power of resiling as from an incomplete engagement or an unaccepted offer is barred. [p. 926, col. 1.]

The dying declaration of a person, making reference to his previous promise or proposal on the faith of which the promisee has acted and after recognizing the latter's right to the thing promised declaring that it shall be given effect to after his death, cannot be treated as a nuncupative Will because the true effect of the declaration is to recognize a right already vested in the promisee. It constitutes only a re-affirmation and confirmation of the original contract. [p. 926, col. 2; p. 927, col. 1.]

P, a childless Hindu widow, agreed to settle some property on the plaintiff, her grand-niece, to whom she was very much attached in consideration of the plaintiff and her husband living with her till her death. The date of the settlement was in 1886, the

LAKSHMI VENKAYYAMMA v. VENKATANARASIMHA.

year of the plaintiff's marriage, and the arrangement was indefinite. Following upon it the plaintiff and her husband resided with P up to 1893. During this interval of time P purchased some properties in her own name which she afterwards conveyed to the plaintiff. In 1893 the plaintiff purchased a valuable property known as Repudi in her own name, but distinctly stated that it was purchased for the plaintiff. This dissatisfied the plaintiff's husband who separated from P. P. then started negotiations asking the plaintiff's husband to return, which culminated in a letter to plaintiff wherein it was distinctly set out that Repudi was purchased for plaintiff and would be duly delivered to her after P's death. In consequence of these assurances the plaintiff and her husband continued to live with P till her death in 1899. On her death-bed P declared that Repudi was purchased solely for plaintiff which she could take after her death. After P's death plaintiff sued for recovery of possession of Repudi from persons who alleged to have derived interest from P.

Held, (1) that P's letter was a definite promise vesting the ownership of Repudi in the plaintiff and contracting that possession was to be given immediately upon the expiry of P's life-interest; [p. 924, col. 2.]

(2) that the said promise accompanied by compliance with the stipulations on the part of the plaintiff constituted a completed contract of which plaintiff was entitled to claim specific performance; [p. 925, col. 1.]

Maunsell v. Hedges, (1854) 4 H. L. C. 1039; 10 E. R. 769; 94 R. R. 532; *Maddison v. Alderson*, (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 31 W. R. 820; 47 J. P. 821; 49 L. T. 803; *Mahomed Musa v. Aghore Kumar Ganguli*, 28 Ind. Cas. 930; (1915) M. W. N. 621; 17 Bom. L. R. 420; 21 C. L. J. 231; 13 A. L. J. 229; 42 C. 801; 42 I. A. 1; 19 C. W. N. 250; 28 M. L. J. 848, referred to.

(3) that the dying declaration of P could not be regarded as a nuncupative Will, but was a re-affirmation and confirmation of the original contract. [p. 926, col. 2; p. 927, col. 1.]

Consolidated appeals from a judgment and decree of the High Court, Madras dated November 26, 1909, reported as 5 Ind. Cas. 102, on an appeal, under section 5 of the Letters Patent, against a decree of the same Court, dated November 16, 1908, reported as 2 Ind. Cas. 316, which had affirmed the decree of the District Judge of Godavari, dated November 3, 1904.

FACTS of the case are sufficiently set forth in their Lordships' judgment. The District Judge had held that the grand-niece was entitled to the village claimed. On appeal to the High Court the Judges having differed the appeal was dismissed. Appeal was then preferred against this order of dismissal under section 15 of the Letters Patent. The judgment of the District Judge was reversed. One of the reversioners had not appealed to the High Court, but claimed the benefit of the order of the High Court

against the grand-niece, which was not allowed on the ground that the appeal was not against the whole decree. Hence appeals to the Judicial Committee of the Privy Council.

Sir E. Richards, K. C., and Mr. Brown, for the Appellant Lakshmi Venkayamma.—Special leave to appeal to the Privy Council was granted to one of the reversioners Parthasaradhi who had not appealed to the High Court and to the present appellant who reserved the right to object to it at the hearing. The appellant Parthasaradhi had no *locus standi*. He was out of time under the Civil Procedure Code, as he did not apply for leave to appeal in India, as well as under the rules of the Privy Council. This was not an appeal against the whole decree and, therefore, he could not take advantage of a judgment against a part of the claim. [Order XLI, rules 4 and 33 of Act V of 1908 and *Colonial Sugar Refining Company v. Irving* (1).]

[LORD SHAW: If the defendant fails he drops out. There is no advantage in putting the point at this stage.]

(The case was then argued on merits.)

The present appellant took either by virtue of a contract or under the Will. The letter established a contract as it was followed by acceptance. The lady was to live with her grand-aunt. This was the consideration. She could have lived with her husband.

[LORD SHAW: A man says if you do so and so I will do so and so. The moment you do what he asked you, the covenant becomes binding. This is what the House of Lords says in *Maunsell v. Hedges* (2).]

Reference was made to *Hammersley v. De Birl* (3); *Synge v. Synge* (4); *Maunsell v. Hedges* (2); *Mahomed Musa v. Aghore Kumar Ganguli* (5); Indian Contract Act by Pollock, section 8.

Mr. De Gruyther, K. C. (with him Mr. Dube), for the Respondent Venkatanarasimha—There was no binding contract, although the village was bought for appellant. It required registration under section 17 (b) of Act III of 1879. It could not be construed

(1) (1905) App. Cas. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(2) (1854) 4 H. L. C. 1039; 10 E. R. 769; 94 R. R. 532.

(3) (1845) 12 Cl. & F. 45; 8 E. R. 1312; 69 R. R. 18.

(4) (1894) 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 42 W. R. 309; 9 R. 265; 58 J. P. 396.

(5) 28 Ind. Cas. 930; (1915) M. W. N. 621; 17 Bom. L. R. 420; 21 C. L. J. 231; 13 A. L. J. 229; 42 C. 801; 42 I. A. 1; 28 M. L. J. 548; 19 C. W. N. 250.

LAKSHMI VENKAYYAMMA v. VENKATANARASIMHA.

■ a trust as it would be had under section 5 of the Indian Trusts Act of 1882. There was only an expression of intention and it was of no effect under the Contract Act. The doctrine of making good representations made was exploded. Either there must be a contract, or ■ representation of fact. The cases relating to marriage as consideration stood on a different footing. The facts in this case were like those in *Maunsell v. Hedges* (2), in which it was held that there was no contract.

Reference was made to *Loffus v. Maw* (6); *Jorden v. Money* (7); *Imrao Singh v. Lachhman Singh* (8).

Mr. Lawrence, K. C. (with him Mr. Parikh), for the Appellant Parthasaradhi.—There were representations and expressions of intention only. There was no binding contract.

Reference was made to *Loffus v. Maw* (6); *Jorden v. Money* (7); *Maunsell v. Hedges* (2); *Maddison v. Alderson* (9).

Sir E. Richards, in reply.—The Registration Act, section 17 (b), did not apply to contracts at all, nor did section 54 of the Transfer of Property Act, 1882.

JUDGMENT.

LORD SHAW.—These are consolidated appeals against a judgment and decree, dated the 26th November 1909, pronounced by the Chief Justice and two Judges of the High Court of Judicature at Madras in an appeal under Letters Patent against a decree of the High Court, dated the 16th November 1908. The two Judges constituting the High Court differed in opinion, with the result that a decree pronounced by the District Judge of Godaveri, dated the 3rd November 1904, had been affirmed in the original appeal. The Letters Patent appeal was allowed and the suit was dismissed. The form which the dismissal took will be afterwards referred to.

The suit was brought with the main object described in the first prayer of the plaint,—to the effect that it be declared

that the plaintiff is entitled to the village of Repudi, and that defendants do put the plaintiff in possession of the same.

Rajah Narayya, who died in 1864, was the owner of an extensive *zemindary* of Nidadavole. He was survived by two widows, both of whom were childless. One of these widows died in 1881; the other, ■ lady named Papamma, became sole life owner and continued to enjoy the estate until December 1899, when she died.

She resided in her palace, or fort, at Senivarpet, having a large income amounting to about 6 lakhs of rupees per annum. The appellant, who is plaintiff in the suit, was ■ grand-niece of Papamma, and was brought up by her from an early age. In 1886, at the age of 14, she was married to the ex-*zemindar* of Narasaropet. He was a man of good standing, in the enjoyment of ■ small pension from the Government, and himself the owner of property of considerable value.

There can be little doubt that the Rani, herself childless, was on terms of attachment and affection towards the plaintiff and valued her companionship. When the marriage was arranged, the Rani disbursed all the suitable expenses thereof; but she appears to have been extremely anxious that her grand-niece, although married, should continue to live with her. This, however, would without doubt have involved a certain loss of dignity and position on the part of her husband: and it appears clear from the facts proved that the obtaining of his consent to any arrangement of the kind was obtained with difficulty. The Rani agreed to make presents of jewellery to her grand-niece, and to make provision for her apparently on a fairly ample scale by the purchase of immoveable property for her. Upon this footing, an arrangement was made and matters were settled. The date of that settlement was 1886, namely, the year of the plaintiff's marriage.

The arrangement was indefinite, and the indefiniteness was the cause of considerable uneasiness. Following upon it, however, the plaintiff and her husband did reside with the Rani until 1893. During this interval of time two properties were purchased by the Rani. The form in which she carried out her promise towards her grand-niece was that in each instance she took the property in the first place in her own name, and after

(6) (1862) 3 Giff. 592, at p. 594; 8 Jur. (N. S.) 607; 6 L. T. 346; 10 W. R. 513; 66 E. R. 544; 32 L. J. Ch. 49; 133 R. R. 193.

(7) (1854) 5 H. L. C. 185 at p. 217; 23 L. J. Ch. 865; 10 E. R. 868; 101 R. R. 116.

(8) 10 Ind. Cas. 285; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 33 A. 344; 38 I. A. 104.

(9) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

LAKSHMI VENKAYYAMMA C. VENKATANARASIMHA.

■ period of about two years she granted ■ conveyance thereof to her grand-niece. These properties were small. The balance of evidence is that they would not have been held by any of the parties as sufficient consideration for the plaintiff and her husband continuing to reside as stated. The Rani herself appeared, as circumstances afterwards showed, to be anxious to make further and more substantial provision for her grand-niece. This was the situation of affairs up till the spring of the year 1863.

At that time the Rani purchased the property known ■ Repudi. She made no concealment of having done so for the plaintiff; but she did raise objection to the title of Repudi being taken directly in the plaintiff's name. The impression of her Dewan had been that the transaction was to be direct; and on the 28th February 1893 ■ receipt was given to him for an advance paid in respect of the purchase which bore that "having settled to sell to you for Rs. 40,000 the village"....."in order that you may give away the same to M. R. Ry. Rajah Malraju Lakshmi Venkayyamma Rao Garu for dowry,"....."we have this day received from out of your own separate property Rs. 100 as advance towards the said sale amount." This appeared to be much too direct for the Rani, and she wrote to the Dewan on the 8th March: "I have told you that this village should be purchased and the document obtained, for the present, in my name alone, as was done before." She mentioned her desire that the document "should be got written" as on the previous occasion, and she added "it is not my intention to have this village conveyed to anyone's name for the present, and so I have written this." In their Lordships' opinion the Rani desired to follow her own previous practice of taking the title in her own name, and as was done with the two other villages, thereafter to give a conveyance from herself. She uses the expressions "for the present," and "as was done for the former villages." The title was accordingly taken in her own name.

This, however, brought matters to a head with regard to the position of the plaintiff and her husband, and to their continuing to reside with the Rani. The plaintiff's husband left; he betook himself to his own property, and he received various com-

munications which asked him to return, and contained assurances that the arrangement upon which Repudi was bought, namely, that it should be truly for the plaintiff, should be carried out. Their Lordships do not state these arrangements in detail. They are, however, fully satisfied on the evidence that the Dewan and the plaintiff's uncle were authorised to communicate to the plaintiff's husband this assurance and promise, and that in pursuance of that authority they visited him and made the communication.

The negotiations were protracted, but they culminated in a letter of date 12th October 1893, written by Papamma in her own hand to the plaintiff herself, in which she stated: "Repudi was purchased for you alone. Some encumbrances thereon have yet to be discharged. I shall discharge the debt, retain it under ■■■ long as I am alive, and afterwards convey it to you yourself. From that forwards you may do with it as you please. The whole world knows that I purchased it (only) to give it away to you. Do not think, even in your dream, that I, who brought you up from infancy, would ruin you. I wrote to the grandson (she designated the plaintiff's husband thus) in that manner, thinking that there was need to tell him all these matters and nothing else."

This letter appears to their Lordships to be ■ promise, and to be quite definite (1) with regard to its subject-matter, namely, the village of Repudi; (2) with regard to the ownership thereof, namely, that that was to be in the plaintiff; and (3) with regard to the date of her entry into possession thereof, namely, that possession would be given immediately upon the expiry of the life-interest therein, which Papamma reserved to herself.

In their Lordships' opinion this promise was accepted. The evidence taken as ■ whole and the actings of parties are in entire conformity with this being so. Their Lordships believe the plaintiff's testimony to the following effect: "In the said letter she wrote to say that she would pay off the debts, keep the village under her throughout her lifetime and then give it to me. I agreed to it. I informed my husband of this. He too consented to it. Being unable to bear the separation, she desired ■■■ to stay with her.

LAKSHMI VENKAYYAMMA v. VENKATANARASIMHA.

She promised to give me, as aforesaid, for staying with her accordingly till her death. The arrangement was that both myself and my husband should remain there. I consented to it accordingly. My husband also consented to it. Had Papamma Rao Garu failed to enter into such an agreement in regard to Repudi, myself and my husband would not have stayed there."

The Board is of the opinion accordingly that there was here a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words of Lord St. Leonards in *Maunsell v. Hedges* (2) might be asked here: "Was it not a proposal, with a condition which, being accepted, was equivalent to a contract?" Their Lordships do not doubt that it was.

From that date forward, for a period of about seven years, namely, until Papamma's death in 1898, the plaintiff and her husband continued to live with her in her palace. There is a mass of oral and documentary evidence, but it does not advance, nor does it in their Lordships' opinion recede from, the point of completed contract as above set forth.

This being so, the citation of that set of cases of which *Maddison v. Alderson* (9) and *Maunsell v. Hedges* (2) are the familiar examples is beside the mark. In both of these cases, a contract must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is: is a contract proved? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance.

Maddison v. Alderson (9) is a good instance of the point. The contract was alleged to be constituted by a promise followed by actings on the faith thereof. The actings were carefully scrutinised in order to see whether the contract, the sole evidence of which otherwise was in the testimony of the plaintiff herself, was established. Lord O'Hagan put the matter thus: "Assuming that the action must be considered maintainable, if at all, for the purpose of forming a parol contract partly

performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained." And Lord Blackburn put the matter broadly thus: "It seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between two parties."

In the case of *Maunsell v. Hedges* (2) a bill was filed for the purpose of compelling those claiming under a certain Will to settle certain real estates in Tipperary on the appellant pursuant to an alleged obligation arising out of certain letters. The letters disclosed that the deceased had positively declined to be bound. "I shall never settle," said he, "any part of my property out of my power so long as I exist." It was held that there was no contract placing the testator under such obligation.

In short, to use the language of Lord Cranworth in *Jordan v. Money* (7) (a case in which the process of disentangling the true from the erroneous issues, as above alluded to, was carefully followed), "The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a Court of Justice in acting upon it that such a contract as that which is alleged really was entered into?" The Board is of opinion in the present case that this question should be affirmatively answered.

It was strongly pressed upon their Lordships that the letter did not contain sufficient evidence of anything but an intention, and that it stopped short of any actual promise upon which acceptance of it as such might follow. Their Lordships do not think so. The law of India does not require writing at all in regard to such a bargain; but their Lordships are not surprised, looking to the frequent challenges made of contracts resting

LAKSHMI VENKAYYAMMA v. VENKATANARASIMHA.

upon words of mouth alone, that the desire should have been expressed to have Papamma's undertaking in writing and distinctly set down. In their Lordships' opinion they were so obtained, and a contract was concluded in October 1893.

Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance made by the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the plaintiff and her husband? Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by Papamma to have taken and to be taking place on that footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord Selborne in the case of *Maddison v. Alderson* (9), a judgment which was cited at some length by this Board in *Mahomed Musa v. Aghore Kumar Ganguli* (5). After such actings *locus penitentiae*, or the power of resiling from an incomplete engagement or an unaccepted offer is, to use language borrowed from the Law of Scotland and highly approved in the case referred to, barred by "*rei interventus*," which raises a personal exception which excludes the plea of *locus penitentiae*." As was stated in the judgment of the Board in *Mahomed Musa's* case (5), "Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule."

As stated, accordingly, the same result is reached. And it would not be open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village of Repudi to the plaintiff, such possession to take effect as from the date of the Rani's death.

The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the Board that she never meant to be bound. Their Lord-

ships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grand-niece and husband live on with her under the impression, on their part, that they were bound; whereas all the time she, Papamma, knew she was, and intended to be, free. Their Lordships do not think that the Rani's design included duplicity of this character.

The transactions of October 1893, followed by the years of compliance, on the footing that those transactions formed a concluded contract, leave no substantial doubt that no repudiation by the Rani would have affected it. Fortunately, however, there is a body of evidence throwing light upon the Rani's own view.

Her death occurred on the 5th December 1899. On her death-bed she declared that she had purchased Repudi village solely on account of the plaintiff. Their Lordships believe the plaintiff's statement that the Rani then said "that she had purchased the Repudi village on my account alone, that I should take it after her death." The Dewan's evidence is quite plain upon the subject. He made a statement on the 5th December before the *tahsildar* as to his instructions by the Rani, in which he said "she has given me directions saying, among other things, that the village of Repudi had been given away to her granddaughter, and that the same should be delivered into possession of her after her death."

In the opinion of the Board accordingly, instead of there being any such repudiation of the contract, there was a dying declaration by the Rani, which, in their Lordships' opinion, constituted a reaffirmation and confirmation thereof.

Their Lordships observe that much discussion and considerable difference of judicial opinion arose, in the Courts below, upon the question whether these statements made on death-bed by the Rani did not constitute a nuncupative Will. Such a Will is valid in India. Some of the Judges, including the Trial Judge, thought that it did; others thought it did not. The argument presented at this Board is noticeable in this particular. It was to the following effect: "Granted that the words taken by themselves might have made a Will, it really could not have been

NAMASIVAYA KURUKKAL v. SUBRAMANIA AYYAN.

so because the lady used language, the true effect of which was a declaration that the property of Repudi was already the plaintiffs'. She thought that it was, and therefore did not make ■ Will with regard to it." If this argument be sound, that there was no Will for the reason given, then the reason given is very helpful evidence that the Rani had already and effectually given ■ right to Repudi to the plaintiff, under which, immediately she, the Rani, died, the plaintiff would enter into possession of the village.

As stated, their Lordships are of opinion that the plaintiff has such a right in terms of a contract accepted and complete, and that ■ Will accordingly would not have been in place in the circumstances, and should not be affirmed by law. Upon the other hand the declaration on death-bed by the Rani herself leaves no doubt that what had been done had been effectively done. Her belief and statement to that effect were entirely well-founded.

With regard to the shape of their Lordships' decree, it is to be noted that, consequent upon litigation with regard to this and other property, a Receiver was appointed. This circumstance saves any complexity from arising in the carrying out of the present judgment. The Receiver will act upon it. He will deliver possession of Repudi upon the terms of the contract now affirmed, that is to say, the plaintiff will be entitled to the village as from and after the Rani's death.

The judgment now given disposes of any necessity for a pronouncement upon the cross-appeal.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs, and that the cross-appeal be dismissed also with costs.

Appeal allowed ; Cross appeal dismissed.

Solicitor for the Appellant.—Mr. Douglas Grant.

Solicitors for the Respondents.—Messrs. T. L. Wilson & Co. and Mr. Edward Dalgado.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 948 of 1914.

November 3, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

NAMASIVAYA KURUKKAL—DEFENDANT
— PETITIONER

versus

SUBRAMANIA AYYAN—PLAINTIFF—
RESPONDENT.

Madras Abkari Act (I of 1886), s. 3 (1)—'Abkari' includes ganja—Abkari license, general conditions of, whether applicable to ganja—Contract Act (IX of 1872), s. 23—Transfer and sub-letting of ganja license—Illegality.

The term 'abkari' in the Abkari Act includes ganja and the conditions of an abkari license apply to ganja also, even though they do not specifically and in terms refer to the latter. [p. 927, col. 2.]

Where one of the conditions of an abkari license prohibits vending, transferring or sub-letting of the license, an agreement sub-letting the right to vend ganja is illegal and unenforceable. [p. 928, col. 1.]

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Palghat, in Small Cause Suit No. 674 of 1914.

Mr. C. Madhavan Nair, for the Petitioner.

Mr. Narayana Sarma for Mr. T. K. Gorinda Aiyar, for the Respondent.

JUDGMENT.—The District Munsif was clearly in error in holding that the nine "conditions applicable to ganja licenses" (see page 4 of Exhibit B) are the only conditions applicable thereto and that none of the "general conditions applicable to all abkari and opium licenses" applies, even when such a condition, by its terms, is not restricted to liquor or opium licenses. "Abkari" is defined in section 3, clause (1), of the Madras Abkari Act so as to include all the liquors and intoxicating drugs referred to in the provisions of that Act. "Intoxicating drug" is defined (in clause 13) to include ganja and bhang but not to include opium as defined in the Indian Opium Act of 1878. Hence abkari does not include "opium" but it includes all other intoxicating drinks and substances including ganja. The thirty-eight general conditions, therefore, are said to apply to all abkari and opium licenses, instead of merely to abkari license, because opium is not included in abkari. The second of the general conditions makes a distinction between abkari and opium licenses. The 6th, 7th, 14th, 15th and several other conditions refer to intoxicating drugs which

SIRDAR KHATUN v. MURADALI.

clearly include *ganja*. The lower Court's view that only the nine conditions specially relating to *ganja* licenses apply to such licenses and that no other conditions apply cannot be upheld. Condition 16 of the general conditions prohibits vending, transferring or sub-letting and Exhibit A is clearly such a transferring and sub-letting agreement, and the suit based on the terms of Exhibit A ought to have been dismissed ■ based on an illegal agreement.

The lower Court's decision is set aside and the suit will stand dismissed with costs in both Courts.

Order reversed; Suit dismissed.

V. R. P.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 OF 1914.

December 10, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

Musammât SIRDAR KHATUN—PLAINTIFF
—APPELLANT

versus

MURADALI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 1—Pleader, compromise by, without specific authority—Ratification by client, effect of—Evidence Act (I of 1872), s. 115—Estoppel—Division of shares—Acceptance of specific share at first—Subsequent attempt at close of case to show incorrectness of that share.

Although a Pleader cannot effect a compromise on behalf of his client without specific authority, yet, if a compromise is so effected by him and acquiesced in by his client, it is binding on the latter. [p. 928, col. 2.]

Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer, 24 C. 469, referred to.

Where in the preliminary decree the Court presumed the plaintiff's share as equal with the other co-parceners, fixed the value of his share on that presumption, and the plaintiff raised no objection:

Held, that the plaintiff could not be permitted subsequently, at the close of the case, to show that the share presumed was an excessive one. [p. 929, col. 1.]

Appeal against the decree of the 1st Class Sub-Judge, Larkana.

Mr. Wadhmal Oodharam, for the Appellant.

Mr. Tolasing Khushalsing, for Respondents Nos. 1, 2, 3a, 3b, 3c and 3e.

JUDGMENT.—This appeal involves only two items in dispute between the plaintiff and the defendants in ■ partition made of their joint property. As to two houses the plaintiff has been awarded money compensation in lieu of her share. This was on an application made on her behalf by her Pleader. It is objected to on the ground that the Pleader had no authority to effect such ■ compromise of her right. The Pleader's *vakalatnama* includes ■ power to compromise but it is urged this is ineffectual under the ruling of this Court in the case of *Mahomed Umar v. Chimansing* (1).

Now we have already held, following the English case of *Faviell v. Eastern Counties Railway Company* (2), that ■ Pleader who is duly appointed to act for the party has authority to do all acts incidental to that general authority. He may make applications on behalf of his clients, he may make admissions binding against his clients and he may make ■ application referring the matter in dispute to arbitration. A presumption of such power is essential to the due conduct of the litigation. But no such presumption is necessary in the case of an authority to compromise; and the case of *Mahomed Umar v. Chimansing* (1) shows that ■ general power to compromise given in ■ *vakalatnama* is not only irregular as not warranted by Form IV, page 160, Sind Court Civil Circulars, but is also inadequate to support a particular compromise in the course of the suit. Proof of specific authority for that compromise is necessary.

But having said so much in favour of the appellant we think that the Pleader's application, if not supported by specific authority, has been ratified. The compromise was entered into on the 16th May 1913 and although the parties were represented from 12th June 1913 by a different Pleader, the compromise was not challenged from that date until the conclusion of the proceedings before that Court on the 28th February 1914. Therefore the plaintiff's silence amounted to an acquiescence or tacit ratification of the Pleader's authority, *Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer* (3). The second item was the item of Rs. 750. The sum is

(1) 25 Ind. Cas. 935; 8 S. L. R. 91.

(2) (1845) 17 L. J. Ex. 297; 2 Ex. 344; 6 D & L. 54.

(3) 24 C. 469.

JADAV CHANDRA SARKAR v. KAILASH CHANDRA SINGH.

charged as having been received by her as her share in the sale-proceeds of a house which was part of the joint property. In the preliminary decree the Court assumed that she had received an equal share with the other coparceners and fixed a sum of Rs. 750 on that presumption. The plaintiff never objected to this equal division until called in evidence to show that what she received was something less than Rs. 750. But after the case had been closed certain documents were tendered in evidence which the Sub-Judge rightly refused to receive. Here again we think the plaintiff is precluded by her inaction, as she did not avail herself of the opportunity of showing that the share presumed was an excessive one. And the Sub-Judge in making his final decree is justified in acting under the supposition that she had received.

We accordingly confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 614
OF 1914.

June 7, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

JADAV CHANDRA SARKAR—PRINCIPAL
DEFENDANT—APPELLANT

versus

KAILASH CHANDRA SINGH—PLAINTIFF,
AND KSHETRA NATH SARKAR—

Pro forma DEFENDANT NO. 1—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res
judicata, applicability of, to co-defendants.*

In order that a finding in a case should be *res judicata* between co-defendants three things are necessary—(1) that there should be a conflict of interest between the co-defendants, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit and (3) that the judgment should contain a decision of the question raised as between the co-defendants. [p. 931, col. 1.]

Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and it has been applied, where it has been applied with great caution. [p. 931, col. 1.]

Where in a suit for money, all the defendants denied the claim of the plaintiff and the Court decreed the suit against some of the defendants, whilst against the others it dismissed the suit on the ground that they were not liable:

Held, that this decision could not operate as *res judicata* in a suit for contribution which the defendants, against whom the decree was made and who satisfied the decree, brought against the other defendants who were held not to be liable. [p. 931, col. 2.]

Cottingham v. Earl of Shrewsbury, 3 Hare 627; 15 L. J. Ch. 441; 67 E. R. 530; *Gurdeo Singh v. Chandrika Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611; *Fukirchand Lalubhai v. Naginchand Kalidas*, 33 Ind. Cas. 423; 17 Bom. L. R. 1106; 40 B. 210, referred to.

Appeal against the decree of the Additional Subordinate Judge, Faridpur, dated the 29th November 1913, reversing that of the Munsif, 1st Court, Goalando, dated the 17th May 1913.

FACTS appear from the judgment.

Babu Sitaram Banerjee (with him Babu Gopal Chandra Chackravarty), for the Appellants.—There are two points *viz.*, (1) *res judicata* and (2) limitation.

(1) The lower Court was wrong in thinking that there could be no *res judicata* between co-defendants. This was an erroneous view of the matter. See *Ram Chandra v. Narayan Mahadev* (1), *Cottingham v. Earl of Shrewsbury* (2), *Venkayya v. Narasamma* (3), *Madhavi v. Kelu* (4), *Yunf Sahib v. Durgi* (5).

But in the case of *Balambhat v. Narayambhat* (6) it was held that there could be no *res judicata* between co-defendants, unless the rights and obligations of the co-defendants were distinct and conflicting and the judgment determined those rights and obligations between the defendants *inter se*.

The drift of the latest cases on the point is that there may be *res judicata* as between co-defendants, only if there be a conflict of interest between the co-defendants and the rights and obligations of the defendants are finally decided.

The cases of *Magniram v. Mehdi Hossein Khan* (7), *Gurdeo Singh v. Chandrika Singh* (8), *Saroda Prosad Roy Chaudhuri v.*

(1) 11 B. 216.

(2) 3 Hare 627; 15 L. J. Ch. 441; 67 E. R. 530.

(3) 11 M. 204.

(4) 15 M. 264.

(5) 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 333.

(6) 25 B. 74; 2 Bom. L. R. 511.

(7) 31 C. 95; 8 C. W. N. 30.

(8) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

JADAV CHANDRA SARKAR V. KAILASH CHANDRA SINGH.

Kailash Bashini Guha (9), *Fakirchand Lallu Bhai v. Naginchand Kalidas* (10) would govern the present case.

The present plaintiff and defendants were co-defendants in the previous suit brought against them by a creditor; the issue raised in the previous case was substantially the same as was raised in the present case; rather the issue in the present case might and ought to have been raised in the previous case, and so the case comes under Explanation IV of section 11, Civil Procedure Code. Hence the plaintiff's suit is barred under section 11, Civil Procedure Code.

(2) The case is not governed by Article 61 of the Limitation Act. In the previous case the present appellants were not made liable to pay, hence this was not a case in which it may be said that the plaintiff paid money which the defendants were under a legal obligation to pay. The present plaintiff paid the money as he was bound to pay and in so doing he did nothing more than what he was legally liable to do. Hence I submit the limitation should begin to run from the date of debt and not from the date when the plaintiff paid the money on his own behalf.

Babu Sarat Chandra Roy Chowdhury (with him Babus Probodh Chandra Roy and Kumar Sankar Roy), for the Respondents.—As regards limitation, the finding of the Court of Appeal below is clear, and it finds that the plaintiff was a surety for the defendants. This is a finding of fact. So Article 81 or 61 of the Limitation Act is applicable. In any view of the matter, the suit is not barred by limitation.

As regards *res judicata*, the liabilities of the defendants *inter se* were not raised nor decided in the previous suit; hence no question of *res judicata* can arise.

In answer to a question from the Bench, the learned Vakil said that even assuming the question was raised it would not matter much, as the plaintiff-respondent being the surety the decree would bind the present appellants, even though they were held to be not liable in the creditor's suit.

Babu Sitaram Banerjee, in reply.—The other side has not shown that the cases cited by me do not apply to this case.

(9) 16 Ind. Cas. 117; 17 C. W. N. 128.

(10) 33 Ind. Cas. 42; 17 Bom. L. R. 1106; 40 B. 10.

[D. CHATTERJEE, J.—Supposing the question of suretyship was raised in the previous case, would not the decree bind the present appellants as well?]

I submit not, for in that case the decree would have been in a different form. I submit if that decree bound the present appellants, the creditor undoubtedly in all human probability would have first proceeded against the principals and failing them, then against the surety. If that point was expressly raised, the question would have been decided and as it was not raised, am I not entitled to ask your Lordships to hold that if the question was raised it would have been decided against the respondents?

Sri Gopal v. Pirthi Singh (11), *Guddappa v. Tirkappa* (12) referred to.

JUDGMENT.—One Janky Saha brought a suit against the plaintiff defendant No. 1, the defendant No. 1 as defendant No. 2, and the defendant No. 2 as defendant No. 3 for money said to have been borrowed by the said defendants. Defendant No. 3 was made defendant No. 4 the *gomasta* of the other defendants. The defendants Nos. 1, 2 and 4 denied the loans and defendant No. 3 did not appear. The issues framed were:—

1. Had the defendants the alleged transaction with the plaintiff and did they borrow the sums as stated in the plaint?

2. Is the claim against defendant No. 1 barred by limitation?

3. Are the defendants Nos. 2 and 4 liable to the plaintiff for the alleged debts?

4. What amount, if any, can the plaintiff recover from any and which of the defendants?

It was found that defendant No. 2 was not liable, that defendant No. 4 was a mere *gomasta* and was not liable, that defendant No. 1 (the plaintiff in this case) and defendant No. 3 (defendant No. 2 in this case) were liable. The decree was executed against the plaintiff of this case and he satisfied the same and brings this suit for recovery of the decretal amount from defendant No. 1 for self and as executor of his deceased brother, on the ground that the money borrowed and decreed in favour of Janky Saha was borrowed for the business of the defendant No. 1

(11) 24 A. 429 (P. C.); 29 I. A. 118; C. W. N. 889; 4 Bom. L. R. 827.

(12) 25 B. 189; 2 Bom. L. R. 869.

VENKITAMMAL v. ALANGAT RAMAN NAIR.

and his deceased brother Dina Bandhu. Defendant No. 2, who was defendant No. 3 in the creditor's suit, is the son of defendant No. 1 and defendant No. 3, who was defendant No. 4 in the former suit, is the *gomasta* of the defendants' firm.

The Trial Court gave a decree for half the amount claimed against defendant No. 2 who was one of the judgment-debtors under the previous decree, and dismissed the suit against the others as barred by limitation. The learned Subordinate Judge on appeal by the plaintiff has decreed the suit in full against defendant No. 1, who appeals before us.

It is contended on his behalf that the suit is barred by the principle of *res judicata*. Now the plaintiff and the defendants were ranged on the same side ■ co-defendants and the question of the liability of the defendants would be *res judicata* if it was raised and decided ■ a question as between the plaintiff and them. The Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and it has been applied, where it has been applied, with great caution. In the case of *Cottingham v. Earl of Shrewsbury* (2) Vice-Chancellor Wigram said: "If ■ plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But, if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." In order, therefore, that ■ finding in ■ case should be *res judicata* between co-defendants three things are necessary, (1) that there should be a conflict of interest between co-defendants, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit, (3) that the judgment should contain ■ decision of the question raised as between the co-defendants. See *Gurdeo Singh v. Chandrika Singh* (8), *Fakirchand Lallubhai v. Naginchand Kalidas* (10). In the previous suit of the creditor the defendants had no conflict, they all denied the claim of the plaintiff, so that on the pleadings there was no conflict of interest

amongst the defendants. Issue No. 3 was framed on the plea of defendants Nos. 2 and 4, who said they were not liable as defendant No. 2 had not taken the loan and had not authorised defendant No. 3 and ■ defendant No. 4 was a mere *gomasta*. Issue No. 4 was ■ general one on the said pleas and was intended to decide who were liable to the plaintiff. The decision was that defendant No. 2 was not liable to the plaintiff so that none of the three elements of a *res judicata* between co-defendants is present in the judgment. It is said, however, that the plaintiff ought to have raised the plea that he now raises, that he was ■ mere surety for the others. In the first place, such ■ plea would be inconsistent with the plea that he did take evidently for the benefit of the present defendants; in the second place, it would not save him from the decree; and in the third place, it would be unnecessary to decide the question of the liabilities as between the several defendants as the plaintiff claimed a joint decree against all the defendants. On all these grounds we think that the question is not *res judicata*.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2222 OF 1912.

January 19, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

VENKITAMMAL, MINOR, BY GUARDIAN
MANIYAN alias HARIHARAN PATTTER
—DEFENDANT No. 1—APPELLANT

versus

ALANGAT RAMAN NAIR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Malabar Law—Karnavan, power of, to grant melcharth before expiry of kanom—Justification—Family necessity or advantage.

A *karnavan* of a Malabar *tarwad* has not an uncontrolled discretion in the renewal of *kanoms* or in the grant of *melcharths* prior to the expiry of the former but must justify his grants by family necessity or advantage. [p. 932, col. 1.]

Karyar Kandy Pattupurail Cheria Cherikandan v. Aylliath Kushiath Krishnan Nambiar, 16 Ind. Cas. 391; 27 M. L. J. 690; 12 M. L. T. 600, followed.

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 713 of 1911, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 333 of 1910.

Mr. T. R. Ramachandra Aiyar, (with him Mr. T. R. Krishnasami Aiyar), for the Appellant.

Messrs. C. Madhavan Nair and A. Swaraman Menon, for the Respondents.

This second appeal coming on for hearing on the 27th April 1914, the Court (Oldfield and Sadasiva Aiyar, JJ.) delivered the following

JUDGMENT.--The learned District Judge dealt with the case without reference to *Karyan Kandy Patupurail Cheria Chirikkandan v. Aylliath Kushitath Krishnan Nambiar* (1). That decision shows, what is not recognised in the judgment under appeal, that a *karnavan* has not an uncontrolled discretion in the renewal of *kanoms* or grant of *melcharths* prior to the expiration of the term of the former, but must justify his grants by family necessity or advantage. The learned District Judge's misapprehension of the law appears to have influenced his consideration of this part of the case. We must, therefore, call on him to submit a finding in the light of the foregoing on the issues:—

(1) "Was there adequate necessity for the grant of Exhibit B, so as to make it binding on the *tarwad*?"

(2) "Did plaintiff take it with the *bona fide* belief that there was such necessity?"

The findings should be submitted within two months after the re-opening of the District Court after the summer recess and seven days will be allowed for filing objections.

After the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We understand the finding of the lower Appellate Court to be that the plaintiff (who was the Vakil's clerk of the *karnavan* who granted the *melcharth*) was not a *bona fide* alienee so far as

(1) 16 Ind. Cas. 391; 12 M. L. T. 600; 27 M. L. J. 690.

regards the 10 items of properties in dispute are concerned, that is, did not believe in the necessity for the grant of the *melcharth*, and that there was no such necessity in fact.

We accept this finding and setting aside the District Judge's decree, restore the decree of the District Munsif with costs here and in the lower Appellate Court payable to the 1st defendant by the plaintiff. It is unnecessary to decide in this suit the question whether the *melcharth* is valid against the *tarwad* of the mortgagors and against the prior mortgagees (if any) of the six items of properties not now in dispute.

Appeal allowed; Suit dismissed.

V.R.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2438 OF 1914.

November 5, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Le Rossignol.

MRS. JESSIE MOYLE STEWART—DEFENDANT
—APPELLANT

versus

THE BANK OF UPPER INDIA, LTD.—
PLAINTIFF, AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Hypothec of moveable property made orally, whether valid in Punjab—Priority, subsequent unregistered mortgage, whether obtains.

In the Punjab a hypothec of moveable property is not required to be by deed in writing, and is, if made orally, as effectual for all purposes (except in cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing, provided always that its existence can be proved. [p. 934, col. 1.]

Where, therefore, plaintiff sued to recover a certain sum of money on the basis of an unregistered mortgage-deed in respect of moveable property which had been previously hypothecated orally to another person:

Held, that the hypothec created over the property in suit gave the hypothecatee as much right to that property, as the unregistered deed of mortgage subsequently executed gave to the plaintiff, and that, quite irrespective of all questions of notice, his rights being prior in time must prevail over the rights of the latter. [p. 934, col. 2.]

Abdur Rahman v. Kishna Mal, 11 Ind. Cas. 869; 161 P. W. R. 1911; 247 P. L. R. 1911, followed.

MRS. STEWART v. BANK ■ UPPER INDIA, LTD.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 26th May 1911, affirming that of the District Judge, Simla, dated the 23rd December 1910.

Mr. *Fazl-i-Hussain*, for the Appellant.

Mr. *B. Bevan Petman*, for the Respondents.

JUDGMENT.

RATTIGAN, J.—This is in reality ■ very simple case and we have no doubt would have presented no difficulty to the Courts below had it not been for the extraordinary prolixity, futility and irrelevancy of most of the pleas urged on behalf of defendant No. 3 (Mrs. Stewart) in the Court of the District Judge and to the argumentative verbiage of the 33 grounds of appeal filed on her behalf in the Court of the Divisional Judge on appeal. The real question at issue between the parties was, unfortunately for this defendant, entirely obscured as ■ result of these pleas—the majority of which were so obviously untenable that we are not surprised that no reference has been made to them in the argument before us, and the dispute between plaintiff and defendant No. 3 has been decided on points which are really irrelevant. For this very unfortunate result the blame rests not with the Courts which dealt with the case as presented before them, but with the defendant and her legal adviser who would seem to have gone out of their way to hide from the Courts the only, but, as we shall presently show, the very effective answer that they have to plaintiff's claim.

Briefly stated, the plaintiff Bank claims to recover a sum of Rs. 2,167 from the estate of the late Mr. George Corstorphan and bases its claim on ■ promissory note and an unregistered deed of mortgage (P-1 and P-2, both dated 10th of July 1909). This mortgage-deed will be found printed at page 12 of the paper-book in (First Appeal No. 1323 of 1911) *Mrs. Stewart v. Bank of Upper India Ltd., Simla* (1) and under its terms Mr. and Mrs. Corstorphan for a consideration of Rs. 2,000 mortgaged, granted and assigned to the plaintiff Bank "all our press and the relative business run under the name and style of the 'Simla Times Press at Simla' together with all and singular the machines, types, plants, printing presses, printing materials

and apparatus, &c., as also the good will, furniture, fixtures, fittings and appurtenances," &c., &c. Admittedly the Punjab Banking Company had ■ much earlier mortgage on this ■ property and that mortgage was paid off by Mr. Corstorphan, who borrowed money from defendant No. 3 for the purpose of redeeming his property. It is alleged, and there is nothing on the record to the contrary, that this mortgage was paid off in June 1905. Defendant No. 3 states that on redemption of the Punjab Banking Company's mortgage, Mr. Corstorphan handed her an inventory of the property now in suit and agreed with her that she should have a mortgage or charge upon the said property as part security for her loan to him which at that date amounted to about Rs. 22,000 [see Exhibit D-3 (25)]. This plea is set forth in paragraphs 10 and 11 of her second written statement, and is amply substantiated by the letters addressed to her by Mr. Corstorphan which are marked (in the supplementary paper-book) ■ D. 3 (31); D. 3 (35); D. 3 (39) and D. 3 (49). In the first of these letters dated 28th January 1906, Mr. Corstorphan writes as follows:—
"Bond or no bond, your positions are perfectly safe. We owe you Rs. 22,000 and everything we possess is pledged to you for its repayment." In the second letter dated 16th February 1907, he writes:—"The value I put on the properties mortgaged to you are as follows:—
■ * * * * *

"Press.....Rs.16,000."

In the same letter, later on, he refers to ■ suggestion that he should pay Mrs. Stewart Rs. 4,000, and that in consideration thereof, she should "relieve" him "of a claim on the press for the first mortgage," and take in lieu thereof "■ second mortgage on the press."

In D. 3 (49) he tells her again, "you have, of course, your claim on the press." And finally, in recognition of Mrs. Stewart's right to the press, both he and his wife, by their Wills, dated 13th May 1906, give and bequeath (*inter alia*) the Simla Times Printing Press and all its appurtenances to this lady.

In face of all this documentary evidence it is impossible to hold that Mr. and Mrs. Corstorphan did not create ■ charge or

RAJENDRA NATH v. BAIKUNTHA NATH.

hypothec upon the property now in suit in favour of Mrs. Stewart, and this quite apart from the contention that by handing over to her the inventory of the said property, Mr. Corstorphan created an equitable mortgage thereupon in her favour. The documents to which we have referred bear various dates in 1906 and 1907 and they clearly refer to an oral anterior agreement by which such charge or hypothec was created. They are all prior in time to the pro-note and unregistered mortgage upon which the plaintiff Bank relies and which bear date 10th July 1907.

Upon these facts how can it be contended that plaintiff's unregistered mortgage-deed and pro-note are entitled, though later in date, to priority over the charge possessed by Mrs. Stewart? We know of no provision of law in force in this Province which requires a charge of this kind in respect of moveable property to be by deed in writing; nor is there any authority for the proposition that if made orally it is not as effectual for all purposes (except, of course, in the cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing, provided always that its existence can be proved. In the case before us section 48 of the Registration Act has no applicability and the existence of the charge has, in our opinion, been established beyond all possibility of doubt. Plaintiff Bank has not in its pleas contended nor was it put in issue that Mrs. Stewart by any act on her part had forfeited this right of priority, though Mr. Bevan Petman on behalf of the Bank suggested before us that by taking a registered deed in 1910, Mrs. Stewart had, by operation of law, had the misfortune to lose any rights of priority which she might otherwise have had, inasmuch as the oral agreement to create a hypothec in her favour was merged in the higher security of the registered deed. As we have remarked, this argument was not put forward in either of the Courts below and it is too late to urge it at this stage. But apart from that objection, we are entitled to assume that it was not Mrs. Stewart's intention, when she obtained the registered deed, to forego valuable rights which she had in law under the earlier agreement

with Mr. Corstorphan. On the contrary, as it was obviously to her benefit to keep the earlier charge alive, she must be presumed to have taken the registered deed subject to that condition.

We hold, accordingly, that the hypothec created by Mr. and Mrs. Corstorphan in favour of Mrs. Stewart over the property in suit gave her as much right to that property as the unregistered deed of mortgage subsequently executed gave to the plaintiff Bank and that quite irrespectively of all questions of notice, her rights being prior in time must prevail over the rights of the latter [see *Abdur Rahman v. Kishna Mal* (2)].

As a result of this finding we must accept this appeal and amend the decree by declaring that the plaintiff Bank is entitled to realise the amount claimed in the plaint from the property mortgaged to it, only after the claims of Mrs. Stewart against that property have been fully satisfied. Plaintiff Bank will pay Mrs. Stewart's costs throughout. Mrs. Corstorphan, defendant No. 2, put forward no defence and stated that she was a mere stakeholder who was ready to pay whomsoever of the two claimants was adjudged by the Court to be entitled to the money claimed.

Appeal accepted.

(2) 11 Ind. Cas. 869; 161 P. W. R. 1911; 247 P. L. R. 1911.

CALCUTTA HIGH COURT.

CIVIL RULE No. 183 OF 1916.

May 26, 1916.

Present:—Mr. Justice Teunon and
Mr. Justice Sheepshanks.

RAJENDRA NATH CHAKRAVARTY—
DEFENDANT—PETITIONER

versus

BAIKUNTHA NATH PRAMANICK AND
OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1
—Withdrawal of suit, order for—Grounds not specified
—Application made at late stage—High Court—
Revision—Remand—Amendment of plaint.

Where in a title suit, after evidence on both sides was finished, the plaintiff made an application for permission to withdraw the suit with liberty to bring a fresh suit on the same cause of action without specifying any defects in the plaint and the Munsif granted the permission, the High Court, in

GOPALA KRISHNA AIYAR v. SRINIVASA ROW SAHIB.

the exercise of its revisional powers, set aside the order granting permission and remitted the case to the Munsif to be heard, leaving it open to him to consider any application that might be made to him for amendment of the plaint.

Rule against the order of the Munsif, 2nd Court, Howrah, in Suit No. 605 of 1915.

Babu Manmatha Nath Roy, for the Appellant.

Babu Prokash Chandra Majumdar, for the Opposite Party.

JUDGMENT.—In this case it appears that the plaintiffs-opposite party brought a suit (No. 605 of 1915) in the Second Munsif's Court at Howrah for establishment of title to certain land and recovery of possession thereof. The suit came on for hearing and evidence was taken on the 15th December of that year and on the 12th and 13th January of the current year. All the evidence having been taken the case was next adjourned for arguments to the 17th January. On that date instead of proceeding with the case, the plaintiffs made an application for permission to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. That permission was given.

Obviously when the suit had reached the stage at which it did arrive, such permission should not have been given unless for strong grounds. We observe that in his application the plaintiff did not even state what was the defect in the plaint which necessitated his prayer. We are of opinion that on unspecified grounds, more especially at that stage, the Munsif should not have granted the plaintiffs permission to withdraw from the suit. We, therefore, set aside the order of the Court below and remit the case to him to be heard and decided in accordance with law. We may observe that the plaintiffs now state that they made this prayer because they were under the impression that the Munsif would not grant an application, if made to the Court, for certain amendments which appeared to them to be necessary. What those amendments were have not been made clear to us; but it will be open to the Munsif to consider any application that may be made in his Court in that behalf and decide such application in the exercise of his judicial discretion. The Rule is made absolute with costs—two gold mohurs.

Rule made absolute.

COURT OF THE BOARD OF REVENUE,
MADRAS.

SECOND APPEALS NOS. 2 AND 3 OF 1916.

April 13, 1916.

Present:—Mr. Clegg, F. M.

IN S. A. No. 2 OF 1916

GOPALA KRISHNA AIYAR—

PLAINTIFF—APPELLANT

IN S. A. No. 3 OF 1916

NARASIMHA SASTRI—PLAINTIFF—
APPELLANT

versus

C. SRINIVASA ROW SAHIB AND OTHERS

—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), s. 40—
Landlord and tenant—Commutation of rent, principles
applicable to—Discretion of Court.*

Section 40 of the Madras Estates Land Act gives a right to an occupancy tenant to sue for commutation of rent. It is not a matter resting within the option of the landlord, but is in the discretion of the Court to allow or refuse. [p. 935, col. 2.]

A landlord cannot insist on the continuance of paddy rent because he requires periodically a certain quantity of paddy for home consumption. If it is to the convenience of both parties, the commutation of grain into money rent will be sanctioned, especially when the tenant will be thereby enabled to grow any crops of any quality that he chooses. [p. 935, col. 2; p. 936, col. 1.]

Second appeals against the decrees of the Collector of North Arcot, in Appeal Suits Nos. 1 and 2 of 1915.

Mr. C. Rajagopala Aiyangar for Mr. T. Narasimha Aiyangar, for the Appellants.

Mr. A. K. Madhava Rao, for Respondent No. 16.

JUDGMENT.—These second appeals are heard together. In the appeal memo. in Second Appeal No. 3 of 1916, the 16th respondent (defendant's) name has been inadvertently omitted and will now be added. The 16th respondent alone opposes the appeals.

2. The only question to be decided is whether the Courts below have used a proper discretion in refusing to allow commutation. Under section 40 the occupancy *ryot* undoubtedly has the right to sue for commutation. The Act gives him this right, and it is not a matter resting within the option and discretion of the proprietor, but is within the discretion of the Court to allow or refuse.

3. The present rent is a fixed quantity of paddy. It is to the convenience of both parties to have a fixed money rent. No importance can be attached to the

ISA v. SAMMAN.

plea that the proprietor requires a certain amount of grain for home consumption. There is nothing to show that he will be inconvenienced in this respect if he receives a money rent on the suit lands. On the other hand the *ryot* will have the full benefit of his exertions. He can grow inferior or superior kinds of paddy or utilize his lands for other crops as he chooses. The advantages are in favour of commutation. The real dispute appears to be the rate, and this the Court will decide. Commutation will accordingly be sanctioned and the appeals allowed with costs throughout.

Appeals allowed.

V. R. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2040 OF 1913.

October 28, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

ISA AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

SAMMAN AND OTHERS—DEFENDANTS—

RESPONDENTS.

Custom—Alienation—Gujars of Phillour Tahsil—Gift by sonless proprietor to daughter and daughter's son, whether valid.

A sonless proprietor among *Gujars* of the Phillour Tahsil in the Jullundur district can gift his land to a daughter whose husband was a *khana-damad* and to a daughter's son whom he had appointed as his heir. [p. 937, col. 2.]

Muhammad Din v. Sadar Din, 67 P. R. 1901; *Nabia v. Musammam Patta*, 5 Ind. Cas. 232; 2 P. R. 1910; 4 P. W. R. 1910; 156 P. L. R. 1910, *Ralla v. Budha*, 50 P. R. 1893 (F. B.), distinguished.

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 14th July 1913.

Mr. Lakshmi Narain, for the Appellants.

Mr. Nand Lal, for the Respondents.

JUDGMENT.

JOHNSTONE, C. J.—In this case four issues were drawn by the first Court, in whose judgment the facts and pleadings are fully set forth. The first of these issues is concerned with the question whether the land is ancestral. Before us both sides state that it is so. The second issue is

on a fact, *viz.*, did *Musammam Said's doli* remain in the house of her father? This question has been decided in the affirmative by both the lower Courts and in second appeal we cannot discuss it again. A similar remark applies to the third issue, *viz.*, whether *Suleman* was actually appointed as heir by defendant No. 1. In short, the only question that we really have to decide is that of custom, in connection with which the learned Divisional Judge has given a certificate under section 40 (3) of the Act.

The first Court, in our opinion, has dealt with this issue of custom in a very judicious and complete manner. It has sufficiently explained what evidence was produced on both sides and has in an adequate manner discussed the value of that evidence. It has pointed out that each party produced six witnesses, but a very important distinction is this that, whereas the defendants' witnesses quote a large number of instances in support of the custom that a sonless *Gujar* of the Phillour Tahsil can gift his property to his daughter and daughter's son, on the other hand, the plaintiffs' six witnesses are unable to say anything more than this that such gifts are invalid, citing no instances in support of their opinion.

It is unnecessary for us again to set forth in detail what the documentary evidence produced by the parties consists of. It is enough for us to say that we entirely agree with the lower Appellate Court that Exhibit D-2, judgment pronounced by Mr. Justice Robertson in this Court in August 1909, is of great importance. If it is correct, it concludes the question now before us, and we see no reason to suppose that it is not correct.

On the same side we are much impressed by Exhibit D-3. It is, no doubt, not a judgment of this Court, but at the same time it is a very well reasoned order of the Divisional Judge, Jullundur, which fully supports the defendants' case. No appeal was preferred against that judgment and it may, therefore, be taken as a valuable precedent. In that judgment a large number of instances are carefully scrutinized. Exhibit D-4 is too old a judgment to

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

be of much value now. But in addition to these we have a large number of mutations showing that sonless *Gujars* have been alienating their lands to daughters and daughters' sons without any objection by the collaterals. Ordinarily mere mutations are not so valuable as a judicial decision in a contested case; but, in view of the fact that not a single instance has been adduced *per contra*, we think that a certain amount of weight may properly be allowed to these mutations.

As the first Court has pointed out, the plaintiffs besides their oral evidence rely solely upon the *riwaj-i-am* and two judgments. Now, we have seen the extracts from the *riwaj-i-am* on the record and we cannot find that they help either party. They simply state that in the Phillour Tahsil daughters are excluded by collaterals in the matter of succession; there is nothing said about a gift to a daughter or about *khana-damadi*. It is obvious that such entries have no bearing on the present case. Turning to the two judgments relied on by the plaintiffs, the first is Exhibit P-9 delivered on the 24th May 1912. We have seen it and we find that the learned Munsif's criticism of it is absolutely accurate. The donee there was a sister's son and the gift was supported on the ground that it was made in return for services rendered, but the finding was that no services had been rendered. The distinction between that case and this is very clear. The next judgment, Exhibit P-10, is still more completely beside the mark; in fact, so much so that we do not think it necessary to discuss it at all.

We would also refer to the three rulings quoted by the appellants' Counsel, viz., *Muhammad Din v. Sadar Din* (1), *Nabia v. Musammatt Fatto* (2) and *Ralla v. Budha* (3). As to the last of these, no doubt the onus of proving that a daughter's son can be adopted does generally lie upon the person saying the same; but here we are really concerned with a gift to daughters and the question of *khana-damadi*. This ruling, there-

fore, would not help the appellants. As to *Muhammad Din v. Sadar Din* (1), it is a Single Bench ruling relating to *Kathana Gujars* of Gujrat. The decision was based largely upon proof of actual practice obtaining in that tribe in the Gujrat district. The present case comes from Phillour in the Jullundur district, and, therefore, it is impossible, in the face of the evidence adduced by the respondents, to attach much importance to that ruling. As to *Nabia v. Musammatt Fatto* (2), the first remark to be made is that the case is from the Ludhiana district. Next, in that case the last male holder of the property made a Will of a very peculiar kind to the effect that, when his infant daughter should marry, her husband should be considered as his *khana-damad* and that his property should go to that infant daughter. The Division Bench held that such a Will was not competent in the presence of near collaterals. It is difficult to see how this can be held up as contrary to the decision of the lower Court in this case, in which the question is whether a sonless proprietor among *Gujars* of the Phillour Tahsil has the power to gift his land to a daughter whose husband was undoubtedly *khana-damad* and to a daughter's son whom he had appointed as his heir.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1323 OF 1911.
November 4, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice LeRossignol.
MRS. JESSIE MOYLE STEWART—
DEFENDANT—APPELLANT

versus

BANK OF UPPER INDIA, LTD., SINGLA
—PLAINTIFF—RESPONDENT.

Mortgage—Equitable mortgage—Deposit of title-deeds, whether creates valid mortgage in Punjab—Deposit of copies of title-deeds, when enough—Subsequent registered deed of mortgage, effect of—Earlier mortgage, whether kept alive—Presumption—Priority—Registration Act (XVI of 1908), s. 48.

(1) 67 P. R. 1901.

(2) 5 Ind. Cas. 232; 2 P. R. 1910; 4 P. W. R. 1910; 156 P. L. R. 1910.

(3) 50 P. R. 1593 (F. B.).

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

In the Punjab and in other places where the Transfer of Property Act does not obtain a mortgage by deposit of title-deeds is a valid legal mortgage and has the same legal effect as a mortgage created by any other means recognized by law. [p. 942, col. 1.]

Varden Seth' Sam v. Luckpathy Royjee Lallah, 9 M. L. A. 303; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756; *Himalaya Bank Ltd. v. F. W. Quarry*, 17 A. 252 at p. 260; A. W. N. (1895) 97; *Manekji Framji v. Rustomji Naserwanji Mistry*, 14 B. 269, referred to.

A mortgage can be created by a deposit of copies of title-deeds when the originals are not forthcoming. [p. 940, col. 2.]

Ex parte Broadbent, In re Barrow, 1 M. & A. 635; D. & C. 3; 3 L. J. Bk. 95, referred to.

The English doctrine of the legal estate prevailing over the equitable estate does not obtain in a country where there is no distinction between legal and equitable estates; and consequently a mortgagee who holds a registered deed of mortgage cannot claim priority over an earlier mortgage created by deposit of title-deeds. [p. 942, col. 1.]

Webb v. Macpherson, 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238, *Coggan v. Pogose*, 11 C. 158; *Gokul Dass v. Eastern Mortgage and Agency Co.*, 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102; *Paw Wa v. O. A. R. Valliappa Chetty*, 14 Bur. L. R. 211, referred to.

Where in a suit by the plaintiff Bank to enforce their rights as mortgagees against the mortgagors, defendants Nos. 1 and 2, and the mortgaged property itself, defendant No. 3 claimed to have a prior mortgage on the property effected by a deposit of copies of the title-deeds:

Held (1) that the plaintiffs could not raise the plea for the first time in appeal that a mortgage effected by depositing copies of title-deeds was invalid, especially when they had been accepted as regular by the original mortgagees; [p. 940, col. 1.]

(2) that the title-deeds were deposited with defendant No. 3 with the intention of creating a mortgage charge in her favour over the property in suit; [p. 940, col. 2.]

(3) that there was nothing on the record to show that defendant No. 3 had any intention to give up valuable rights accruing to her under this transaction, by accepting a later registered deed of mortgage, but that the ordinary presumption was that she intended to keep the first mortgage alive for all purposes beneficial to herself; [p. 940, col. 2; p. 941, col. 1.]

(4) that section 48 of the Registration Act did not apply and the subsequently registered deed of mortgage did not take precedence over the earlier transaction. [p. 942, col. 1.]

Coggan v. Pogose, 11 C. 158; *Gokul Dass v. Eastern Mortgage and Agency Co.*, 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102; *Paw Wa v. O. A. R. Valliappa Chetty*, 14 Bur. L. R. 211, followed.

First appeal from the decree of the District Judge, Simla, dated the 19th August 1911.

Mr. Fazl-i-Hussain, for the Appellant.

Mr. B. Bevan Petman, for the Respondent.

JUDGMENT.

RATTIGAN, J.—In this, as in the connect-

ed case (Civil Appeal No. 2433 of 1914*), the facts as proved or alleged, ■ simple. The plaintiff is the Bank of Upper India, Limited, and it sues to recover a sum of Rs. 7,471-1-6 on the basis of a registered mortgage-deed executed in its favour on the 12th November 1907 by the late Mr. Corstorphan and his widow, Mrs. Corstorphan (defendants Nos. 1 and 2), who is sued both as the legal representative of her late husband and in her own personal capacity. The plaint sets forth that the consideration for the said mortgage was ■ loan by the plaintiff Bank to the mortgagors of a sum of Rs. 6,000 payable on the 12th October 1910, and that it was agreed between the parties that interest at the rate of 8 per cent. per annum, with half-yearly rests, should be paid thereon on the 15th of each month from the 15th December 1907, and that in default of payment of interest as agreed, the whole amount, principal and interest, was to become due forthwith with interest at the rate of 10 per cent. per annum; that as security for the due payment of the amount secured by the mortgage, the mortgagors mortgaged to the plaintiff Bank the house known ■ 'Chor View Cottage,' situated in Kasumpti, Simla, together with all buildings, erections, furniture, fixtures, goods and chattels thereon and also all the rents, profits and income of the said house; and that defendant No. 3 (Mrs. Stewart) was impleaded as a defendant because she claimed to be "■ puisne mortgagee" of the said mortgaged property. Plaintiff Bank accordingly prayed for ■ decree for payment by defendants Nos. 1 and 2 (i. e., Mrs. Corstorphan in her dual capacity) of the sum of Rs. 7,471-1-6 with costs of the suit and future interest at 10 per cent. per annum and that it might further be decreed that in default the property mortgaged should be sold and if the amount due to plaintiff was not satisfied thereby, the balance should be recoverable from the other property of the said defendants.

Mrs. Corstorphan confessed judgment and admitted execution of the said mortgage-deed and receipt of full consideration.

*See 84 Ind. Cas. 932—Ed.

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

Mrs. Stewart, defendant No. 3, through her Counsel, filed a lengthy written statement in reply to the plaint to which objection was taken in numerous respects, and as a result of her pleading no less than one preliminary and ten main issues were framed by the Court.

Upon these issues the District Judge found as follows:—

(1) *Preliminary Issue*: that the present suit was not barred by reason of the previous Suit No. 163 of 1910;

(2) *Issue 5*: that the present suit was not barred merely because plaintiff Bank did not enforce the forfeiture clause which came into operation on the 15th December 1907;

(3) *Issue 8*: that the question of the priority of defendant No. 3's mortgage over the mortgage-deed upon which the present suit was based, was *res judicata* by reason of the decision in the said former suit between the parties (No. 163 of 1910);

(4) *Issue 3*: that defendant No. 3 had failed to prove that defendants Nos. 1 and 2 had not received full consideration for the mortgage in favour of the plaintiff Bank;

(5) *Issue 6*: that the plaint was not bad for vagueness;

(6) *Issue 9*: that, except as regards a sum of Rs. 500 which should have been claimed as costs, the amount claimed by plaintiff Bank was correct;

(7) *Issue 4*: that in lieu of the rate of interest claimed by plaintiff Bank (*viz.*, 8 per cent. per annum plus 2 per cent. per annum in case of default) plaintiff Bank was entitled, as reasonable compensation, to claim only 9 per cent. per annum;

(8) *Issues 1, 2, 7 and 10*: that Mrs. Stewart had proved that she held an equitable mortgage, through deposit of title-deeds, over the "Chor View" estate; that there had been no subrogation of the prior mortgage to the Punjab Banking Company in her favour; that since 1907 the plaintiff Bank held a legal mortgage upon the said property; that the plaintiff Bank had no knowledge or notice of Mrs. Stewart's equitable mortgage until after the death of Mr. Corstorphan which occurred in February 1910, shortly after the execution of the registered deed of mortgagee in her

favour; and that consequently plaintiff Bank had a first charge on the property in suit.

The learned Judge, as a result of his findings on the above issues, held that the sum of Rs. 6,919-9-6 was due as a first charge to the plaintiff Bank, and that Mrs. Stewart had a second charge, as mortgagee, upon the property in suit to the extent of Rs. 15,603-11-0. He granted a decree accordingly in form 6, Appendix D, of the Civil Procedure Code.

Mrs. Stewart, defendant No. 3, has preferred an appeal from the decree of the District Judge to this Court, and we have heard the case argued at length by Mr. Fazl-i-Hussain on her behalf and by Mr. Bevan Petman for the respondent Bank.

It will clear the ground if we here note that the only points argued before us by the learned Counsel above mentioned were (1) whether Mrs. Stewart had the rights of a mortgagee over the property in suit prior to the execution of the registered deed of the 8th February 1910 [Exhibit D. 3 (1)]; (2) whether she was entitled to claim a subrogation of the earlier mortgage in favour of the Punjab Banking Company on the allegation that that mortgage had been paid off out of the money lent by her to the mortgagor, Mr. Corstorphan; (3) whether the plaintiff Bank in December 1907, when the mortgage-deed now sued upon was executed, had actual or constructive notice of the earlier (alleged) mortgage in favour of defendant No. 3, and if so, whether the fact of such notice deprived the plaintiff Bank of the priority which it might otherwise have had; and (4) whether the alleged mortgage by deposit of title-deeds was merged in the subsequent registered deed of February 1910 and defendant No. 3 thus deprived by operation of law of any priority which she might otherwise have claimed.

In other words, Mr. Fazl-i-Hussain gave up all the pleas advanced by his client in her written statement except those set forth in paragraphs 8 and 9 thereof, while Mr. Bevan Petman did not attempt to support the judgment of the District Judge on the ground that the questions now in issue between the parties were *res judicata* by reason of the decision in the

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

former suit. We have no doubt that Counsel were well advised in adopting this course. The other pleas urged by defendant No. 3 in her written statement were futile and we are surprised that they were ever advanced, while the conclusion arrived at by the District Judge on issue 8 is so clearly wrong that Mr. Bevan Petman was right in not referring to it.

The first question, then, with which we have to deal on this appeal, is whether prior to December 1907 there was in fact and in law a mortgage upon the property in suit (the Chor View estate) in favour of Mrs. Stewart. It has been found by the District Judge in this case and by the Courts in the former case that Mr. and Mrs. Corstorphan did actually deposit certain documents relating to the said estate and described as title-deeds with Mrs. Stewart; that this deposit was intended to be a security to her for the moneys which she had advanced from time to time to Mr. and Mrs. Corstorphan; and that as a result Mrs. Stewart held an equitable mortgage over the said estate which was prior in time to the mortgage upon which the plaintiff Bank bases its present claim. On behalf of the respondent Bank, Mr. Bevan Petman contests the correctness of this finding and contends (1) that the so-called title-deeds were in fact no title-deeds at all but merely attested copies of the original deeds, and that as such their deposit could not create a mortgage in Mrs. Stewart's favour; and (2) that Mr. and Mrs. Corstorphan never intended the deposit to have the effect of a mortgage or charge upon the property.

As regards the *first* argument, Mr. Bevan Petman relied upon a passage in Gour's *Transfer of Property Act* (3rd edition, page 715) where the learned author, citing *Ex parte Broadbent, In re Barrow* (1), states that for the purposes of creating a mortgage or charge by deposit, the copy of a title-deed cannot take the place of the original. We do not think it is open to Mr. Petman to raise this plea for the first time in appeal before us, as the so-called title-deeds have hitherto been received, without demur, as regular title-deeds both by the parties and also by the Punjab Banking Company (the original mortgagees) and by all the Courts before whom the documents have been produced. The deeds in question

were executed many years ago and there is every reason to believe that the originals have been lost, a fact which could, no doubt, have been established had the present objection been taken at the trial of the suit. And in this connection we would refer to a later passage in Gour's work where, citing the same authority as that above mentioned, he observes that "title-deeds include copies of the deeds when the originals are not forthcoming." We accordingly hold that this objection cannot be entertained at this stage of the case.

As regards the *second* point, we see no reason to differ from the finding of the District Judge. It is abundantly proved, and indeed is not denied, that Mrs. Stewart at various periods between November 1904 and May 1906 lent Mr. and Mrs. Corstorphan sums of money, aggregating in all to a sum of Rs. 23,000, and we have every reason to believe, as found by the District Judge, that it was out of this money that Mr. Corstorphan paid off the debt of Rs. 12,000 due from him to the Punjab Banking Company in or about June 1905. He then handed over to Mrs. Stewart the title-deeds to the property in suit and that it was the intention both of himself and of Mrs. Stewart that this deposit should create a mortgage upon that property is evident from his letters which are on the record (see Exhibits D. 3 (25), (31), (35), (38), (39), (49) and the two Wills executed by Mr. and Mrs. Corstorphan, Exhibits D. 3 (63), (64), and from the evidence of Mrs. Stewart (page 92 of the paper-book) which stands uncontradicted. We have no hesitation, therefore, in agreeing with the District Judge that the title-deeds were deposited with Mrs. Stewart with the intention of creating a mortgage charge in her favour over the property in suit.

The argument based on the doctrine of merger, that Mrs. Stewart's acceptance of the registered deed of 8th February 1910 operated by law as an extinguishment of any rights which she might have had by reason of her earlier mortgage, was not urged in the Court below and is put forward for the first time in appeal before us. In these circumstances we decline to entertain it, more especially as there is nothing on the record to show that Mrs. Stewart had any intention, when she accepted the later deed, to give up valuable rights which accrued to her under the earlier transaction. The ordinary presump-

(1) 1 M. & A. 635; D. & C. 3; 3 L. J. Bk. 95.

MRS. STEWART v. BANK OF UPPER INDIA, LTD.

tion in ■ case such ■ this would be that she intended to keep the first mortgage alive for all purposes beneficial to herself

In the view that we take of the legal rights of the parties, we find it unnecessary to discuss the question of subrogation, and we pass on to the final point, namely, whether it was necessary for Mrs. Stewart to prove that the Bank, when it took its mortgage in 1907, had notice, actual or constructive, of the earlier mortgage in her favour.

In those parts of British India where the Transfer of Property Act, 1882, is not in force, there can be no doubt that a perfectly valid mortgage can be created by deposit of title-deeds [see *Varden Seth Sam v. Luckpathy Royjee Lallah* (2); *Burkitt, J., in Himalaya Bank, Limited v. F. W. Quarry* (3); *Manekji Framji v. Rustomji Naserwanji Mistry* (4); *Ghose's Law of Mortgage*, 4th Edition, page 151, *et seq.*]. In England a mortgage of this kind is regarded more as an agreement to make a formal mortgage than as an actual mortgage in itself, and it is on this ground that it is known there as an "equitable" mortgage and does not operate as an actual conveyance. As a result of that doctrine a subsequent mortgagee who obtains what is known in England as the "legal" estate, obtains priority over the prior mortgagee on the ground that where the equities are equal, the law shall prevail. And it is only in those cases where the legal mortgagee can be proved to have had notice, actual or constructive, of the earlier equitable mortgage that he loses his rights of priority.

In this country, as pointed out by their Lordships of the Privy Council in *Webb v. Macpherson* (5), there is no distinction between equitable and legal estates, and as a result, if it be once conceded, as we think it must be, that a deposit of title-deeds, if not forbidden by law, is a lawful mode of creating a mortgage or charge, we see no reason why it should not have as extensive

an operation as a mortgage or charge created by a registered deed. As pointed out by Ghose in his work, to which we have referred above: "In England ■ mortgage by deposit of title-deeds is known as an equitable mortgage, because it does not operate as an actual conveyance; but in our law a deposit of title-deeds to secure a loan constitutes an actual mortgagee and not merely an agreement to create a mortgage. To speak, therefore, of such a mortgage as an equitable mortgage is to confound the distinction between an actual conveyance and ■ mere contract to convey and is likely to encourage the notion that a creditor whose debt is secured by a mortgage duly executed is in the same position as a mortgagee in England, who has obtained the legal estate without notice of a prior equitable encumbrance. A mortgage by deposit of title-deeds is not available in England against a *bona fide* purchaser for value of the legal estate; because such a mortgage is treated as a mere equitable security.

"This preference of the legal estate is rested by English lawyers on the maxim that where the equities are equal the law shall prevail. It is, however, doubtful whether in this particular case it is necessary to resort to any such artificial rule, as ■ distinction is recognized in every system of jurisprudence between a real and a contractual right. You may, if you like, call the one a legal and the other an equitable estate. But we must remember that the distinction owes its origin to a mere accident and has been preserved in England up to the present time only by the piety of her lawyers."

In Shephard and Brown's Commentaries on the Transfer of Property Act, 7th Edition, it is stated that "a mortgage by deposit of deeds is a complete act and not an executory agreement and, therefore, section 48 of the Registration Act, which gives priority to registered instruments as against oral agreements not followed by delivery of possession of the property concerned, does not apply. The mortgage by deposit of title-deeds prevails against the subsequent transferee who takes under a registered instrument." To ■ similar effect are the decisions of the High Court of Calcutta in *Coggan v. Pogose* (6) and

(2) 9 M. L. A. 303; Marsh 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.

(3) 17 A. 252 at p. 260; A. W. N. (1895) 97.

(4) 14 B. 269.

(5) 31 G. 57 (P. C.); 5 Bom. L. R. 838; 8 C. W. N. 41, 13 M. L. J. 369; 30 I. A. 238.

(6) 11 C. 158.

HASMATULLAH v. HARI MOHAN SARMA.

Gokul Dass v. Eastern Mortgage and Agency Company (7). In the two cases last cited and in *Pa Wa v. O. A. R. Valliappa Chetty* (8) it was held that a deposit of title-deeds which creates a mortgage is not an oral agreement within the meaning of section 48 of the Indian Registration Act, and that as a consequence a registered deed relating to the same property and executed at a later date does not take precedence over the earlier transaction by virtue of the provisions of that section. The result then appears to be that in the Punjab and in other places where the Transfer of Property Act does not obtain, a mortgage by deposit of title-deeds is a valid legal mortgage and has the same legal effect as a mortgage created by any other means recognized by law; that the English doctrine of the legal estate prevailing over the equitable estate does not obtain in a country where there is no distinction between legal and equitable estates; and that consequently a mortgagee, who holds a registered deed of mortgage, cannot claim priority over an earlier mortgage created by deposit of title-deeds. In this view it is unnecessary for us to discuss the question whether the plaintiff Bank had any notice of the earlier mortgage in favour of Mrs. Stewart or whether the Bank by the exercise of ordinary care and caution could have obtained notice or knowledge of that transaction. For the reasons given we hold that the mortgage of November 1907 in favour of the plaintiff Bank has no priority over the mortgage created in favour of Mrs. Stewart. At the same time there is a provision in the registered deed which was executed in February 1910 in favour of Mrs. Stewart, to the effect that her mortgage should be subject to an earlier mortgage in favour of the plaintiff Bank for Rs. 3,000. The mortgage here referred to is not the one upon which the suit is based though it forms part of the consideration for the latter, but we consider, and Mr. Fazl-i-Hussain conceded, that the plaintiff Bank is certainly entitled to priority to the money secured thereby.

We accordingly accept this appeal and in lieu of the decree passed by the Court below, we grant plaintiff a decree limited

(as regards priority of payment) to the amount of Rs. 3,000 and interest thereon at the rate of 8 per cent. per annum from the 22nd July 1909 (the date of the said earlier mortgage) up to the date of suit.

We leave the parties to bear their own costs throughout.

Appeal accepted; Decree modified.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 119 OF 1913.

May 12, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

HASMATULLAH—DEFENDANT No. 4—
APPELLANT

versus

HARI MOHAN SARMA—PLAINTIFF,

AND OTHERS—DEFENDANTS—RESPONDENTS.

Practice—Secondary evidence, by oral testimony, without objection, relevancy of, when only secondary evidence admissible is a certified copy—Findings of fact, first Appellate Court's duty in regard to—*Appeal, second.*

Where no objection was taken in the primary Court to the oral evidence of the contents of a document at the time it was given, the High Court in appeal did not discard it, although strictly speaking the only secondary evidence of the contents of the document was a certified copy. [p. 943, col. 2.]

Obiter.—It is very essential that the Judge in the first Appellate Court should give his findings of fact (which are conclusive in second appeals) clearly and decisively on each material point, otherwise its decision is liable to be set aside in second appeal and the case sent back for re-hearing, even though the litigation may have gone on for a long time and the amount involved is a small one. [p. 945, col. 1.]

Appeal against the judgment of Mr. Justice Roy, dated the 6th August 1913, in Appeal from Appellate Decree No. 2235 of 1911.

FACTS.—This was an appeal under section 15 of the Letters Patent from the judgment of Mr. Justice Roy.

The material facts will appear from the following judgment of the first Appellate Court:—"The suit was for the redemption of the land in suit which the plaintiff had mortgaged to the defendants Nos. 1 to 3, giving them possession ■ ■ in lieu of interest. The right under the mortgage is said to have been sold to the defendants Nos. 4 to 6.

(7) 23 C. 419; 10 C. W. N. 276; 4 C. L. J. 102.

(8) 14 Bur. L. R. 211.

HASMATULLAH V. HARI MOHAN SARMA.

The plaintiff alleges that he wanted to pay off the mortgage dues in 1316 B. S., which the defendants have declined to accept. The contesting defendant No. 4 denies the purchase from the mortgagees, and alleges that the plaintiff had no right to mortgage the portions of the plots in suit in his (defendant's) possession, which he has been occupying by right of his purchase from Sarada Charan Sarma. The learned Munsif dismissed the claim against the contesting defendant and decreed as against the rest. The plaintiff has preferred this appeal. The only points urged were

First—That the plaintiff had the right to mortgage, and

Second—That the defendant No. 4 has been in possession by virtue of his purchase of the mortgagees' interest.

(After discussing the evidence the judgment proceeds:—) From all the circumstances of this case I do hold that the land in suit belongs to the plaintiff, which he had mortgaged to the defendants Nos. 1 to 3 and that the defendants Nos. 4 to 6 by purchasing the mortgagees' interest have been occupying that portion only which the plaintiff had given over to the possession of the mortgagees in lieu of interest.

It has also been proved that the plaintiff had offered to pay up the mortgage dues in *Kartik* or *Agran* 1316 B. S., which the defendants declined to accept.

I do, therefore, decree this appeal and the suit with full costs of the plaintiff in both the Courts recoverable from the defendants. The mortgage would stand liquidated on depositing by the plaintiff in Court the principal sum of Rs. 100 minus the costs allowed to the plaintiff in both the Courts within one month from the signing of the decree in this appeal. The plaintiff shall then obtain possession of the disputed land. In default of making the deposit within the time allowed, the mortgaged properties shall be sold for the recovery of the mortgage debt."

The defendant No. 4 appealed to the High Court against this decision and the appeal was heard by Mr. Justice Roy, who dismissed it by the following judgment:—

"There is really nothing in this ap-

peal. The learned Subordinate Judge has found 'I do hold that the land in suit belongs to the plaintiff which he had mortgaged to the defendants Nos. 1 to 3, and that the defendants Nos. 4 to 6 by purchasing the mortgagees' interest have been occupying that portion only which the plaintiff had given over to the possession of the mortgagees in lieu of interest.' This finding determines the suit. The points that for decision were, whether there was a mortgage and whether the defendants were in possession by reason of that mortgage.

The appeal is dismissed with costs."

Babus Sarat Chandra Roy Chowdhury and Bhupendra Chandra Guha, for the Appellant.

Babu Hemendra Coomar Das, for the Respondent.

JUDGMENT.

SANDERSON, C. J. In my judgment this appeal must be dismissed.

The suit was for redemption and was brought against several defendants. The first three defendants were the mortgagees. The mortgage had been executed by the plaintiff on the 6th of April 1903 for the amount of Rs. 100 and the bond was registered. The other defendants Nos. 4 to 6 were alleged to be assignees of the first three defendants and the assignment is alleged to have taken place in December 1906 by means of a deed. The deed of assignment was not produced, and evidence as to its contents was admitted. The plaintiffs' Pleader admitted that it was executed in favour of defendant No. 6 and not of the defendants Nos. 4 or 5. It appears that notice was given to defendant No. 6 to produce this, but he did not appear and then evidence was given of its contents. Now strictly speaking, the only evidence that ought to have been given of its contents was a certified copy of the document and no other kind of secondary evidence was admissible, if objection were taken on behalf of defendant No. 4 at the time when the secondary evidence to the contents was given. Such objection, I have said, to the proceedings was not taken and there was put in an admission by the defendant No. 6 that the document in fact was executed in his favour. One of the wit-

HASMATULLAH v. HARI MOHAN SARMA.

nesses called on behalf of the plaintiff said that the assignment had been to the father of the defendants Nos. 4 to 6 and another of the witnesses said that the assignment had been to defendant No. 4, and then, as I have said before, there was the admission by defendant No. 6 that the document had been executed in his favour. Of course, if it was executed in favour of defendant No. 6, it was not conclusive that it was only he who was interested in it; it may very well be that he took it on behalf of his father in the first instance or of himself and his brothers. But the real question relied upon by the defendant No. 4 at the trial was that he was not interested in the assignment of the mortgage to any extent at all and that his possession, which undoubtedly took place, did not originate by reason of the mortgage but originated by reason of a conveyance which was dated the 25th of February 1906, whereby he purchased from an individual who had a title which was superior not only to that of the mortgagor but also to that of the mortgagee.

The Court of first instance found in favour of the defendant No. 4, namely, that his possession had originated in the title which he obtained under his conveyance of the 25th of February 1906.

The plaintiff appealed; and the first Appellate Court decided in his favour and decreed the suit as against defendant No. 4 as well as the other defendants.

Now the judgment of the first Appellate Court has given rise to a certain amount of difficulty in my mind, and at one time I was somewhat of the opinion that the learned Judge had not really investigated the material facts and had not come to a decision upon one of the material points. But on further consideration of the matter, I think on the whole that he has dealt with the material facts. I think that he has come to the conclusion first of all that the three brothers defendants Nos. 4 to 6 were living in the same joint family, and that he has discarded the evidence which undoubtedly was given and to which the learned Vakil for the appellant has drawn our attention, to the effect that defendant No. 4 severed his mess connection from his brothers. I think the learned Judge first of all came to the conclusion that the

brothers were living in a joint family and were living together. He then comes to the conclusion that the evidence points to this, that the land in question belonged to the plaintiff and that, therefore, he was entitled to execute the mortgage of April 1903 and that the defendant No. 4's allegation that he had obtained a title superior to that of the mortgagor was ill-founded inasmuch as the person who purported to convey by the deed of the 25th of February 1906, if that deed covered the land in question, had no title. Then he proceeds to find that the plaintiff was in possession as owner down to 1903. From that time, defendant No. 2 on behalf of the mortgagees went into possession and he remained there up to the time when another event happened. Now the question is what that event was. I think the learned Judge means to find that that event was the taking of possession by defendants Nos. 4 to 6 jointly. If I am correct in my reading of the judgment, that means that there was no room for defendant No. 4 taking possession of the land himself individually. I think that must be the meaning of the learned Judge's judgment by the words to which I have referred. Then in addition to that he says, "and that the defendants Nos. 4 to 6 by purchasing the mortgagees' interest have been occupying that portion only which the plaintiff had given over to the possession of the mortgagees in lieu of interest." If that is the correct reading of the learned Judge's judgment, then he has found that the defendant No. 4 never did go into possession of this land except as one of the joint family and inasmuch as the defendant No. 6 bought the mortgagees' interest in December 1906, it must be taken that these three brothers went into possession of the land under the mortgagees' title. If those were his findings, I think the learned Judge was entitled to come to the conclusion that the defendant No. 4 was in the position of assignee from the mortgagee and, therefore, the plaintiff should have his suit decreed as against the defendant No. 4 as well as the other defendants against whom the decree had been made in the Court below.

For these reasons I think the appeal must be dismissed with costs.

MANIKKAM PILLAI v. THANIKACHALAM PILLAI.

I think it is desirable to point out that, in cases where there may be an appeal, it is most essential that the Court whose findings of fact this Court has to accept should deal with the material facts specially and decisively, and not leave the matter in such a way that the final Court of Appeal has to draw conclusions as to what the real findings of fact were by the first Appellate Court. This is a matter which involves an amount of Rs. 100 only and the litigation has been proceeding ever since the year 1903; and it would be almost a calamity if we had been forced to re-open this matter and to give an opportunity for further litigation; on the other hand, if we had seen clearly that injustice has been done or that sufficient fact has not been found by the first Appellate Court, it would have been our duty, even though this litigation has been going on for such a long time and even though the amount involved is a small one, to have directed that the matter be re-heard. It is for that reason that I emphasize the fact that it is very essential that the learned Judges in the first Appellate Court should give their findings of fact, which we are bound to accept, clearly and decisively on each material point.

MOOKERJEE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 302 OF 1914.

April 17, 1916.

Present:—Mr. Justice Bakewell and
Mr. Justice Phillips.

MANIKKAM PILLAI—DEFENDANT NO. 1—
APPELLANT

versus

THANIKACHALAM PILLAI (*dead*)

AND OTHERS—PLAINTIFFS NOS. 1 TO 7 AND

DEFENDANT NO. 5—RESPONDENTS.

Limitation Act (IX of 1903), s. 10—'Legal representatives or assigns'—Successor in office of trustee, whether legal representative of former trustee—Adverse possession—Trust property—Acts of ownership while office of trustee vacant—Appointment of trustee—Suit for possession—Limitation.

A trustee succeeding to the office of a deceased or retiring trustee is not the 'legal representative or

assign' of the latter within the meaning of section 10 of the Limitation Act. [p. 946, col. 1.]

There can be no adverse possession of trust property while the office of trustee is vacant, as there is then no person who is capable of taking proceedings to protect the trust property. And a trustee appointed to the office can maintain a suit for possession at any time within 12 years from the date of his appointment. [p. 945, col. 2.]

Jagadindra Nath Roy v. Hemanta Kumari Debi, 32 C. 129; 7 Bom. L. R. 765; 31 I. A. 203; 8 C. W. N. 809; 1 A. L. J. 585 and *Peria Aiya Ambalam v. Shanmugasundaram*, 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 112; 26 M. L. J. 140; (1914) M. W. N. 417; 1 L. W. 119, relied on.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Appeal Suit No. 1 of 1913, preferred against that of the Additional District Munsif, Villupuram, in Original Suit No. 68 of 1911.

Mr. A. V. Viswanadha Sastri for Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.—The lands of both the plaintiff and defendant temples were formerly in the possession of the same trustee, but on his death in 1894, new trustees of the defendant temple were appointed. No trustees of the plaintiff temple were appointed until 1900, but it is found that the son-in-law of the former trustee continued to manage the lands and did *poojah* in the temples and he was also the servant of the trustees of the defendant temple and that the latter exercised certain acts of ownership in respect of the lands and appropriated the rent. Since, however, there were no properly constituted trustees of the plaintiff temple, there was no person with knowledge of the acts of the defendants or capable of taking proceedings necessary for the protection of the suit property and, therefore, possession was not adverse until the appointment of trustees in 1900. [See *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1) and *Peria Aiya Ambalam v. Shanmugasundaram* (2).]

The defendants' adverse possession, therefore, commenced within twelve years prior to the suit, and the plaintiffs are entitled to succeed on the title which has been found by the lower Courts.

(1) 32 C. 129; 7 Bom. L. R. 765; 31 I. A. 202; 8 C. W. N. 809; 1 A. L. J. 585.

(2) 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 112; 26 M. L. J. 140; (1914) M. W. N. 417 1 L. W. 119.

BAIKUNTHA NATH RAI V. BASANTA KUMARI DAS.

As regards the point argued with reference to section 10 of the Limitation Act, a new trustee succeeds to the office of a former trustee, not to him personally, and cannot be said to be his legal representative or assign within the meaning of that section and the defendants are not the legal successors of the former trustees of the plaintiff temple.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 68
OF 1905.

August 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

BAIKUNTHA NATH RAI CHAU-
DHURI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

BASANTA KUMARI DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

Revenue sale, purchasers at, rights of—Ejectment, suit in—Burden of proof—Adverse possession of part of an estate sold at revenue sale, effect of.

The purchasers of an estate at a revenue sale are entitled to all lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date. [p. 951, col. 1.]

The plaintiff in an action in ejectment must succeed on the strength of his own title and, therefore, the purchaser of an estate at a revenue sale cannot by suit oust the defendants from lands which, though not included in the estates claimed by them, are equally outside the estate purchased. [p. 951, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Barisal, dated the 5th September 1904.

Babus Jogesh Chandra Ray and Surendra Nath Das Gupta, for the Appellant.

Babus Nilmadhab Bose, Surendra Chandra Sen, Shib Chandra Palit, Gunada Charan Sen, Rajendra Chandra Guha, Sarat Chandra Sen and Hemendra Chandra Sen, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for recovery of possession

upon declaration of title, instituted so far back as the 27th February 1899. There were more than 100 defendants in the suit, with the result that frequent deaths amongst the parties litigants have delayed the trial of the suit both here and in the Court below. The Trial Court was not able to dispose of the suit till the 5th September 1904, and although the appeal was lodged in this Court on the 13th February 1905, it could not be finally heard till more than ten years later.

The plaintiffs claim the disputed lands as included in *Kismat Baldia*, which they allege is comprised in estate No. 3846 purchased by them at a sale held for arrears of revenue on the 25th March 1897. This estate constitutes a $12\frac{1}{4}$ -*gandas* share of *Perganah Selimabad*. Three of the defendants Nos. 58, 59 and 60 are the recorded proprietors of estate No. 3847, another No. 61 is the proprietor of estate No. 3848, and three others Nos. 62, 63 and 64 are the proprietors of estate No. 3849. These three latter estates constitute $9\frac{1}{4}$ *ganda* each of *Perganah Selimabad*, so that the four estates taken together constitute a 2-annas share of *Selimabad*. The case for the plaintiffs is that the lands in dispute are comprised exclusively in estate No. 3846 and that the defendants are unlawfully in possession thereof under the colour of tenures and under-tenures which are either fictitious, or, if real, do not bind the plaintiffs as purchasers at a sale for arrears of revenue. The Court below has found that these under-tenures do not bind the property in the hands of the plaintiffs and as the first defendant who is affected by this adverse finding has not taken exception to it, either by an independent appeal or by way of cross-objections, the question does not directly arise for consideration in this appeal. The Subordinate Judge has further held that as the plaintiffs have failed to prove that the disputed lands are comprised exclusively in estate No. 3846, they must be deemed to be the joint lands of the entire original estate *Selimabad*, out of which the different estates claimed by the parties as also other estates have been carved out. In this view, the plaintiffs would be entitled to a decree for possession of a $12\frac{1}{4}$ -*ganda* share of the disputed lands; but the Subordinate Judge has given the plaintiffs a decree for $16\frac{3}{4}$ -*ganda* share, because the *thak* map shows that

BAIKUNTHA NATH RAI v. BASANTA KUMARI DAS.

estate No. 3846 comprises such share of the lands in question. The plaintiffs are dissatisfied with this decree and have appealed to this Court. On their behalf three alternative aspects of the case have been put forward, namely, *first*, that the first defendant had acquired a good title to all the disputed lands by adverse possession as against all the other defendants and that as the first defendant had no substantial defence against the plaintiffs, the latter were entitled to a decree for all the land claimed; *secondly*, that as the two contesting defendants Nos. 58 and 59, the purchasers of estates Nos. 3842 and 3847, had title to 1 anna $7\frac{1}{4}$ gandas (or 1 anna $11\frac{3}{4}$ gandas according to the Thak Map), the plaintiffs were entitled to a decree for the remaining share; and *thirdly*, that the lands are the joint lands of the two-annas share of the original *zemindari* Selimabad and that the plaintiffs are entitled to a decree on that basis.

Before we deal with these questions, we may advert to two preliminary points. It is clear, in the first place, that *Perganah* Selimabad was partitioned before the Permanent Settlement. This is conclusively shown from a letter addressed by Mr. G. Thompson, Collector of Dacca, on the 28th December 1793 to the President and Members of the Board of Revenue. This letter was not produced before the Subordinate Judge; in fact its existence was traced out from a passage in the history of Backerganj by Mr. Beveridge. The letter has been produced in this Court and has been admitted in evidence by consent of all the parties. As the letter contains the early revenue history of *Perganah* Selimabad, which is essential for the proper appreciation of the evidence in this case, we set it out below, though it is expressed in quaint phraseology:—

"To

W. COWPER, Esq.,

President and Members of the Board of Revenue.

"GENTLEMEN,

"I now beg leave to address Your Board on the subject of *Perganah* Selimabad and to lay such information before you regarding it as will, I trust, enable you to furnish me with your final instructions on the mode to be adopted for concluding the settlement of it.

On a view of my predecessor's correspondence with your Board respecting this *mehal* I find in his letter of the 8th October 1791 he states, as the cause of the decline of the public revenue in it, that it is the joint property of the several numerous sharers without any separation or division of the land composing it, consequently that every petty *talookdar* or *ryot* is subject to be harassed by being under the control and subject to the vexatious demands of 18 rapacious masters: and for the removal of this grievous evil, he proposes that a general division of the *perganah* shall be made, observing further that another essential benefit would result from the adoption of this plan in the ascertainment of the actual quantity of land possessed by the Salt Byparee *Talukdars*, many of which he states he has every reason to believe, from the information given him, hold their land at a very low rate, owing to the dishonesty of the *mofussil* servants, and Your Board relying on the information submitted by him respecting the state of the property in the *perganah* approve his proposal, and at your recommendation the Governor-General-in-Council was pleased to direct under date the 20th June 1792 that the whole of the *mehal* should be held *khas* for the purpose of making a general division of it between the several proprietors, so that each should have his share of the land composing it allotted to him.

"After such information furnished by the late Collector when he had been in the office nearly three years, and in this period it was to be presumed he had accurately informed himself of the state of the property in the *mehal*, it will no doubt be with some surprise, the Board are now informed that the division recommended was totally unnecessary, the *perganah* having undergone a complete division and each share being separate and distinct from the other with the exception of the Jabberaumul and which, being disputed property between the proprietors of the $11\frac{1}{2}$ anna and some of those holding the property of the $4\frac{1}{2}$ anna division, must necessarily undergo a judicial enquiry for the adjustment prior to any division of it being made.

"In order to show your Board that the *perganah* has undergone the complete

BAJKUNTHA NATH RAI v. BASANTA KUMARI DAS.

division stated by me, I shall beg leave to state the periods when the various divisions were made and the causes which gave rise to them. The whole property in the *perganahs* having been usurped by Aga Backer during the period he held the Waddahdharee of it, the dispossessed proprietors in the year 1156 B.S. preferred a complaint to the Soubah of Bengal, who restored them to the possession of a $4\frac{1}{2}$ anna proportion of it, and in that year the division of it both of land and *jumma* was made by Uzmuttoollah Ammeen appointed by the Soubah for the purpose, and sometime afterwards the $4\frac{1}{2}$ anna division underwent a sub-division into ten shares between the respective proprietors of it and now stand as follows:—

		g.	c.
Shibnarain Roy	...	12	1
Odoynarain Roy	...	9	1
Doolabnarain Roy	...	9	1
Luckinarain Roy	...	9	1
Joychand Roy	...	17	2
Raj Chandra Roy	...	5	0
Kishenram Roy	...	10	1
Ram Ram Roy	...	7	0
Pertabnarain Roy	...	6	1
Kissen Ram Roy	...	4	0

"From the period of the above divisions the $11\frac{1}{2}$ and $4\frac{1}{2}$ annas shares as well as the sub-division of the latter have been separate and distinct and have had no connection with each other. Aga Backer remained in possession of his $11\frac{1}{2}$ annas proportion until the year 1160 when he suffered the punishment of death for the crime of rebellion, and Raja Ranje Ballav was appointed to attach the whole of his property and effects which became forfeited to the State, the latter were disposed of by the reigning Government but the land, the family of Rajbollav had sufficient influence with the Court to retain in their possession until the end of the Bengal year 1164, when in the Government of Mr. Nerulst (*illegible*) Sheevnarain, the son of Joynarain, one of the original proprietors assisted with the influence and patronage of Gocool Ghosaul, obtained restoration of the share of which the family had been unjustly deprived by the usurpation of Aga Backer, and for the assistance afforded by Gocool Ghosaul

he was presented with a moiety of the recovered property or a 5 annas 15 *ganda* proportion of it and had it recorded in the *zemindary sheristah* in the name of Bowannay Charan Roy. Thus the $11\frac{1}{2}$ annas share of the *perganah* became the joint property in equal proportions of Joynarain Roy and Gocool Ghosaul and they jointly possessed it in these proportions until the Bengal year 1179, when at their mutual request to Mr. Barwell the division of it between them was made and each had his share of the land allotted to him. Gocool Ghosaul's share continues complete as allotted him in this division and is now the property of Cassinaut in consequence of the public sale made of it to him in the Bengal year 1196. The other share of 5 annas 15 *gandas* remaining with Joynarain Roy falling in arrear to Government the sale of a moiety or 2 annas 17 *gandas* 2 *kara* division of it was made in 1189, B. S., of the liquidation of the balance and in the following year the division of it was made between the purchaser Joynarain Ghosaul in the name of his son Colly Sankar Ghosaul, and Joynarain, whereby each had his proportion of the land allotted to him and in the same year, the heirs of the latter made a sub-division of their share of 2 annas 17 *gandas* 2 *kara* in the following proportions:—

		g.	c.
Shibnarain	...	18	2
Doolabanarain	...	13	0
Odoynarain	...	13	0
Luckinarain	...	13	0

"The Board will perceive from the above that so far from the *perganah* being the joint undivided property of the several shares as stated by my predecessor it has undergone the most perfect and complete division practicable, into sixteen portions which accord with the number of the present proprietors, as well as with the number of shares stated in the public Rent Roll of the District, and from the information obtained on the fullest enquiry, I can with confidence assure the Board a more perfect division of it between the numerous shares cannot be made than the one which now stands. The late Collector must, I apprehend, have been led into the error of stating it as the joint undivided property of the numerous

BAIKUNTHA NATH RAI V. BASANTA KUMARI DAS.

proprietors from the representations of some of the *talukdars* stating the inconveniences which they suffer from having their Revenue to pay to three or more sharers; this is an inconvenience which I admit some of them do labour under, but I submit it to the Board whether it could have been avoided in the division of ■ *perganah* among so many proprietors, and whether it was not the less to be avoided in the one in question where many of the *talukdars* hold land paying ■ Revenue exceeding several of the proprietors' proportion in the *perganah* and which consequently rendered the division of it between them unavoidable, and although the instances where ■ *talukdar* pays his Revenue to plurality of sharers are many in Selimabad, yet I must observe there are few where the lands composing the *taluks* have not undergone a division between them, so as to define to each proprietor the proportion and particular soil responsible to him for the Revenue as comprised and included in his share of the *perganah* and upon the whole, I beg leave to offer it as my opinion that for the reasons above-mentioned the inconveniences which exist in the present division of the *zemindari* could not be remedied by a new one, while the latter on its operation would make an exchange of the property between the shares to the benefit of some and proportionate disadvantage of others.

"The Board will, therefore, judge how far it may be advisable to make the division directed by the Governor-General in Council at their recommendation given under the erroneous information submitted to them by my predecessor, indeed whether it be practicable or not, without giving just cause of complaint to some of the sharers, who will be sufferers, by the exchange of their property. I am so fully satisfied, gentlemen, in my own mind that it cannot be effected without giving this just cause of complaint and that the new division can, but in a very few instances, remedy the inconvenience complained of in the present one, that I have thought it best not to proceed in it, persuaded it was never your intention to recommend a division where it had this tendency, and at the same time could not but very partially remedy the inconvenience

proposed by it. Although for the above reasons I have not proceeded in the division, yet I have deemed it proper to avail myself of the measurement made of the *perganah* for it to ascertain by a *jammabundy* its actual assets in order to form ■ judgment how far these would admit of the resumption of a part of the large abatement, amounting to Rs. 13,000, granted to the 11½ annas division of it since year 1193 B. S., exclusive of the loss which Government has sustained annually on this reduced *jamma* amounting averagely to Rs. 19,000. I conceived an investigation of the nature the more necessary as a perusal of Mr. Douglas's correspondence with your Board on the subject of this *mehal* gave great reason to suspect that the abatement in question had not been altogether rendered necessary by any actual decline of its resources, but partly by the refractory conduct of some of the *talukdars* refusing to pay the proper and just revenue of their lands to the *zemindars* and partly by the intrigues of others with the *zemindari* servants obtained from them improper deductions as stated in his letters under date the 14th January, 12th April and 8th of October 1791.

"As far as a judgment can be formed from the *jammabandy*, these suspicions seem to be well grounded inasmuch as the assets thereby appear nearly sufficient to admit of the resumption of the whole amount of the abatement but to obtain it will require rigorous measures both towards the *zemindars* and *talukdars*, and am fully satisfied, gentlemen, that neither have one just objection to make to the *jammabandy* and so far from its being oppressive that it is fair if not very moderate. I can have no hesitation to give my recommendation that such measures be taken in all instances requiring them and that the lands, whether the instance be with the *zemindar* or *talukdar*, be formed where refused by either on the terms of the *jammabandy* and where they cannot substantiate any reasonable and just objection to it. I am compelled to call upon Your Board for this authority in the conviction that without it no exertions of mine will effect the resumption of any part of the abatement in a *perganah* the renters

BAIKUNTHA NATH RAI v. BASANTA KUMARI DAS.

whereof have ever shown themselves disobedient and of the most refractory disposition, and whose conduct has annually baffled the attempts of the executive officers to realize even the Revenue which they are pleased themselves to admit as justly payable by them, but it cannot be necessary for me, gentlemen, to dwell on the misconduct of these renters where so much of it already appears upon your records in the repeated representation made by my predecessors in my office.

"The vesting me with the requested authority to form all lands in the cases stated will, I have every reason to believe, enable me to complete the settlement of the *perganah* in the course of the current year, with the resumption of a great part of the abatement, but without such authority I must here again repeat it to the Board the very, and I may say incredible, refractory disposition of the people, will not allow me to entertain the hope of realizing the present rated *jamma*, and to conclude a settlement without an abatement from it, will be altogether impracticable. Your Board will, therefore, decide under the information herein submitted respecting the capability of the *mehal* whether such conduct shall benefit the object which instigates it and whether the abatement shall be allowed and the resumption proposed, be foregone, or whether it will not be more proper to notice it by punishment, bearing out of the consideration the justice of the claim which Government has to the resumption.

"In conclusion, permit me to pledge myself to Your Board for the measures proposed by me proving efficacious and that it is my opinion, few instances will occur to render the exercise of the requested discretionary power necessary, it being my belief the knowledge that I possess it will in general prove sufficient. The Board at all events may rest assured that I will in no instance avail myself of it to oppress and I do hope that I hold a better place in their opinion than to be suspected of soliciting it with any such intention.

"Allow me to beg your instructions on the subject of the address as early ■ convenient.

"I have the honour to be,
Gentlemen,

Your most obedient humble servant,
(Signed) G. Thompson,
Collector.

"Dacca
The 28th December 1793."

It is interesting to compare these shares with the shares now registered in the books of the Collector—

No. of estate.	Share	
	Annas	<i>gandas</i> .
3834	0	6 $\frac{1}{4}$
3836	0	7
3840	5	15
3841	2	17 $\frac{1}{2}$
3842	0	18 $\frac{1}{2}$
3843	0	13
3844	0	13
3845	0	13
3846	0	12 $\frac{1}{4}$
3847	0	9 $\frac{1}{4}$
3848	0	9 $\frac{1}{4}$
3849	0	9 $\frac{1}{4}$

This requires to be supplemented by a share of 1 anna 16 $\frac{3}{4}$ *gandas* to make up 16 annas. This missing share was composed of 17 $\frac{1}{2}$ *gandas*, 5 *gandas*, 10 $\frac{1}{4}$ *gandas* and 4 *gandas* mentioned in the above letter.

It may be observed that estates Nos. 3842-3845 make up 2 annas 17 $\frac{1}{2}$ *gandas*, which together with estate No. 3841, make up 5 annas 15 *gandas*; this taken with estate No. 3840 makes a share of 11 $\frac{1}{2}$ annas. Estates Nos. 384-649 make up a 2 annas, and these together with the remaining shares, namely estates Nos. 3834 and 3836 and the four shares aggregating 1 anna 16 $\frac{3}{4}$ *gandas*, make up 4 $\frac{1}{2}$ annas. If these shares are borne in mind, the various documents may be easily understood; this also bears out that there was originally a division of the *perganah* into two shares 11 $\frac{1}{2}$ annas and 4 $\frac{1}{2}$ annas respectively:

In the second place, it is plain that absolute reliance cannot be placed upon the *thak* map. It is clear that the *mahal milani* statements were prepared only on reference to the original state of the *mahal* pending the decisions in the *adam nisani* and mis-

RAIKUNTHA NATH RAI v. BASANTA KUMARI DAS.

cellaneous cases then under contest. This must be borne in mind in the examination of the long series of documents in the case.

As regards the *first* position taken up by the appellants, we have only to observe that it cannot possibly be sustained. Assume that the first defendant had annexed the disputed lands to the under-tenure claimed by her and had acquired ■ good title thereto by adverse possession for the statutory period against the true owners. That does not avail the plaintiffs, ■ they have purchased estate No. 3846 and nothing beyond it. Take two continuous estates A and B, held by X and Y. Suppose X annexes a portion of B and professes to hold it as included in A, till the title of B is extinguished. If thereafter X makes default in the payment of Government revenue, what does the Collector expose for sale? Obviously estate A as it stood at the time of the Permanent Settlement; he does not put up to sale the portion of B annexed to A by X. Similarly, if Y had defaulted to pay revenue, the Collector would expose for sale estate B as it stood at the time of the Permanent Settlement and would not exclude from the sale the portion annexed by X. The substance of the matter is that the purchaser at the revenue sale is not prejudiced by an encroachment against the defaulting proprietor; nor does he reap the benefit of an encroachment by the defaulter. To put the matter in another way, the effect of the adverse possession by X with regard to the lands of B is to make him a joint proprietor of B along with Y. The Collector is nowise affected by the adverse possession between the proprietors of A and B and if he has occasion to sell either estate, he sells the estate as it was at the time of the Permanent Settlement. Here the plaintiffs have purchased estate No. 3846; they are entitled to all lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date. The *first* contention, consequently, fails.

As regards the *second* position taken up by the appellants, obviously it cannot be sustained. The plaintiffs in an action in ejectment must succeed on the strength of their own title: they cannot succeed, merely because

the defendants may not be able to establish title to all the lands in their possession; in other words, the plaintiffs ■ purchasers of estate No. 3846 cannot oust the defendants from lands, which, though not included in the estates claimed by them, are equally outside the estate purchased by the plaintiffs.

As regards the *third* point taken up by the appellants, we may observe that this covers the real controversy between the parties. The Subordinate Judge has rejected without discrimination the documents adduced by the plaintiffs to prove that the disputed lands are the joint lands of estates Nos. 3846—3849. No doubt, many of these documents are not registered, but they are of some antiquity: many of them were mentioned in the litigation of 1863. It is further clear that they have not been fabricated by the present plaintiffs, and the very fact that they are inconsistent with the extreme case of the plaintiffs that the disputed lands are included in estate No. 3846 alone, removes them from the sphere of indiscriminate suspicion; if the plaintiffs had manufactured these documents for the purposes of this suit, they might well have been drawn up to support their maximum claim. These documents, which disclose the dealings of the various parties with separate parcels of land as included in one or other of the shares on definite partitions by metes and bounds in *Perganah* Selimabad, are obviously of value, as embodying assertions of title in times now long past. The letter of Mr. Thompson, as we have seen, proves conclusively that there was a partition prior to 1793, and that many of the estates then and now existing had separate parcels of land allotted to them before the Permanent Settlement. The question thus narrows down to this: have the plaintiffs proved that the disputed lands or any portion thereof were at the time of the Permanent Settlement the separate lands of the 2-annas share now represented by estate Nos. 3846—3849. In the investigation of this question, we are materially assisted by the proceedings in a suit for assessment of rent brought by Manikya Chandra Das against Mahes Chandra Biswas and decided by the Deputy Collector of Bakergunj on the 23rd November 1864 and by this Court on the 17th November 1865 (Exhibits 618, 619).

ANAND SARUP v. CHAWWA.

[After adverting briefly to the facts of that suit and discussing evidence in the present case His Lordship concluded as follows:—]

The conclusion follows that the plaintiffs have established that there was a partition prior to 1793, and that plots Nos. 3, 6, 7, 9, 10 and 11 of the map of 1864 fell to the 2-annas share now represented by estates Nos. 3846—3849. Consequently the plaintiffs are entitled to a decree for possession of these plots only, in respect of a $12\frac{1}{4}$ -gandas share out of 2 annas, that is, if the 2 annas be treated as 16 annas the plaintiffs are entitled to a decree for possession of 4-annas $18\frac{1}{4}$ -gandas share of plots Nos. 3, 6, 7, 9, 10, 11 only. The Subordinate Judge, however, has given them a decree for $16\frac{3}{4}$ -gandas share of all the plots in suit. As the defendants have not filed an independent appeal or preferred a memorandum of cross-objections, we cannot on an appeal by the plaintiffs, deprive them of the benefit of any portion of the decree already made in their favour by the Subordinate Judge.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The decree in favour of the plaintiffs for $16\frac{3}{4}$ -gandas share of all the lands claimed in the suit is maintained. In addition to this, the plaintiffs are awarded in respect of plots Nos. 3, 6, 7, 9, 10, 11 of the map of 1864 a further decree for 4 annas $1\frac{1}{4}$ -gandas share, so as to bring up their share in those plots only to 4 annas $18\frac{1}{4}$ gandas. The plaintiffs will have joint possession of the lands now decreed in their favour and also mesne profits in the way directed by the Subordinate Judge. We set aside the order for costs made by the Subordinate Judge and direct that all parties pay their own costs both here and in the Court below.

Appeal allowed in part.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 878 OF 1914.

December 11, 1915.

*Present:—*Sir Henry Richards, Kt.,
Chief Justice, and Mr. Justice Rafique.

ANAND SARUP—PLAINTIFF—
APPELLANT

versus

CHAWWA—DEFENDANT—RESPONDENT.

Ejectment—House site—Possession, long—Adverse possession—Presumption—Building license.

The plaintiff sued for possession of a plot in an enclosure on the ground of having purchased it at an auction-sale. The defendant pleaded that he was in adverse possession of the property in dispute. But he was not found to be in adverse possession nor was any arrangement between the parties proved by which the defendant was to remain in possession for all time.

Held, that the fact that the defendant remained in possession for a long time raised no presumption that he was in possession by virtue of a building license and that the defendant was liable to ejectment. [p. 953, col. 1.]

Second appeal from a decree of the Subordinate Judge of Meerut.

Mr. Kailas Nath Ratia, for the Appellant.

The Hon'ble Mr. Abdul Raof, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed possession of a certain plot in an enclosure situated in the town of Meerut. The plaintiff's title was an auction-purchase in a decree against one Ata Ullah. The defendant pleaded that he was in adverse possession of the property in dispute. The first Court decreed the plaintiff's claim. The lower Appellate Court reversed the decree of the Court of first instance and dismissed the plaintiff's suit. It appears that previously the plaintiff had brought a suit against this very same defendant alleging him to be a tenant who had refused to pay his rent, the rent being the monthly sum of Re. 1. That suit was dismissed, the Court holding that an old tenancy had subsisted and that the plaintiff had failed to prove a new tenancy at the rate of Re. 1 per month. The plaintiff then brought the present suit.

Both the Courts below have found, and we think rightly found, that the defendant and his predecessors were not in adverse possession of the land. There is no dispute as to the title of Ata Ullah, nor is there now any dispute as to the title of the plaintiff as auction-purchaser of the estate of Ata Ullah. The

MADAN MOHAN DE SARKAR v. REBATI MOHAN PODDAR.

lower Appellate Court has decided against the plaintiff upon the ground that the defendant and his predecessors having for a very long time been in possession, it must be presumed that he was in possession by virtue of a building license. We think that this view is not correct. There is no evidence of any kind that the land was ever given to the defendant's predecessor-in-title for building purposes. The building on the plot is a *kutcha* structure worth about Rs. 25. Once it was found that the defendant was not in adverse possession of the plot in dispute, it lay upon him to show by proper evidence that he could not be disturbed and was entitled to remain in possession. The defendant never pleaded that by an arrangement between the predecessor-in-title of the plaintiff and his own predecessors-in-title, they were to remain for all time in possession in consideration of certain services to be rendered. No doubt in a statement as a party to this suit he admitted that he and his predecessors-in-title had been in the habit of paying certain dues and rendering services to Ata Ullah and his ancestors. In our opinion under these circumstances and bearing particularly in mind the nature of the defendant's plea that he had become absolute proprietor of the plot in dispute by virtue of adverse possession, the decision of the Court below was not correct. It was contended by Mr. Abdul Raoof that if the defendant be deemed to be a tenant, the tenancy could not be determined without the service of a proper notice determining the tenancy. In our opinion this question does not arise, because the defendant both in his written statement in the present suit and previously denied the plaintiff's title.

We allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2797
OF 1912.

March 12, 1915.

Present:—Mr. Justice Woodroffe and
Mr. Justice Richardson.

MADAN MOHAN DE SARKAR AND OTHERS
PLAINTIFFS—APPELLANTS

versus

REBATI MOHAN PODDAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXXVIII, r. 10, scope of—Attachment before judgment—Sale after attachment in pursuance of contract entered into before attachment, effect of.

The provision of section 64, Civil Procedure Code, is for the protection of a creditor against transactions subsequent to the attachment; but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by it. [p. 954, col. 2.]

There is no ground for holding that the provision in Order XXXVIII, rule 10, Civil Procedure Code, is limited to rights *in rem*. [p. 954, col. 2.]

Where after a contract for sale of a property had been made by the debtor in favour of the defendant, the plaintiff attached the property before judgment and the property was then sold to the defendant in a suit for specific performance of the contract:

Held, that the defendant's purchase must prevail against all claims of the plaintiff enforceable under the attachment. [p. 954, col. 2.]

Appeal against the decree of the District Judge, Dacca, dated the 3rd July 1912, reversing that of the Officiating Additional Subordinate Judge of that place, dated the 29th August 1910.

Dr. Rash Behary Ghose and Babus Dwarka Nath Chakravarti and Kali Kinkar Chakravarti, for the Appellants.

Mr. B. Chakravarti, and Babus Basanta Kumar Bose, Surendra Nath Guha and Sures Chandra Das, for the Respondents.

JUDGMENT.

WOODROFFE, J.—The facts of this case, so far as they are relevant to the findings in the judgment, are these. The plaintiffs attached the disputed property before judgment on November 6th, 1895, purchased it at an execution sale on August 19th, 1897, and obtained symbolical possession on August 20th, 1898. But on the 25th May 1897, before the execution sale, the defendants had purchased the disputed property by a *kobala* executed by the Court in pursuance of a contract dated before the attachment. This contract was evidenced by the *bayna patra*, referred to in the judgment, dated the 19th August 1895. It was followed by a suit for specific performance,

MADAN MOHAN DE SARKAR V. REBATI MOHAN PODDAR.

the decree in which was passed on the 30th January 1897. The *kobala*, which was executed by the Court in the suit for specific performance, was executed in pursuance of the aforesaid contract dated before the attachment. The defendants obtained possession before the execution sale at which the plaintiffs purchased.

A number of questions have been argued in the lower Courts and before us. Though it is unnecessary, in the view that we take of this case, to go into all these questions I note them here. In the *first* place, it was objected on behalf of the respondents that the appeal could not proceed in the absence of the heirs of the first respondent Rebat Mohan Poddar, the appeal having been, according to the previous judgment, declared to have abated as regards that respondent. It was *next* contended that the attachment was invalid for the two reasons stated in the judgment of the lower Court, namely, first, by reason of the want of proof that the proceedings were formally in order; and secondly, because section 483 of the Civil Procedure Code had, it was contended, no application to an attachment of the present character by a mortgagee to realize his security. It was, however, argued and has in fact been held by the lower Court that even if there were a valid attachment the plaintiffs' suit was barred. It was contended on one hand before us by the appellants that the period of 12 years is to be reckoned from the date upon which the symbolical possession was awarded to the plaintiffs. And it is urged on behalf of the respondent that the limitation must run from at least the date when the defendants obtained possession in 1897 under the decree in the suit for specific performance, and that such possession must not be taken to have been, as is contended, possession on behalf of the judgment-debtor but a possession obtained on their own behalf by suit *in invitum*.

The appeal must, in my opinion, be determined on one of the grounds on which the learned Judge has proceeded in the Court below and with which I now deal. It is true that under section 64 of the Code alienations after attachment are void as against all claims enforceable under the attachment. On the other hand under the provisions of Order XXXVIII, rule 10, an attachment before judgment does not affect the rights existing prior to the attachment. Now, it appears to

me that a creditor can only attach the right, title and interest of his debtor at the date of the attachment and that he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property. The object of the provisions in section 64 of the Code appears to me to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor, which may imperil his obtaining the fruits of his decree through the attachment which has been effected. I do not think that we are called upon to extend the provisions of section 64 to cases which, it seems to me, were never contemplated by the section. After an agreement for sale the rights and duties of the seller were to receive the purchase-money and to execute the conveyance.

It has been argued by Dr. Ghose that creditors' right in this matter is paramount. This is so as regards all transactions subsequent to the attachment. But it does not seem to me that their right is paramount in the sense that the creditors are able to brush aside every obligation which may have been binding on the debtor prior to the date when the attachment was made. This would place them in a better position than the debtor whose property was attached. It is true that in this case the actual conveyance was executed after the attachment. But this was merely carrying out an obligation which was incurred prior thereto. It seems to me that if we are to hold that the plaintiff as a creditor can ignore the obligations incurred by the debtor, we should use the provision of section 64 for a purpose which was not intended, that provision being for the protection of a creditor against transactions subsequent to the attachment.

It may be noted here that before the plaintiff purchased the property at the execution sale he had had notice of the agreement to sell, having been previously impleaded in the specific performance suit to which I have referred. And some portion of the purchase-money was paid at the date of the agreement.

It is said that the agreement created no interest in the land itself. This may be so. But neither did the attachment create any interest in the land and the purchase subsequently made at the auction sale was later than the defendant's purchase and subject, as I have said, to the notice of the agreement

BALDEO SAHAI v. KANHAYA LAL.

under which the defendant's purchase was made.

Therefore, it seems to me that the natural justice of the case demands that the defendants' purchase should prevail. I do not see any ground for holding that the provision in Order XXXVIII, rule 10, is limited to rights *in rem*. The section does not say so, and the Judge has not so held. I agree with his conclusion that the defendants had a right to have the contract to sell specifically performed and that under section 489, now corresponding to Order XXXVIII, rule 10, that right was not affected by the attachment. As he points out, the decree for specific performance was obtained and the sale completed before the attached property was sold to the plaintiff. Accordingly he held, and we think rightly, that in the circumstances of this case the defendants' purchase must prevail.

In this view of the case it is not necessary to enter into the other questions raised in the case.

I would, therefore, dismiss the appeal with costs.

RICHARDSON, J.—I agree, upon the point which has been discussed, with the conclusion arrived at in the Court of Appeal below.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 101
OF 1913.

July 1, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

BALDEO SAHAI—JUDGMENT-DEBTOR—
APPELLANT

versus

KANHAYA LAL—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 13—Application for attachment not specifying immoveable property—Court, power of, to require amendment—Limitation—Previous application for execution need not be examined.

Where in an application for execution the property sought to be attached has not been described as required by rule 13 of Order XXI, Civil Procedure Code, it is open to the Court to require amendment in this particular; before any immoveable property is attached the decree-holder can be called upon to furnish the necessary particulars. [p. 955, col. 2.]

In considering whether an application for execution of a decree is within time, it is not necessary to examine the previous applications to ascertain whether they in all respects comply with the provisions of law. [p. 955, col. 2.]

Baness v. Turton, 23 P. R. 1883; *Shankar Lal v. Zorawar Singh*, 116 P. R. 1907, referred to.

Miscellaneous first appeal from the order of the District Judge, Rohtak, dated the 7th January 1913.

Bakhshi Tek Chand, for the Appellant.

Rai Sahib Lala Moti Sagar and Mr. Nand Lal, for the Respondent.

JUDGMENT.—This is an appeal by Baldeo Sahai from an order passed in execution proceedings. The respondent obtained a decree on 28th July 1904 against Nemat Singh and Baldeo Sahai. There have been various applications for execution. The present application was put in on 26th August 1912. Counsel for appellant contends that this application is not according to law, and should have been rejected under Order XXI, rule 17. What this rule says is that if the requirements of rules 11—14 have not been complied with, the Court may reject the application or may allow it to be amended. Counsel picks several holes in the application, but omits to notice that an amended application was put in on 4th December 1912. As to this last application Counsel's only objection is that the property sought to be attached has not been described as required by rule 13. It is still open to the Court to require amendment in this respect; before any immoveable property is attached, the decree-holder can be called upon to furnish the necessary particulars.

Then it is urged that the application is time-barred, the former applications having been defective in certain respects and so not amounting to applications in accordance with law. But granting that the previous applications were in some respects defective, they are still effectual to keep the decree alive and when considering whether the present application is within time, it is not necessary to examine the previous applications to ascertain whether they in all respects comply with the provisions of law. See *Baness v. Turton* (1) and several other rulings, of which we need only quote *Shankar Lal v. Zorawar Singh* (2).

Counsel urges that the previous applica-

(1) 23 P. R. 1883.

(2) 116 P. R. 1907.

SAFAR ALI v. MOHESH LAL.

tions were not acted upon, but he owns that he cannot point to any application in regard to which his client did not receive notice.

We hold, therefore, that the present application is within time, and we need not stop to consider whether the fact that a part of the decree was realized from the co-judgment-debtor Nemat Singh in 1911 renews limitation.

We note that Counsel has said nothing as to the last two grounds of appeal, so we take it that these grounds are given up.

We dismiss this appeal with costs. Respondent's Counsel's fees Rs. 50.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3083 OF 1911.

March 8, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

SAFAR ALI AND OTHERS.—DEFENDANTS—
APPELLANTS

versus

MOHESH LAL CHOWDHURY AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 65, cl. (b), 91—Registered deed of sale, not produced—Secondary evidence, admissibility of—Estoppel, plea of, when not put in issue—Admission by vendor.

A person to whom property has been sold by a registered deed, cannot, when that deed is not produced, adduce any evidence of the sale to prove his title without laying a foundation for the admission of secondary evidence with respect to it. [p. 956, col. 2.]

A question of estoppel, which ultimately depends on questions of fact, unless put clearly in issue, cannot be raised in argument. [p. 957, col. 1.]

An admission by a vendor as to sale of immoveable property in favour of vendee cannot be admitted as secondary evidence in the absence of conditions mentioned in clause (b) of section 65 of the Evidence Act. [p. 956, col. 2.]

Obiter dictum.—When a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. [p. 956, col. 2.]

Appeal against the decree of the District Judge, Purneah, dated the 8th August 1911, affirming that of the Subordinate Judge, Purneah, dated the 10th September 1910.

Babu Jogendra Nath Mookerjee, for the Appellants.

Babu Ajitish Chandra Hazra, for the Respondents.

JUDGMENT.

COXE, J.—The land in suit in this case originally belonged to one Bado Mondol. He died leaving three sons, Kalu, Talewar and Akal. It has been found that they succeeded to equal shares in the property and that the shares of Talewar and Akal have come to the plaintiffs, although within these shares there is one share, namely, one-sixth which the defendants held as under-tenants. The share of Kalu has come to the defendants.

The defendants appeal and on their behalf it is argued that the plaintiffs' title has not been proved to the one-third share of Talewar.

This contention, in my opinion, must succeed. It is proved that the share of Talewar came ultimately to Giridhari Lal and it is said that he sold it to the plaintiffs by a registered deed. That deed, however, is not produced and so far as we know, no foundation has been laid for the admission of any secondary evidence with respect to it. It appears to me, therefore, that no evidence of that sale can be adduced under section 91 of the Evidence Act and that being so, the plaintiffs' title to the share must be regarded as not proved.

The Courts below have held that this defect is cured by the fact that Giridhari Lal supports the plaintiffs. That, however, does not justify secondary evidence of the document against the defendants under section 65, clause (b), of the Evidence Act.

Reference has been made to the case of *Lal Achal Ram v. Raja Kazim Husain Khan* (1). That case, however, has no application. The principle laid down in that case, if I understand it aright, is that when a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. But certainly that case cannot, in my opinion, be invoked practically to repeal section 54 of the Transfer of Property Act and section 91 of the Evidence Act.

It has been suggested that we should give the plaintiffs another opportunity of producing this deed. Seeing, however, that the case was instituted in 1909 and that the absence of this deed has been commented on by both the Courts below, I certainly do not think

(1) 9 C. W. N. 477; 27 A. 271; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 113.

AMIR CHAND v. DURGA DAS.

that the plaintiffs should have another chance of producing a document which they were too negligent to file at the proper time. This point, therefore, must, in my opinion, be decided in favour of the appellants.

The second point taken is that the plaintiffs are estopped from questioning the defendants' rights. Apparently Akal Lal on the same day sold one-third share to one Gora Lal Sahu under whom the plaintiffs claim and another one-third share to Isak Lal under whom the defendants claim; and the *kobala* of Isak Lal is recited in that of Gora Lal and *vice versa*. It is, therefore, contended that the plaintiff who claims under Gora Lal cannot dispute the *koba'a* in favour of Isak Lal. This contention, however, appears to me quite untenable. It is evident from the judgments of the Courts below that this question of estoppel was never put in issue. There appears to be nothing to show that the position of Kalu was in any way affected by the execution of this *kobala* in favour of Gora Lal. The learned Vakil who appears for the appellants is unable to assure us that there is any evidence that Isak Lal would not have bought the land covered by his *kobala* if the *kobala* in favour of Gora Lal had not been executed. The main element, therefore, to justify a plea in estoppel is wanting: and further it is evident that a plea of this nature, which ultimately depends on questions of fact, ought to be put clearly in issue.

Thirdly, it is contended that the defendants are entitled to retain possession of the land as *raiya*s. This, however, does not appear to have been seriously contested in the Court below. The Judge says: "The defendants Nos. 1 to 4 were also under-tenure-holders, but only in respect of the 2-annas 8-pies share of which they had taken settlement from Mohan Lal under the *kabuliat*." It was argued that the position of the defendants with respect to the lands which they cultivated personally was different from their position with respect to the lands which they let to tenants. But this is clearly erroneous. Their title to these lands was precisely the same and if it failed with regard to the tenanted lands, it must also fail with regard to the cultivated lands.

The appeal will, therefore, be partly decreed and the suit will be dismissed with respect to the $\frac{1}{3}$ rd share said to have descended from Talewar. Otherwise the decree of the lower Court will be confirmed. Having regard to the proportion of success, we pass no order as to costs.

SHARFUDDIN, J.—I agree.

Appeal partly decreed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 3453 of 1915.
March 25, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

AMIR CHAND—PLAINTIFF—
APPELLANT

versus

DURGA DAS AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 51—
Improvements made by defendant in good faith—Right
to compensation.*

Where in a suit for possession it appeared that the property in dispute had been sold *pendente lite* to defendants Nos. 2 to 5 who sold it to defendant No. 6 and that the 1st set of vendees, believing in the soundness of their title, had effected certain improvements in the property:

Held, (1) that the plaintiff could not recover the property without payment of compensation to defendant No. 6 for the improvements effected. [p. 958, col. 2.]

Second appeal from the decree of the Additional Judge, Lahore, dated the 7th August 1915, affirming that of the Subordinate Judge, 1st Class, Lahore, dated the 26th April 1915.

Mr. D. C. Ralli and Kanwar Dalip Singh,
for the Appellant.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—The question in this case is whether the defendant-respondent is entitled.

KALU V. RAM LAL.

ed to receive from the plaintiff compensation in Rs. 1,100, as a condition precedent to his surrender of the property claimed by the plaintiff and decreed to him. The property originally belonged to Diwan Chand, and to his estate there were two rival claimants, Amir Chand, the present plaintiff, and his late father on one side, and Durga Das, defendant No. 1, on the other; litigation between them was proceeding from 1905 to 1908, and the property in dispute was sold *pendente lite* first by Durga Das to defendants Nos. 2 to 5 in 1905, and again by defendants Nos. 2 to 5 to defendant No. 6 on 10th June 1908. In November 1908 this Court decided that Amir Chand was the heir of Diwan Chand, and Amir Chand now sues to recover the property sold to defendant No. 6. The Courts below have applied the principle of *lis pendens*, for they have not dismissed the plaintiff's claim, but have decreed for him on the condition that he first pay Rs. 1,100 to defendant No. 6, Rupees 1,100 representing the increased value of the property due to the improvements effected by the first set of vendees.

The value of the improvements is a question of fact, and not a matter which may be considered in second appeal, and the cross-objections by the respondent on the same point are not competent.

For the appellant it is argued that the plaintiff is entitled to the house without payment of any compensation, that the improvements were not made *bona fide*, and that in any case plaintiff cannot raise Rs. 1,100 and is entitled to alternative relief in the shape of a money-decree for Rs. 500 with all costs.

We hold it clear that the defendant No. 6 has at least as good a right as his transferors, the first vendees, defendants Nos. 2 to 5, and the Court below finds that they were transferees in good faith.

That their belief in the soundness of their vendor's title was not entirely baseless is clear from the fact that the Court was persuaded to find that title established, and they backed up their belief by spending a considerable sum on the improvements of their purchase.

In the circumstances we are not prepared to dissent from the finding that the first

vendees believed in good faith in the soundness of their title and acting on the principle enunciated in section 51 of the Transfer of Property Act, we hold defendant Durga Das to be entitled to compensation for the improvements effected by his vendors.

The appeal fails on the main point, but as respondent has no objection to the grant to the plaintiff of the alternative relief prayed for, we modify the decree of the Court below by providing that plaintiff may at his option, to be declared within three months of date, in lieu of the decree already granted by the Court, execute a decree for Rs. 500 and costs against the property in suit and defendant No. 6.

The costs of this appeal shall be paid by the parties incurring them, for the defendant-respondent's cross-objections are dismissed, and the costs in the Courts below as directed by the Additional Judge.

Appeal and Cross-objections dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1231 OF 1914.

January 19, 1916.

Present:—Mr. Justice Shah Din.

KALU—DEFENDANT—APPELLANT

versus

RAM LAL AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suit by mortgagee for declaration of his title—Mutation in his favour refused—Starting point of limitation.

Where on the refusal of the Revenue Authorities to sanction mutation of the land in suit in his name, the mortgagee sued for a declaration of title:

Held, that the period of limitation began to run against him from the date of the denial of his right in mutation proceedings and the fact that the suit was brought in compliance with the requisition made by the Revenue Court under section 98 of the Punjab Tenancy Act, did not affect the question of limitation; [p. 959, col. 1.]

(2) that the suit having been brought more than 6 years after the date of the denial was time-barred. [p. 959, col. 1.]

GANGAHARI CHAKRABARTI v. NABIN CHANDRA BANIKYA.

Second appeal from the decree of the Divisional Judge, Ferozepore, dated the 23rd March 1904, affirming that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 1st October 1913.

Lala Tirath Ram and Mr. Gullu Ram, for the Appellant.

Lala Durga Das, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgments of the Courts below. The principal question for decision in this appeal is whether the suit of the plaintiffs-respondents is barred by limitation or not; and after hearing arguments my view is that the suit is so barred. In 1898 the Revenue Authorities refused to sanction mutation of the land in suit on the strength of the mortgage-deed of the 23rd of May 1898, and it seems that mutation was put up again by the *patwari* in 1901 and again it was refused. The last payment was one of Rs. 80 and all that the plaintiffs' account-book shews is that this sum was paid by the defendant's mother on the 17th of June 1901, but whether it was paid by way of rent or otherwise is not clear from the entry in the account book. Assuming that the payment of the sum in question is established, it is clear that the plaintiffs' right to obtain possession of the land as mortgagees was definitely denied in 1901 and the denial was given effect to by mutation being refused. The plaintiffs were entitled to take possession of the land mortgaged under the terms of the mortgage-deed and first in 1898, and thereafter in 1901, they sought to enforce that title by getting mutation effected in their names, but they failed. The period of limitation, therefore, started against them from 1901 at latest; and the present suit for a declaration is barred by time. The fact that the present suit was brought in compliance with the requisition made by the Revenue Court under section 98 of the Punjab Tenancy Act does not, in my opinion, affect the question of the limitation applicable to the declaratory suit instituted by the plaintiffs; the right to sue did not accrue to them when the order of the Revenue Court was passed, but it accrued to them long before that in 1901 when their right of possession as mortgagees under the mortgage-deed of 1898 was denied. No fresh cause of action accrued to them after that

year, the denial of their alleged right as mortgagees to take possession of the land being a mere reiteration of the objection advanced in 1901. It did not amount to a fresh invasion of right and did not give rise to a fresh right of suit.

I accept the appeal and setting aside the decree of the lower Appellate Court dismiss plaintiffs' suit with costs throughout.

Appeal accepted; Suit dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1154 OF 1914.

April 30, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

GANGAHARI CHAKRABARTI—
PLAINTIFF—PETITIONER

versus

NABIN CHANDRA BANIKYA AND

ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 49, 115, 145—Suit to recover gold delivered to goldsmith to make ornaments—Limitation.

The limitation of 30 years from the date of deposit under Article 145 of the Limitation Act is applicable to a suit against a depository to recover moveable property even when the property is not recoverable in specie. [p. 960, col. 1.]

Kristo Kamini Dassi v. Administrator-General of Bengal, 7 C. W. N. 476, *Administrator General of Bengal v. Kristo Kamini Dasse*, 31 C. 519; 8 C. W. N. 500, followed.

Where the plaintiff made over to a goldsmith gold ornaments to be melted and made into new ornaments, without fixing the time within which the work was to be finished, and failing to get the ornaments on repeated demands, instituted a suit for the return of the gold or its price:

Held, that the suit was governed by Article 145 of the Limitation Act, that even if Article 145 did not apply, Article 49 or Article 115 applied and that limitation began to run from the date on which the goldsmith wrongfully refused to do the work. [p. 960, col. 2.]

Civil Rule against the decision of the Munsif, Bajitpur, exercising the powers of a Small Cause Court Judge, dated the 7th September 1914.

GANGAHARI CHAKRADARTI v. NABIN CHANDRA BANIKYA.

Babu Gopal Chandra Das, for the Petitioner.

Moulvi A. K. Fazlul Huq and Babu Jatin-dra Mohan Choudhury, for the Opposite Party.

JUDGMENT.

MOOKERJEE, J.—The question for decision in this Rule is, whether the suit is barred by limitation. The case for the plaintiff is that about eleven years ago he made over to the defendants, goldsmiths by profession, gold ornaments of the weight of one *tola* in order that they might be melted and new ornaments made therewith; no time was fixed within which the work was to be finished. The plaintiff asserts that the defendants put him off from time to time and that ultimately when on the 24th March 1914, he pressed the defendants for the ornaments, they promised to make and deliver them within fifteen days. This period, however, expired, and yet the plaintiff has not been able to get the ornaments. He consequently instituted this suit on the 11th May 1914, and prayed, in the alternative, either that the defendants be directed to return to him the one *tola* of gold or that a decree for the price thereof, namely, Rs. 25, might be made against them. The Small Cause Court Judge has dismissed the suit on the ground that it is barred by limitation. In our opinion, this view cannot possibly be supported.

The case is governed either by Article 49 or 115 or 145 of the Indian Limitation Act. Article 145 provides that a suit against a depository to recover moveable property deposited must be instituted within 30 years from the date of deposit. This Article, as was observed in *Kristo Kamini Dassi v. Administrator-General of Bengal* (1) and *Aministrator-General of Bengal v. Kristo Kamini Dasse* (2), applies even when the property is not recoverable in specie. The Article does not also cease to be applicable merely because the defendant, after demand, wrongfully refuses to return the property; such refusal does not bring into operation Articles 48 and 49; *Narmadabai v. Bhavanishankar* (3)

and *Gangineni Kondiah v. Gottipati Pedda Kondappa Naidu* (4). Consequently, Article 145 may be applied in so far as the first prayer in the plaint is concerned, namely, recovery of one *tola* of gold which, if his case is true, was made over by the plaintiff to the defendants for a specific purpose not yet carried out.

But even if Article 145 is not applied, no question of limitation arises either under Article 49 or Article 115. Article 49 provides that a suit for compensation for wrongfully detaining specified moveable property may be instituted within three years from the date when the detainer's possession becomes unlawful. In this case, the detainer's possession did not become unlawful till he had wrongfully refused to apply the gold to make ornaments as he had originally agreed to do. According to the plaintiff there was no refusal till the 8th April 1914. Consequently the suit is within time. The same result follows, if Article 115 is applied. Under that Article, a suit for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, may be instituted within three years from the date when the contract is broken. In this case, the contract was not broken till the 8th April 1914; indeed, it is not the case for the defence that there was a demand by the plaintiff on an earlier occasion and a refusal on their part. In our opinion the view taken by the Small Cause Court Judge is erroneous and his decree cannot be supported.

The result is that this Rule is made absolute, the judgment and decree of the Court below set aside, and the case remanded for trial on the merits. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold *mohur*.

Rule made absolute; Case remanded.

(4) 5 Ind. Cas. 1; 33 M. 56; 7 M. L. T. 282; 20 M. L. J. 41.

(1) 7 C. W. N. 478.

(2) 31 C. 519; 8 C. W. N. 500.

(3) 26 B. 430; 4 Bom. L. R. 72.

ABDUL ALI CHOUDHURY v. EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1159 OF 1915.

October 28, 1915.

Present:—Mr. Justice Greaves and
Mr. Justice Walmsley.

ABDUL ALI CHOUDHURY AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1899), s. 106, order under, findings necessary for—High Court, jurisdiction of—Revision—Penal Code (Act XLV of 1860), s. 143.

Where the findings of the lower Courts do not sufficiently and clearly show that the acts for which the accused were convicted under section 143, Indian Penal Code, necessarily involved a breach of the peace or any evident intention of committing the same, a High Court in revision would set aside an order under section 106, Criminal Procedure Code, binding down the accused to keep the peace.

Revision against the order of the Sessions Judge, Sylhet, dated the 28th July 1915, affirming that of the Additional District Magistrate of that place, dated the 5th July 1915.

Mr. A. Rasul and Babu Hemendra Kumar Das, for the Petitioners.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The accused in this case were convicted under section 143, Indian Penal Code, and bound down under section 106, Criminal Procedure Code. It has been urged before us that the order under section 106, Criminal Procedure Code, is without jurisdiction as there was no finding of any likelihood of a breach of the peace being committed or of any evident intention of committing acts which would involve a breach of the peace. The Appellate Court came to no finding upon this point. All that is said in the judgment of the Appellate Court is that the appellants formed with others an unlawful assembly with the common object set forth in the charge. In the lower Court the findings are as follows:—"The common object of this unlawful assembly was by means of criminal force or show of criminal force to take possession of the plot of land cultivated by Syam Bap." There is a further finding to this effect: "There can be no doubt that had not Afruz Bakht Chowdhry directed Syam Bap and his other tenants not to resist the accused but to remain quietly in Alpha Moral's bari, there might

have been a serious riot as Afruz Bakht is, according to the evidence on the record, the leading *zemindar* in Aurangpur and must have many men under his control. Obviously the accused persons thought that they had their enemy at their mercy as, if on account of having been bound down under section 107, Criminal Procedure Code, he decided not to resist their attacks they could do what they liked in seizing land by force, while if he did resist their armed attack by sending a similar body of men and a riot ensued, they would be able to get him mulcted of the amount of Rs. 5,000." Various decisions have been quoted before us, but it seems to us that the law is succinctly and accurately laid down in *Jib Lal Gir v. Jogmohan Gir* (1), where it is said that "being a member of an unlawful assembly does not necessarily involve a breach of the peace. It does, however, involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under section 143 of being a member of an unlawful assembly necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing' a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the persons convicted amounted to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same." We have already referred to the findings in this case and they do not seem to us to sufficiently and clearly show that the acts for which the accused were convicted under section 143 necessarily involve a breach of the peace or any evident intention of committing the same.

The Rule is, therefore, made absolute and the order under section 106, Criminal Procedure Code, set aside.

Rule made absolute.

(1) 26 C. 576.

TOTA RAM v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1514 OF 1915.

February 10, 1916.

Present:—Mr. Justice Rattigan.

TOTA RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), ss. 48, 50—Complaint by clerk under authority of Registrar, Joint Stock Companies, whether legal—Person acting as Director, whether can plead that he was not legally a Director or that he was not appointed till after penalty first accrued.

Under the Punjab Government Notification No. 3, dated the 23rd February 1910, the Registrar of the Joint Stock Companies is empowered to authorise any person to institute complaints of offences under the Companies Act. [p. 963, col. 1.]

Where, therefore, a clerk "acting under the instructions of the Registrar, Joint Stock Companies, Punjab," instituted complaints against the petitioner under sections 48, 50 and 74 of the Companies Act:

Held, that the clerk having been duly authorised by the Registrar, the complaint was good in law. [p. 963, col. 1.]

Emperor v. Shih Das, 8 Ind. Cas. 190; 35 P. W. R. 1910 Cr.; 11 Cr. L. J. 577, distinguished.

A person who acts as a Director or Manager of a Company cannot set up in answer to a penalty under section 50 of the Companies Act that he was not legally a Director or Manager. [p. 964, col. 1.]

Gibson v. Barton, (1875) 10 Q. B. 29; 44 L. J. M. C. 81; 32 L. T. 396; 23 W. R. 858, referred to.

It is the bounden duty of a Company and of its Directors and Managers to forward to the Registrar the summary and list specified in section 48 of the Companies Act and this obligation does not come to an end on the date on which by default on the part of the Company, Directors and Managers the penalty begins to accrue. Therefore, every person who at any time during the default in complying with the provisions of section 48 acted as Director or Manager can be convicted under sections 48 and 50, and it is immaterial that some or all of these persons were not legally qualified to act as Directors or Managers or that they did not in fact become Directors or Managers until after the date when the penalty first accrued. [p. 964, col. 2; p. 965, col. 1.]

Criminal revision from the order of the Sessions Judge, Multan, dated the 28th May 1915.

Mr. Nand Lal, for the Petitioner.

The Additional Government Advocate, for the Respondent.

JUDGMENT.—On the 17th February 1914 one Jhanda Singh, described as "Companies Clerk acting under the instructions of the Registrar, Joint Stock Companies, Punjab," filed two written complaints, through the Public Prosecutor, Multan, in the Court of the District Magistrate, Multan, against the individuals who were alleged in

the said complaints to have committed offences under (1) sections 48 and 50 of the Indian Companies Act (VI of 1882) and (2) under section 74 of the Act.

The said persons were (1) Baba Jaswant Singh, Bedi; (2) Sardar Ganga Singh; (3) Chaudhri Isar Singh; (4) S. Tikam Das-Chandan Das; (5) Mehta Ram Kishen; (6) Lala Hakim Rai; (7) Lala Sidhu Ram; (8) D. Tota Ram; (9) Lala Dida Ram Talwar; and (10) Lala Punna Lal. Of these persons Chaudhri Isar Singh appears to have died pending the trial and proceedings against him accordingly abated. Of the others, all were described as Directors of the Derajat Sindh Bank, Limited, with the exception of Lala Punna Lal who was described as General Manager of the said Bank.

The complaint under section 50 of the Act further charged an offence thereunder on the part of the said Bank itself.

The two complaints were transferred by the District Magistrate to Mr. Brayne, Magistrate, 1st Class, Multan, for trial and on the 10th November 1914 the latter delivered a consolidated judgment which dealt with both complaints. The learned Magistrate found (1) *as regards the complaint under section 50*, that Dida Ram, Chandan Das, Punna Lal, Sidhu Ram, Tota Ram, Hakim Rai and the Derajat Sindh Bank, Limited, were guilty and sentenced each of them to a fine of Rs. 1,000; but that Jaswant Singh, Ganga Singh and Ram Kishen were not guilty and must be acquitted; (2) *as regards the offence under section 74 of the Act*, that Punna Lal, Tota Ram, Sidhu Ram, Hakim Rai, Jaswant Singh and Chandan Das were guilty, and sentenced them each to pay a fine of Rs. 1,000; that Ganga Singh, Dida Ram and Ram Kishen were not guilty and must be acquitted.

The convicted persons appealed to the Sessions Judge, Multan, who by his judgment, dated 28th May 1915, rejected all the appeals and maintained the sentences awarded by the Magistrate.

Baba Jaswant Singh, who was convicted under section 74 of the Act, has not moved further in the matter, but the other convicted persons including the Bank have, through their respective Counsel, applied to this Court to revise the orders of the Magistrate and the Sessions Judge upon various

TOTA RAM V. EMPEROR.

grounds, most of which are common to the ~~many~~ of all the petitioners, though some are peculiar to the particular petitioners concerned. I shall deal in this judgment with all the ~~many~~ and in the first instance with the ground common to all. The first contention is that there was no proper complaint upon which the Magistrate could take cognizance of the offences. Reliance is placed upon the ruling of a Single Bench of this Court reported in *Emperor v. Shib Das* (1), and it is urged that the complaint should have been preferred by the Registrar of the Joint Stock Companies, whereas it was in fact preferred by a clerk of his office. I confess I have myself doubts as to the correctness of the ruling cited, but it is not necessary for me to consider that question as the decision was based upon a Notification of the Punjab Government issued in 1883, which has since been superseded by Punjab Government Notification No. 3, dated the 23rd February 1910 and published in the *Punjab Gazette* of the 25th February 1910. Under this latter Notification the Registrar is empowered to authorize any person to institute complaints of offences under the Act, and that the clerk who filed the complaints was duly authorized by the Registrar is apparent not only from the complaints themselves but also from the letter of the Registrar which has been filed as Exhibit P. 32. I might further note that this objection was not taken either in the Magistrate's Court or before the Sessions Judge on appeal. I accordingly overrule it.

It is next urged, in connection with the complaint which relates to the offence under sections 48 and 50 of the Act, that the meeting of the Company which took place on the 20th December 1912 was not an ordinary general meeting of the Company within the meaning and for the purposes of section 48, but was an extraordinary general meeting convened simply and solely for the purpose of confirming the resolution passed at the extraordinary general meeting held on the 3rd December 1912. It is alleged that, in spite of the express provision in article 74 of the Company's Articles of Association, in point of fact no ordinary general meeting of the Company was held at any time within

six months from the date of registration of the company, and that consequently no offence could possibly have been committed under sections 48 and 50 of the Act. This is, of course, an entirely erroneous view of the law [see *Park v. Lawton* (2); *Edmonds v. Foster* (3)], but I need not discuss it, the only question before me, upon the complaint, is whether in fact the meeting of the 20th December 1912 was an ordinary general meeting or an extraordinary general meeting. This is a question of fact to be determined from the evidence on the record, and both the Magistrate and the Sessions Judge, after full consideration, have decided that it was an ordinary general meeting. They have given excellent reasons for arriving at this conclusion and nothing that I have heard in argument before me has convinced me that they have fallen into any error. It seems to me, on the contrary, that Exhibits P. 5 and 6 (read with Exhibit P. 15) and Exhibit P. 21 are in themselves sufficient to prove that the meeting was the ordinary general meeting of the Company, though as a matter of fact, the only business that had to be transacted at that meeting happened to be the confirmation of the resolution passed at the extraordinary general meeting of the 3rd December.

The third ground for revision was that the petitioners were not guilty of any offence under sections 48 and 50 because they were not legally qualified under the Articles of Association of the Company to act as Directors, inasmuch as they held no shares at all in the Company, or at all events not the requisite amount of shares to qualify them for the post of Director. In this connection it is further contended on behalf of Lala Dida Ram Talwar that he parted with all his shares on the 22nd December 1912 and he could not thereafter be rightly regarded as a Director of the Company, while on behalf of Sidhu Ram Hakim Rai and Tota Ram, it is urged that they became Directors only after the

(1) Ind. Cas. 190; 35 P. W. R. 1910 Cr.; 11 Cr. L. J. 577.

(2) (1911) 1 K. B. 588; 80 L. J. K. B. 396; 104 L. T. 184; 75 J. P. 163; 18 Manson, 151; 27 T. L. R. 192.

(3) (1895) 45 L. J. M. C. 41; 33 L. T. 690; 24 W. R. 368.

TOTA RAM v. EMPEROR.

offences under sections 48 and 50 had, according to the complaint, become complete, i.e., on the 10th January 1913, and that they cannot accordingly be held liable in respect of that offence.

In my opinion there is no force in these contentions. There is ample evidence on the record to show that all the petitioners, whether qualified or not to act as Directors, did in point of fact act as such for a long time after the default was made, and in *Gibson v. Barton* (4), Blackburn and Lush, JJ., held (contrary to the opinion of Quain, J.) that a person who acts as a Director or Manager of a Company cannot set up in answer to a penalty under section 27 of the English Act (corresponding to section 50 of the Indian Act of 1882) that he was not legally a Director or Manager. He becomes a Director *de son tort*, and cannot protect himself from the liability cast upon a Director by the act by saying: "I am not a Director *de jure*." The case of *Lala Punna Lal Mukhi* is very similar. He was one of the original Directors of the Company and was appointed Manager on the 29th May 1913. It was he who issued the notorious prospectus which figures as Exhibit 7 and it was he who carried on most of the dilatory correspondence with the Registrar of Joint Stock Companies. Dida Ram, according to the Magistrate, left the Company in April 1913 but till then he was undoubtedly acting as a Director.

The argument that the offence was complete on the 10th January 1913 and that no one who became a Director or Manager after that can be held liable in respect of the complaint under sections 48 and 50 of the Act, is based on the misapprehension that the offence is not a continuing one and that the persons in default can by paying the penalty relieve themselves of all liability to comply with the provisions of section 48. That such is not the law is clear from *Reg. v. Catholic Life and Fire Assurance and Annuity Institution* (5) and

Queen v. Tyler (6). As remarked by Kay, L. J., in the latter case (page 596):—

"Section 25 requires a Company to keep a register of its members; and section 26 requires a company once a year to make a list of members of the Company, specifying certain particulars, such list to be contained in a separate part of the register, and to forward a copy of the list to the Registrar of the Joint Stock Companies. By section 32 the register is to be open to the inspection of the shareholders and the public. The object, therefore, is that this list which is contemplated by section 26 should be entered in the Company's register so as to be open to inspection. That is a very important duty in the interests not only of the share-holders, but also of the public, who have the right, upon payment of a mere nominal sum, to inspect the register and list. Sections 25 and 26 being imperative in their terms, and imposing upon the Company the duty of keeping this register and inserting in it from time to time this list, and forwarding a copy of the list to the Registrar, section 27 imposes a penalty for the omission to forward the list. I think it is impossible to read section 27 without seeing that the penalty is not intended to be the equivalent for the omission to perform the duty imposed upon the Company by section 26, but is of such a nature that the Company cannot by paying the penalty continue to neglect to perform the duty, because the penalty imposed is a penalty of 5 £ a day during which the default continues."

It is thus clear that it is the bounden duty of the Company and of its Directors and Managers to forward to the Registrar the summary and list specified in section 48 of the Act and that this obligation does not come to an end on the date on which by default on the part of the Company, Directors and Managers, the penalty begins to accrue. I hold, therefore, that every person, who at any time during the default in complying with the provisions of section 48, acted as Director or Manager of the company and the Company itself were rightly

(4) (1875) 10 Q. B. 329; 44 L. J. M. C. 81; 32 L. T. 396; 23 W. R. 858.

(5) (1883) 48 L. T. 675; 47 J. P. 503.

(6) (1891) 2 Q. B. 588; 60 L. T. 662; 61 L. J. M. C. 38.

YADO V. EMPEROR.

convicted of the offence under sections 48 and 50 of the Act and that it is immaterial that ■■■■ or all of those persons were not legally qualified to act as Directors or Managers or that they did not in fact become Directors or Managers until after the date when the penalty first accrued. At the same time I would be prepared to hold that a person who became, or acted as, a Director or Manager after such date could not be punished for the period of the default prior to his becoming a Director or Manager or acting as such. In other words, to take a concrete case, I think that Tota Ram could not be punished by fine for the default prior to the date when he became ■ Director (i. e., the 26th February 1913), but that he would be liable to the penalty for every day thereafter while the default still continued. But ■ the fines inflicted on the petitioners do not in any case exceed the amounts to which they would be liable on this view of the law, I need not further dilate upon it.

As regards the petitioners who were convicted under section 74 of the Act, little has to be said. It is not denied that the balance sheet was not filed with the Registrar within the prescribed period, but it is urged that the petitioners did not "knowingly and wilfully authorise or permit such default", inasmuch "as they were awaiting the decision of the Registrar upon the amalgamation question." In this connection I have been referred to the correspondence between the Company and the Registrar (Exhibits P. 13, 14, 15 and 16). I am unable to see how this correspondence helps the petitioners. They must be assumed, ■ ordinary business men, to know the law, and that they were not ignorant of the mandatory provisions of section 74 of the Act is obvious from Lala Sidha Ram's letter (Exhibit D. 38), dated the 15th August 1913. In that letter addressed to the Manager, Punna Lal the writer points out that unless the balance sheet is submitted within time a fresh complaint will probably be made and requests that it may be prepared and submitted within the prescribed period. No doubt this letter shows that Lala Sidhu Ram was anxious at the time to have the balance sheet sent in by due date, but the fact remains that he

knew that it had not been prepared and that he took no steps thereafter to insist on the law being complied with. The Magistrate and the Sessions Judge are both satisfied that the default in respect of the balance sheet ■ wilful and due to anxiety on the part of the Directors and Managers to conceal as long ■ they could the true state of affairs. I see no reason to take ■ different view, even if I had jurisdiction to do so.

As a result, then, I hold that the petitioners were rightly convicted of the offences for which they have respectively been punished. The sentences are heavy, but in view of the abuse of the provisions of the Companies Act that was unfortunately rife at the time and of the widespread mischief and loss resulting therefrom, I think exemplary punishments were necessary. I accordingly reject all the petitions.

Revision Petitions rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 37 OF 1916.

April 25, 1916.

Present:—Mr. Stanyon, A. J. C.

YADO—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 436, 437—Order of discharge passed by first class Magistrate with powers under section 30—Revision to District Magistrate, whether competent—Further inquiry, when to be directed—Proper order.

When a Subordinate Magistrate of the first class, invested with powers under section 30, Criminal Procedure Code, makes an order of discharge in a case which, under Schedule II of the Code read with section 28 or 29 thereof, is triable exclusively by the Court of Session, such order is open to revision by the District Magistrate under sections 436 and 437 of the Code. [p. 967, cols. 1 & 2.]

Jaloo v. Emperor, 15 P. R. 1904 Cr; 1 Cr. L. J. 1063; 131 P. L. R. 1904, referred to.

Where a District Magistrate considers that a case triable only by ■ Court of Session, which has been tried by a specially empowered Magistrate and has ended in a discharge, has been incompletely or imperfectly tried, he may order further inquiry by the same Magistrate or by another Magistrate equally

YADO V. EMPEROR.

empowered, but not by a Magistrate without special powers and, therefore, in ■ sense, ■ Court of inferior jurisdiction to the Court which ordered the discharge. But if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment under section 436 of the Code. [p. 968, col. 1.]

Wahed Ali v. Emperor, 32 C. 1090; ■ Cr. L. J. 120; *Queen-Empress v. Surendra Nath Sarkar*, 28 C. 397; 5 C. W. N. 574; *Queen-Empress v. Krishnabhat*, 10 B. 319, referred to.

Criminal revision against the order of the District Magistrate, Raipur, dated the 4th March 1916, setting aside the order of discharge passed by the Magistrate, First Class, Raipur, dated the 13th January 1916.

Dr. H. S. Gour, for the Appellant.

Mr. G. P. Dick, for the Crown.

JUDGMENT.—The applicant in this case was sent up by the Raipur Police for trial upon a charge of attempting to murder an ex-servant. He was tried by ■ Magistrate invested with powers under section 30 of the Code of Criminal Procedure, 1898. After taking all the available evidence for the prosecution, the Magistrate came to the conclusion that a *prima facie* case had not been made out against the accused. He gave his reasons in a detailed order, wherein he analysed the prosecution evidence and shewed that the accusation rested on the practically uncorroborated evidence of the complainant, whom the accused had dismissed from his service shortly before he was wounded. The Magistrate, therefore, discharged the accused.

Thereafter the District Magistrate took up the case on revision and wrote an order discussing the merits of the evidence and giving reasons for the view, evidently entertained by him, that ■ *prima facie* case had been made out. But instead of making an order of commitment under section 436 of the above Code, the learned District Magistrate made an order under section 437 for another inquiry by a Magistrate who is not invested with powers under section 30 aforesaid. The accused has applied for revision of this order, urging that it is illegal upon two grounds, namely—

(1) that the District Magistrate has no power to revise an order of discharge made by a Magistrate having powers under section 30 in a case triable only by a Court of Session, and

(2) that the powers given by section 437 of the Criminal Procedure Code do

not extend the ordering of a review of a one Magistrate's finding by another upon ■ reconsideration of the ■■■■ evidence.

Both these questions require consideration, and were well argued before me. I will deal with them in the above order.

The powers given to a Magistrate under section 30 of the Criminal Procedure Code, 1898, make him competent to try many cases which, under Schedule II to that Code, are triable exclusively by ■ Court of Session. But the maximum sentence which he may pass, in such cases under section 34, is the same ■ that which section 31 (3) empowers an Assistant Sessions Judge to pass. It seems clear that in the territories mentioned in section 30, the Magistrate empowered thereunder takes the place of an Assistant Sessions Judge in what are known as the Regulation Provinces. The particular case before ■■ is one under section 307, Indian Penal Code. Schedule II enacts that a charge of ■ offence punishable under that section shall be tried only by a Court of Session, there is no alternative tribunal given in the last column of the Schedule by use of such words ■ "or by ■ Magistrate specially empowered under section 30." From this premise it is urged that when ■ Magistrate so empowered tries ■ case under section 307, Indian Penal Code, he necessarily sits as a Court of Session, and his procedure and decision in that case are no more subordinate to ■ District Magistrate, or his Court inferior to that of a District Magistrate, than if he were an Assistant Sessions Judge. In other words, when a Magistrate, ordinarily subordinate to the District Magistrate, exercises "section 30 powers" in trying ■■ accused who is triable exclusively by ■ Court of Session, he becomes an Assistant Sessions Judge in all but name, and exercises ■ Sessions Court jurisdiction over which the District Magistrate has no control.

This argument is specious but unsound. It is ■ common feature in the law Courts in British India to find ■ part of the jurisdiction of a principal Court conferred upon a Court subordinate to it. Thus we have Additional and Assistant Judges of all grades: and Assistant and Extra Assistant Commissioners invested with

YADO V. EMPEROR.

certain of the powers of a Deputy Commissioner in certain territories. In the Central Provinces the Financial Commissioner is invested with certain of the powers of the Chief Commissioner. But the conferral of such powers does not make him an Additional Chief Commissioner nor does the investing of an Extra Assistant Commissioner with some of the powers of the Deputy Commissioner make him a Deputy Commissioner or Additional Deputy Commissioner or affect his subordination to the Deputy Commissioner otherwise than in the matter of appellate jurisdiction. In the same way a Magistrate invested with powers under section 30, Criminal Procedure Code, is not, in any sense, a Court of Session or an Assistant Sessions Judge. He is given exceptional powers to try certain offences, ordinarily triable only by a Court of Session, but he tries them as a *Magistrate*. That is to say, he takes cognizance under section 190, and not under section 193, of the Code of Criminal Procedure, and, having begun a Sessions case as a trial, he, nevertheless, may do what no Assistant Sessions Judge could do, *viz.*, commit for trial by a Court of Session under section 347 (1). When he himself carries out the trial, he proceeds under Chapter XXI, and not under Chapter XXIII, of the Code last above-mentioned. Hence, notwithstanding his special powers, he remains a Magistrate and nothing else. He is not an Assistant Sessions Judge, but, if I may so describe him, a magisterial substitute for him. Therefore under section 17 (1), Criminal Procedure Code, he is, if not himself the District Magistrate, subordinate to the latter, in the same way and to the same extent as any other Magistrate of the first class in the same district; and sub-section (5) of that section applies to him. This was the view taken in *Julloo v. Emperor* (1). It follows that where a Subordinate Magistrate of the first class, invested with powers under section 30 of the Code of Criminal Procedure, makes an order of discharge in a case which, under Schedule II of that Code read with section 28 or 29 thereof, is triable exclusively

by the Court of Session, such order is open to revision by the District Magistrate under sections 436 and 437 of the same Code. Hence the District Magistrate of Raipur had power to revise the order of discharge made in the present case, if legal and sufficient ground existed for such revision.

I now take up the *next* question. It is manifest that in this case the District Magistrate came to a different conclusion upon the same evidence as that which Mr. Collins considered insufficient to be a basis for framing a charge against the accused. There was no failure to make due inquiry into the charge, though the District Magistrate believes himself to have discovered a defect in the examination of the accused by Mr. Collins. The case is obviously one in which the District Magistrate, having come to a different conclusion from that of the Magistrate who tried the case, has, for that reason, set aside the order of discharge, and has sent the case to another Magistrate, who has no special powers under section 30 aforesaid, with what is practically a mandate to commit for trial by a Court of Session.

Whether such procedure is legal is open to some doubt. It is a question on which there is some conflict of opinion. In *Empress v. Bhagwan* (2) it was laid down by Crosthwaite, J. C., that "where a Magistrate, after taking all the evidence, discharges an accused person, section 437, Criminal Procedure Code, does not empower the Sessions Court to order a fresh trial in order that another Magistrate may consider the same evidence and give his opinion on it." The District Magistrate has disregarded this ruling on the ground that it is "an old case." That is a reason for giving all the more obedience to it. A long established and unmodified *dictum* is far more binding than a new proposition. Nor is it any justification for disregarding the ruling of this Court by any Court subordinate to it that a different view of the law has been taken by the High Courts of other provinces. But in *Emperor v. Debidas* (3)—which is a ruling under the 1898 Code, while *Empress v. Bhagwan* (2) was decided under the 1882 Code—it was laid down by Ismay, J. C.,

(1) 15 P. R. 1904 Cr.; 1 Cr. L. J. 1063; 131 P. L. R. 1904.

(2) 2 C. P. L. R. 82.

(3) 14 C. P. L. R. 161.

YADO V. EMPEROR.

that the expression 'further inquiry' does not imply that additional evidence must be forthcoming, and that any mistake or illegality or irregularity in the proceedings will justify the District Magistrate in setting aside an order of discharge. In the present case there does not seem to be any mistake, illegality or irregularity in the procedure of Mr. Collins; and I doubt whether the order for a further inquiry is legally sustainable. In *Dulla v. Empress* (4) such a course was held to be improper. However, having regard to the conflict of authority, I prefer not to decide that question. I am competent to interfere in revision on the ground of impropriety with an order that may not be illegal. It seems to me that there are two respects in which the order made by the District Magistrate in this case is improper, namely—

(1) that he has directed a junior Magistrate not empowered under section 30, Criminal Procedure Code, to review upon the same evidence the judgment of a senior Magistrate who is so empowered; and

(2) that his order for further inquiry is in terms a judgment on the merits of the case which must seriously prejudice the accused before the new Magistrate.

I am of opinion that where a District Magistrate considers that a case triable only by a Court of Session, which has been tried by a specially empowered Magistrate and has ended in a discharge, has been incompletely or imperfectly tried, he may order further inquiry by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate without special powers and, therefore, in a sense, a Court of inferior jurisdiction to the Court which ordered the discharge. But where in such a case the whole of the prosecution evidence has been taken and there is no material defect of procedure, and the Magistrate discharges because, in his opinion, the evidence is insufficient or incredible, then, if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment under section 436 of the Criminal Procedure Code. In the present case, which is a Sessions case, it is manifest that the District Magistrate formed the conclusion that Mr. Collins ought to

have framed a charge against the accused and tried him. Under those circumstances the District Magistrate should have ordered a commitment to the Court of Session.

As regards the second ground of impropriety, there is clear authority in *Wahed Ali v. Emperor* (5), if authority is necessary for so obvious a proposition. As I have already said, the order, in terms, is practically a mandate to a subordinate Magistrate to commit the accused for trial. It makes prominent all the points against him, and makes no mention of the points in his favour, e. g., that the complainant has undoubtedly lied in saying that he was dismissed from the accused's service for no reason whatever. In every way the better course was for the District Magistrate to have ordered the commitment of the accused, and it seems expedient that he should now be directed to make that order.

For the above reason the order of the District Magistrate for further inquiry is set aside, and he is directed to make an order under section 436, Criminal Procedure Code, committing the accused for trial. The District Magistrate may himself make such an order: *Queen-Empress v. Surendra Nath Sarkar* (6); *Queen-Empress v. Krishnabhat* (7). The offence is non-bailable, but inasmuch as the commitment will rest entirely upon a difference of opinion as to the credibility of the complainant between the District Magistrate who did not, and the specially empowered Magistrate who did, examine him, I further direct that, subject to any future order by the Court of Session, the accused, notwithstanding commitment, be admitted to bail himself in Rs. 5,000 and two sureties of Rs. 2,500 each pending the commencement of his trial.

Order accordingly.

(5) 32 C. 1090; 3 Cr. L. J. 120.

(6) 25 C. 397; 5 C. W. N. 574.

(7) 10 B. 319.

(4) 2 P. R. 1901 Cr.; 2 P. L. R. 1901.

BAKIR SAHEB AMIR SAHEB V. EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 578 OF 1915.

February 18, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

BAKIR SAHEB AMIR SAHEB—

ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 476, 477—Enquiry under s. 476—Statement of witness—Right of party against whom proceedings instituted to cross-examine—Trial based on result of enquiry—Witness not available—Statement, whether can go upon record—Evidence Act (I of 1872), s. 33.

The person against whom proceedings have been instituted under section 476, Criminal Procedure Code, has not the right to cross-examine witnesses during the enquiry under the said section. Therefore, if a witness is not forthcoming at the trial that is started on the result of such enquiry, his previous statement is not admissible under section 33 of the Evidence Act. [p. 970, cols. 1 & 2.]

Per Batchelor, J.—It is open to a Court to make an order under section 476, Criminal Procedure Code, without taking any evidence at all. If it chooses to take evidence it is entirely within its discretion to say when and where that evidence should stop. The section gives the widest discretionary power to a criminal Court and deliberately refrains from imposing any special formalities to hamper the discretion of the Court. [p. 970, col. 1.]

Safurabai v. Abdullabhai, 4 Ind. Cas. 273; 11 Bom. L. R. 1164; 10 Cr. L. J. 539 and *In re Kanvirappa*, 16 Ind. Cas. 497; 14 Bom. L. R. 587; 13 Cr. L. J. 689; 1 Bom. Cr. C. 154, followed.

Per Shah, J.—The scope of the enquiry under section 476 depends on the discretion of the Court. It is optional to the Court to make a preliminary enquiry and the nature of that enquiry must be determined with reference to the circumstances of each case. If a witness be examined in the course of such enquiry, it cannot be said that it is the right of the person against whom the enquiry is being made, to cross-examine the witness. There is nothing either in section 476 or section 477 to suggest that the person concerned has any such right. [p. 970, col. 2; p. 971, col. 1.]

Criminal appeal from convictions and sentences passed by the Assistant Judge, Thana.

Mr. Binning (with him Mr. M. M. Karbhari), for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.

BATCHELOR, J.—The first point taken in this appeal is a question of law which arises in this way:—

The appellant, Bakir, has been convicted of making a false charge against one Aliser. The appellant had alleged that this Aliser had stolen a thousand rupee note from him. Aliser was convicted by the Magistrate in regard to this theft, but the conviction was set aside on appeal by the learned Sessions Judge. After setting aside the conviction, the Sessions Judge entered upon an inquiry for the purpose of ascertaining whether such proceedings as these should not be instituted against the then complainant, Bakir. Ultimately the Sessions Judge ordered Bakir to be committed for trial on the charge of making a false charge of theft. In the inquiry which preceded the commitment, the learned Judge took the statement of Aliser among others. Aliser has now disappeared, and his evidence could not be obtained in the Court of Session. Therefore, the learned Assistant Judge, by whom this trial was conducted, allowed upon the record the statement which Aliser had made to the Sessions Judge in the inquiry preceding the commitment of Bakir. As Aliser is a very important witness, it is desirable to decide *in limine* whether this admission of his earlier statement is in conformity with law or not.

Mr. Binning, contending for the negative, refers to section 33 of the Indian Evidence Act, under which alone the statement could be admissible; and contends that one necessary condition laid down by section 33 is not in this case satisfied; that is to say, in this case, Mr. Binning argues that the present appellant, Bakir, had not the right to cross-examine Aliser in the inquiry before the Sessions Judge. Admittedly, unless Bakir had that right, Aliser's previous statement, which has gone upon the record, must be excluded. In my opinion Mr. Binning's objection is well founded.

Some attempt was made to suggest that the inquiry held by the learned Sessions Judge might be attributed to section 477 of the Criminal Procedure Code, so that the preceding inquiry should be regarded as a proceeding resulting in commitment with the result that all the usual requirements which are needed in inquiries terminating in a commitment

BAKIR SAHEB AMIR SAHER v. EMPEROR.

should be observed. It appears to me, however, impossible to ascribe the inquiry to any section but section 476. That is the section which the learned Sessions Judge himself quotes, and that section authorizes precisely the kind of inquiry which this is. Section 477, moreover, makes no reference to any inquiry at all. If, then, the inquiry must be held to have been made under section 476, it seems to me that the appellant, Bakir, had no right to cross-examine the then witness, Aliser. Certainly no such right is conferred by the section. Indeed, the section goes so far as to say that the inquiry is merely discretionary, for it may or may not be made; in other words, it was perfectly competent to the Sessions Judge to make the order which he finally did make without taking any evidence at all; and if he chose to take evidence, it appears to me that it was entirely within his discretion to say when and where that evidence should stop. I regard section 476 as giving the widest discretionary powers to the criminal Court and as deliberately refraining from imposing any special formalities to hamper the discretion of the Court. The wisdom of that is obvious, because it is clear that grave danger of prejudice would be incurred if the informal inquiry contemplated in section 476 were to be expanded and formalized into an investigation which would be practically a trial.

The view which I take seems to me to receive countenance from the decisions of this Court in *Safurabai v. Abdullahar* (1) and *In re Karrirappa* (2).

It may be added that the principle or reason of the thing is in favour of Mr. Binning, since the general rule undoubtedly requires that a witness should be produced if his evidence is to go upon the record, and the particular exceptions allowed by section 33 are not, in my opinion, to be extended without very good cause.

[After discussing the evidence his Lordship proceeded to observe as follows:—]

On the whole, therefore, it appears to me that this conviction must be reversed, both because the direct positive evidence in its favour is too slight and fragmentary and because such corroboration as the circumstances afford is insufficient to justify a conclusion of the appellant's guilt.

I would, therefore, allow the appeal, reverse the conviction and sentence and direct that the accused be acquitted and discharged.

SHAH, J.—I agree that the statement of Aliser taken in the course of the inquiry before the Sessions Judge, which resulted in the commitment of the present appellant, is inadmissible in evidence. Its admissibility depends upon the answer to be given to the question, whether the present appellant had the right to cross-examine the witness within the meaning of the proviso to section 33 of the Indian Evidence Act when his statement was recorded by the Sessions Judge. In my opinion, in those proceedings, the present appellant had not the right to cross-examine Aliser. Those proceedings were taken under section 476 and the order was made under section 477. The inquiry held on that occasion must, in my opinion, be referred to section 476. The order of commitment, no doubt, is made under section 477 of the Criminal Procedure Code, which makes no provision for any inquiry; and the learned Sessions Judge has stated in the beginning of his order that the inquiry was made under section 476 with a view to see whether an order under section 477 could be made. It seems to me that the scope of the inquiry under section 476 depends upon the discretion of the Court. It is optional to the Court to make a preliminary inquiry, and the nature of that inquiry must be determined with reference to the circumstances of each case. Under these circumstances it seems to me that even if a witness be examined in the course of such an inquiry, it cannot be said that it is the right of the person, against whom the inquiry is being made, to cross-examine the witness. Of course, ordinarily a witness would be allowed to be cross-examined, and I do not for a moment suggest that it would be anything but proper for the Court to allow a witness to be cross-examined

(1) 4 Ind. Cas. 273; 11 Bom. L. R. 1164; 10 Cr. L. J. 539.

(2) 16 Ind. Cas. 497; 14 Bom. L. R. 587; 13 Cr. L. J. 689; 1 Bom. Cr. C. 154.

BAIJNATH MARWARI v. W. S. STREET.

by the adverse party. But the question as to whether the person against whom the inquiry is proceeding, has the right to cross-examine a witness is quite different. There is nothing either in section 476 or section 477 to suggest that the person concerned has any such right.

I only desire to say a word as to the observations in the judgment of this Court in the application made by the present appellant against the order of commitment, upon which the learned Government Pleader has relied. It is argued by him that the judgment shows that the inquiry held in this case must be deemed to have been held under section 477 and that it could not now be properly treated as an inquiry under section 476. In the first place, it seems to me that the observations do not support his contention. They were made with reference to the argument then advanced on behalf of the applicant that the inquiry was not under section 476 but must be referred to section 477, and that there being no provision in section 477 with regard to any inquiry, the whole inquiry was illegal. It was not necessary then to decide whether the proceedings held by the Sessions Judge were in fact under section 476 of the Criminal Procedure Code. Secondly, if the inquiry cannot be properly treated as having been made under section 476, it is clear that there is nothing in section 477 to regulate the inquiry which results in an order of commitment under that section, and to support the contention that the party against whom the inquiry is held has a right to cross-examine any witness examined in the course of that inquiry.

I agree generally with the reasons given by my learned brother for the conclusion that the conviction and sentence must be set aside.

On a careful consideration of the arguments on both sides, the conclusion that I have come to is that though there is no reason to doubt the correctness of the acquittal of Aliser, there is not sufficient material on the record to justify an inference as to the guilt of the present appellant on either charge.

It seems to me that there is room for a reasonable doubt as to the guilt of the appel-

lant and the benefit of that doubt must be given to him.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 41 OF 1916.
February 11, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

BAIJNATH MARWARI AND ANOTHER—
SECOND PARTY—PETITIONERS
versus

W. S. STREET AND OTHERS.—FIRST PARTY
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, applicability of—Joint property.

The mere fact of there being joint title to the land in dispute would not prevent the application of section 145, Criminal Procedure Code, where one of the joint owners is in actual and exclusive possession. [p. 972, col. 2.]

Rule against an order of the Sub-Divisional Magistrate, Dhanbad, dated the 7th November 1915.

FACTS material to the case are as follows:—This Rule was issued by Chitty and Walmsley, JJ., on the 13th January 1916 on the petition of Baijnath Marwari and others upon the opposite party Mr. H. N. Thorpe and on the Deputy Commissioner of Manbhum, to show cause why the order of the Sub-Divisional Officer of Dhanbad declaring the opposite party to be entitled to possession of the disputed land (a mining lease hold) should not be set aside on the ground that the Sub-Divisional Officer of Dhanbad, Mr. A. P. Middleton, had no jurisdiction to exercise his powers under section 145, Criminal Procedure Code, inasmuch as the subject-matter of the proceedings was a joint property. The allegations made in the petition to the High Court were that the petitioner Baijnath Marwari and others, second party, obtained a mining lease of *Mauza Loha Paty*, District Manbhum, by a registered *puttah* on the 13th *Baisak* 1300 B. S., that it was arranged at the time between Baijnath and one Rambandhu Chattopadhyaya, since deceased, that the latter on payment of half the cost for obtaining the

BAIJNATH MARWARI V. W. S. STREET.

lease would be a co-sharer to the extent of 8-annas of the said *Mauza Loha Paty* and accordingly his name also was included as one of the lessees in the *pattah*, that on the death of the said *Rambandhu* on 6th *Agrahayan* 1317 B. S. his two sons executed a deed of conveyance in favour of their mother *Sindhubala Debya* in respect of an undivided half share of the said *mauza*, that on the 31st January 1915 the said *Sindhubala Debya* demised a defined area of 100 *bighas* out of her half share of the *mauza* with the underground rights thereof to Messrs. Thorpe and others, the opposite party to the Rule, that the said opposite party proceeded to start work to which the petitioners, *Baijnath* and others, offered resistance and thereupon proceedings under section 145, Criminal Procedure Code, were instituted by the Sub-Divisional Officer of Dhanbad, with the result that the opposite party were declared to be in possession of the land in dispute. The Sub-Divisional Officer in his judgment made the following observations:—"The first party's contention is that it (*mauza*) was partitioned into two equal shares. Subsequently the heirs of *Rambandhu* transferred their right to his widow from whom the first party derived their title. The Company (the first party) after getting their lease exercised various acts of possession (boring for samples of coal, digging inclines, raising coal and building some huts) up till last August, when admittedly the disputed property was left in neither party's possession owing to a notice under section 144, Criminal Procedure Code, being issued from this Court on both parties. The second party denies the partition and while admitting the first party's possession say that this possession was only exercised after a protest by them and after a constable had in consequence been deputed to see that the peace was not disturbed. It was further argued for the second party that a coal mining lease is only a license which does not connote exclusive possession but always allows the grantor and his representative to mine coal himself; that actual possession of under-ground rights only extends to the coal actually cut and removed, while constructive possession remains with the person who has the right title. This seems to me to introduce subtleties with which section 145 was never intended to deal. The Magistrate acting under this section is

primarily concerned with actual possession and only with title in so far as it affords presumption of possession. * * * * If a party who digs, inclines and gets coal is not in actual possession, then language has lost all meaning and in this case the first party's possession is not seriously disputed. * * * It was finally suggested that neither party was in possession within two months of these proceedings being drawn up; but this is due to the issue of a notice under section 144, Criminal Procedure Code, on both parties and it has been held by the Calcutta High Court that such an order makes no real break in possession. * * *

I consider it clearly proved and indeed admitted that the first party was in actual possession at the time of the issue of notice under section 144, Criminal Procedure Code."

Sir S. P. Sinha and Babus *Monmotho Nath Mukerjee* and *Sishir Kumar Mitter*, for the Petitioners.

Mr. J. W. Chippendale, for the Opposite Party.

JUDGMENT.—In this case, after perusing the record and hearing the parties on either side, we think that the Rule should be discharged. It is true with reference to the partition at the close of 1905, which was alleged by the first party and denied by the second, the Magistrate has not recorded any specific finding that that partition did in fact take place or that there was any division of the property by metes and bounds between the predecessors of the two parties now before us. He has, however, found in unmistakable terms that the first party were in possession and that the fact of their possession was not seriously disputed. He calls it throughout actual possession; and his judgment can only be read in the sense that he means it was both actual and exclusive of the other side. The mere fact that there may be a joint title to the land would not prevent the application of section 145, Criminal Procedure Code, as is shewn by the case of *Basanta Kumari Dasi v. Mohesh Chandra Laha* (1). The Rule is accordingly discharged.

Rule discharged.

(1) 19 Ind. Cas. 541; 17 C. W. N. 944; 14 Cr. L. J. 269; 40 C. 982.

ANNA LAXMAN BHINTADE v. EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 395
OF 1915.

March 9, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

ANNA LAXMAN BHINTADE—

ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 429—Maiming an animal, what is—Privation of use of limb or member—Permanent injury.

The word 'maiming' in section 429 of the Indian Penal Code involves the notion of the privation of the ■■■ of some limb or member involving a permanent injury and not ■ mere disfigurement.

Where nearly one-half of one ear of an animal is cut off without impairing its sense of hearing, the injury does not amount to 'maiming' within the meaning of the section.

Criminal application for revision from the conviction and sentence passed by the First Class Magistrate, Wai, confirmed on appeal by the Sessions Judge, Satara.

Mr. K. H. Kelkar, for the Applicant.

JUDGMENT.

BATCHELOR, J.—In this case the applicant has been convicted, under section 429 of the Indian Penal Code, of the offence of maiming a mare.

The maiming alleged consists in this that nearly one-half of one ear of the mare was cut off by the applicant. There is no suggestion that the animal's sense of hearing has been impaired. The question is, whether such an injury amounts to maiming within the meaning of section 429 of the Indian Penal Code. Having regard to the position of the word 'maiming' in that section, where it occurs in conjunction with the words 'killing, poisoning or rendering useless,' I am disposed to think that the 'maiming' of the section implies some permanent disability inflicted on the animal. I do not seek to give an exhaustive definition of the word 'maiming.' But it appears to me that involved in the word is the notion of the privation of the use of some limb or member involving a permanent injury, and not ■ mere disfigurement. That view is, I think, in accordance with Mr. Justice Philips's decision in

Marogowdha v. Srinivasa Rangachar (1), where the record shows that both the ears of the animal were removed and the hearing had been permanently impaired. In *Reg. v. Jeans* (2) the facts were that the prisoner pulled out part of the tongue of ■ horse. It was argued that that did not constitute maiming, because the injury inflicted was only of ■ temporary character, whereas in maiming the injury must be permanent. Mr. Justice Wightman, having consulted with Mr. Justice Parterson, allowed this argument, saying that there was no such permanent injury inflicted on the animal as would support the count for maiming. So also in Stroud's Judicial Dictionary the word is defined as "a bodily harm whereby a man is deprived of the use of any member of his body, or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened." In Murray's Dictionary the word is defined ■ "an injury to the body which causes the loss of a limb or of the use of it" or more widely as "any lasting wound or injury". The word occurs in the English Malicious Damage Act, 1867, 24 & 25 Vic., c. 97, s. 40, and in Russell on Crimes, Vol. II, p. 1827, 7th Edn., where *Reg. v. Jeans* (2) is cited, it is stated in commentary upon the statute that "to constitute ■ maiming, ■ permanent injury must be inflicted on the animal." In this case there is no permanent injury, but a mere disfigurement, and I am of opinion, therefore, that the case does not fall under section 429 of the Indian Penal Code.

The conviction must be altered to a conviction under section 426 and the sentence must be reduced to a term of three months' rigorous imprisonment. Since the applicant has already suffered this term of imprisonment, we order him to be discharged and set at liberty.

SHAH, J.—I am of the same opinion.

Conviction and sentence altered.

(1) 12 Ind. Cas. 90; 35 M. 594; 21 M. L. J. 843; (1911) 2 M. W. N. 141; 10 M. L. T. 192; 12 Cr. L. J. 482.

(2) (1844) 1 Car. & K. 539.

EMPEROR V. SALIMI.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1557 OF 1915.

November 20, 1915.

Present:—Mr. Justice Rattigan.

EMPEROR—PROSECUTOR

versus

SALIMI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 562, scope of—Applicability to adults.

Section 562 of the Criminal Procedure Code is not restricted to juvenile offenders only.

Queen-Empress v. Tukaram, 2 Bom. L. R. 817; *Emperor v. Po Thein*, 1 Cr. L. J. 1121; 2 L. B. R. 314 referred to.

Where, therefore, in a petty case of theft it appeared that the accused had been about 2 months in the lock-up and that there was no previous conviction against any of them:

Held, that an order calling upon the accused to execute a bond under section 562, Criminal Procedure Code, was good even though the accused were adults.

Case reported by the District Magistrate, Gujrat, with his No. 1794, dated the 29th of September 1915.

FACTS.—One hundred thirty-eight maunds of wood valued between Rs. 12 and Rs. 50 were stolen and sold by the accused to Fateh Muhammad, Contractor. The charge of the theft was proved against all of the accused and they were bound over under section 562, Criminal Procedure Code, by the Tahsildar of Phalia.

The accused on conviction by M. Hamid Ali, Tahsildar, Phalia, exercising the powers of a Magistrate of the 2nd class in the Gujrat District, were directed, by order, dated 24th of June 1915, under section 379 of the Indian Penal Code, to execute a bond in Rs. 200 each for six months under section 562, Criminal Procedure Code.

The proceedings are forwarded for revision on the following

GROUND.—Salimi, Kamun, Mehra and Sahbu, "Sohlas" of Bhalowal, have been convicted by M. Hamid Ali, Magistrate, 2nd class, under section 379 of the theft of a quantity of wood, about 138 maunds, valued between Rs. 12 and Rs. 50, and have been bound over under section 562 instead of receiving sentence.

The order is improper for the following reasons:—

(a) With the exception of Sahbu, whose age is 16 years, none of the accused are under the age of 30.

SITAL PRASAD V. EMPEROR.

(b) The character and antecedents of the offenders are not good.

Salimi accused has long been under Police supervision and has been bound over under section 110, Criminal Procedure Code. They are "Sohlas," a caste addicted to crime, and it has been necessary owing to the criminality of the village Bhalowal to impose a Police post there.

(c) The offence is by no means trivial and there are no extenuating circumstances.

(d) The direction of the Chief Court contained in their endorsement No. 2039-G., dated 4th May 1910, has been ignored.

As I am uncertain whether as District Magistrate I can call up the accused for sentence I forward the case for orders of the Chief Court.

ORDER.—I do not feel called upon to interfere at this stage. The Magistrate in taking action under section 562, Criminal Procedure Code, refers to the facts that the accused persons had been about 2 months in the lock-up and that there was no previous conviction standing against any of them. The case was a petty one and section 562 is not restricted to juvenile offenders only [*Queen-Empress v. Tukaram* (1), *Emperor v. Po Thein* (2)]. I accordingly decline to interfere.

Interference declined.

(1) 2 Bom. L. R. 817.

(2) 2 L. B. R. 314; 1 Cr. L. J. 1121.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1168 OF 1915.

November 4, 1915.

Present:—Mr. Justice Greaves and

Mr. Justice Walmsley.

SITAL PRASAD—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 108 (b)—Intention to promote or attempt to promote feelings of enmity or hatred, if necessary—Penal Code (Act XLV of 1860), s. 153A, ingredients of.

To justify an order under section 108 (b) of the Criminal Procedure Code, it is not necessary to find that there was an actual intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects; it will be sufficient when it is found that there are words

SITAL PRASAD V. EMPEROR.

in the leaflet or matter complained of which were likely to promote feelings of enmity or hatred. [p. 975, col. 2.]

Obiter dictum.—To constitute an offence under section 153A, Indian Penal Code, there must clearly be an intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects. [p. 975, col. 2.]

Criminal revision against the order of the District Magistrate, Monghyr, dated the 8th July 1915.

Babus *Dasarathi Sanyal, Siva Nandan Roy* and *Rajendra Prasad*, for the Petitioner.

Mr. *S. Ahmed*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The petitioner in this case has been bound down under section 108 (b), Criminal Procedure Code. We granted ■ Rule calling on the District Magistrate to show cause why the order should not be set aside, on the ground that upon the true construction and interpretation of the leaflet as ■ whole the Court below ought to have held that it does not contain any matter the dissemination of which is punishable under section 153A, Indian Penal Code, which necessitates there being an intention to promote feelings of enmity or hatred. On behalf of the petitioner it was contended that even if the matter or some of the matter contained in the leaflet was likely to promote feelings of enmity or hatred, there could be no order made under section 108, unless the Court was satisfied that there was an intention in using the words of the leaflet to promote or attempt to promote feelings of enmity or hatred; and we were referred to *Joy Chandra Sarkar v. Emperor* (1) as an authority that for a conviction under section 153A there must be a deliberate attempt to excite class against class and an intention to create enmity. We were also referred to the case of *Jaswant Rai v. Emperor* (2), which lays down that to constitute an offence under section 153A there must be an intention to promote feelings of enmity and hatred. We were further referred to two English cases, *Reg. v. Sullivan* (3) and *R. v. Burns* (4), cases under the English Common Law, which

(1) 10 Ind. Cas. 948; 38 C. 214 at p. 225; 12 Cr. L. J. 348.

(2) 10 P. R. 1907 Cr.; 5 Cr. L. J. 439; 14 P. W. R. 1907 Cr.; 2 M. L. T. 272.

(3) (1868) 11 Cox. C. C. 44.

(4) (1886) 16 Cox. C. C. 355.

were cited before us as authorities for the proposition that to constitute an offence under section 153A, which is said to be founded upon the principles of the English Common Law, there must be intention. The only case to which we were referred which is an actual decision under section 108 (b), Criminal Procedure Code, is the case of *U. Dhammaloka v. Emperor* (5). It is a case decided in the Lower Burma Chief Court by a single Judge and he without ambiguity lays down the proposition that to justify an order under section 108 (b) there must be an actual intention to promote or attempt to promote feelings of enmity or hatred.

Our view of the section is at variance with this decision. We think that although to constitute an offence under section 153A, Indian Penal Code, there must clearly be intention, different considerations arise with regard to the provisions of section 108 (b), Criminal Procedure Code. It is true that the words of the section are "any matter the publication of which is punishable under section 153A, Indian Penal Code." But in our view in order to justify an order under section 108 (b), one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got those words present, there is no necessity for finding intention as would be necessary if the person was placed under his trial under section 153A. If this were not so, there would be no necessity for section 108, Criminal Procedure Code, as proceedings would be taken under section 153A, Indian Penal Code. The result is that we have simply got to look to the actual words of the leaflet to see if there are words which in our opinion are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed to call backsliders from the true Hindu faith to ■ sense of their misdeeds. If the words of the leaflet had been confined to this, there would have been nothing in respect of which the petitioner before us could have been bound down under section 108, Criminal Procedure Code. But it seems to us that when we read the leaflet we find that there are

(5) 10 Ind. Cas. 789; 12 Cr. L. J. 248; 4 Bur. L. T. 84.

GOVIND BALVANT LAGHATE v. EMPEROR.

passages which go far beyond the object above-mentioned; if that had been the only object. For instance, there was no necessity to refer, as the pamphlet does, to members of the Mahomedan faith as beef-eaters and destroyers of the Vedas and the Shastras. The passage which specially seems to us unnecessary for the alleged purpose of the pamphlet is as follows: "Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down and the images of our gods and goddesses have been burnt for heating *hamams* for providing hot baths, many places of pilgrimage have been destroyed for the construction of mosques (and mosques built on the sites), crores of beneficial cows have been killed and crores of ignorant widows or orphans and the helpless are deprived of (degraded from) their religion by misleading and enticement." These facts may be true historically or not, and in the history of any country or of any community or religion there are passages which are best left unrecalled. It seems to us, therefore, that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between Hindus and members of the Mahomedan religion. Having regard to this we consider that the order made by the District Judge of Monghyr binding down the petitioner was rightly made.

The Rule is, therefore, discharged.

Rule discharged.

BOMBAY HIGH COURT.
CRIMINAL REVISION No. 474 OF 1915.
January 13, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

GOVIND BALVANT LAGHATE—
ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 492, 495, 342 (4), 343—Separate trials of accused persons on distinct charges—Withdrawal of charge against one of the accused at first trial—Pendency of second charge—Competency of accused against whom charge with-

drawn to give evidence—Oath, administering of, to such person—Such person, whether accused under s. 342 (4)—Inducement by prosecution to speak truth, whether excludes evidence altogether—Appointment of Public Prosecutor—Accused subsequently impleaded—Right of Public Prosecutor to withdraw case against such accused—Accomplice, evidence of—Evidence Act (I of 1872), ss. 133, 114 ill. (b).

The accused, a first grade Subordinate Judge, was charged with receiving illegal gratification from one N in respect of (1) a horse and (2) two *hundis* for Rs. 55 and Rs. 50, respectively. N was impleaded as a co-accused. By direction of the Court, the two charges were split and were ordered to be tried separately. A Pleader was appointed to conduct the prosecution of the accused before N was joined as co-accused. The horse case having been taken up for trial, the Public Prosecutor withdrew from the prosecution of N. N received an assurance from the District Magistrate that if he gave truthful evidence, the *hundi* case against him would also be dropped. The Magistrate discharged N under section 494, Criminal Procedure Code. Objections were taken to the competency of N to give evidence under section 343, Criminal Procedure Code, and to the power of the Court to administer to him oath under section 342 (4). It was also urged that the Public Prosecutor had no power to withdraw from the prosecution of N:

Held, (1) that the appointment of the Public Prosecutor was for the case and not with reference to any particular accused, and that the Public Prosecutor had every right to conduct the prosecution as against persons subsequently impleaded or to withdraw from the prosecution as against any of the accused; [p. 979, col. 1; p. 982, col. 2; p. 983, col. 1.]

(2) that section 342 (4), Criminal Procedure Code, did not apply, as N was only a witness in the horse case that was then actually before the Court; [p. 979, col. 1; p. 983, col. 1.]

Queen-Empress v. Mona Puna, 16 B. 661; *Empress v. Durant*, 23 B. 213 and *Queen-Empress v. Hussein Haji*, 25 B. 422; Bom. L. R. 1095, followed.

(3) that as the inducement was offered to N only as a witness and not as an accused, the evidence of N was admissible, though that circumstance might materially affect the weight to be attached to his evidence; [p. 984, cols. 1 & 2; p. 984, cols. 1 & 2.]

Winsor v. Queen, (1866) 1 Q. B. 390; 7 B. & S. 450; 35 L. J. M. C. 161; 12 Jur. (N. S.) 561; 14 L. T. 567; 14 W. R. 695; 10 Cox. C. C. 327, referred to.

(4) that, in so far as N was an accomplice, his evidence should be tested in the light of what corroboration it received from other independent evidence. [p. 980, col. 2.]

Clause 4 of section 342, Criminal Procedure Code, lays down the manner in which the Court is to examine an accused person then before it as an accused person, and the words 'the accused' must be read as referring to the accused then under trial and examination by the Court. [p. 979, col. 1; p. 983, col. 1.]

Per Batchelor, J.—Section 343 of the Criminal Procedure Code does not declare what would be the

GOVIND BALWANT LAGHATE v. EMPEROR.

consequences if an accused person did make a statement under inducement. Where the inducement is offered to a discharged accused who is taken as a witness, the objection to his evidence is good only so far as it relates to his credit. This construction seems to be favoured by section 118 of the Evidence Act which suggests that, in India, the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration. [p. 979, cols. 1 & 2.]

An accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is important that the requirements of the Legislature in this respect should not be so exaggerated by the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are, in their very nature, difficult of detection. When all legal precautions are taken and all relevant considerations are duly weighed, there remains the plain question whether the Judge or the Magistrate does or does not believe the particular accomplice. If, after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, it is his duty to say so and to give effect to his mental conviction. [p. 980, col. 2; p. 981, col. 1.]

Per Shah, J.—It is legally open to the Crown to withdraw from the prosecution of any particular accused, even if it be for the purpose of securing him as a witness in the case. Of course, it is for the Court, whose consent is necessary under section 494, Criminal Procedure Code, to exercise its discretion according to the circumstances of each case, and it is open to that Court to give or withhold its consent. [p. 983, col. 1.]

Obiter.—There are no words in section 343, Criminal Procedure Code, to show that the prohibition contemplated by the section refers to the Court and not to any other person and that an 'accused person' within the meaning of the section is the accused under examination and trial. A person who ceases to be an accused person in consequence of his discharge under section 494 is a competent witness in the case against the other accused. [p. 984, col. 1.]

There is a material difference between the position of a pardoned approver and the position of a witness to whom an inducement is given by the Crown that, if he speaks the truth, a separate charge against him would be withdrawn. In the one case the pardon is given openly to the knowledge of the parties and subject to the statutory conditions and limitations. In the other case, the fact of the inducement is known only to the party to whom inducement is given and to the party who gives the inducement and not to all the parties, not even to the Court, before the evidence relating to the inducement is given in the course of the trial. Besides, the approver's liberty is subject to the control of the Court,

whereas the liberty of the witness is in the hands of the party who is supposed to have held out the inducement. [p. 984, col. 2.]

Criminal appeal from the conviction and sentences passed by the Additional District Magistrate, Ahmednagar.

Mr. Velinkar (with him Messrs. D. A. Khae and G. K. Chitale), for the Accused.

Mr. Coyajee (with him Mr. S. S. Patkar, Government Pleader), for the Crown.

JUDGMENT.

BACHELOR, J.—The arguments in this appeal have occupied us for more than three days. But so far from thinking that any part of that time was wasted, I am of opinion that the Court is indebted to the learned Counsel on both sides for the assistance which they have afforded us by their able and thoroughgoing arguments. In a case of this importance it is a matter of much satisfaction to feel sure that no point which could possibly be urged in the appellant's favour has passed unnoticed.

The appellant is one Govind Balwant Laghate who, up to the time of his suspension in view of this prosecution, belonged to that excellent and deserving body of public servants, the Subordinate Judges. In that body he held a distinguished position, being a Subordinate Judge of the first class and drawing a substantial salary of Rs. 800 a month—a salary which, unless his mode of life was very extravagant, must have been more than sufficient for his needs. He has now been convicted of being a corrupt Judge. In more technical language he has been convicted under section 161 of the Indian Penal Code of receiving an illegal gratification, that is to say, a bribe in respect of the discharge of the duties of his office as Judge. According to the case for the Crown the bribe took the form of the gift of a horse, which was presented to the appellant as a bribe by the witness Narayandas Kanhayalal, whose adoptive sister Mirabai had at the material times an important suit pending in the appellant's Court. Amidst much controversy there is one point upon which both sides seem agreed, and it is convenient to notice it now. I mean the patient and careful trial which the appellant had in the Court

GOVIND BALVANT LAGHATE v. EMPEROR.

of the learned Trying Magistrate, and the lucid and exhaustive judgment in which that Magistrate has discussed fully every point raised in argument and every material passage of the evidence on the record. In my opinion, if the merits of this case can be arrived at, and especially, if the evidence of Narayandas Kanhayalal can be fairly considered, this appeal is hopeless. Whether because that was recognized by the appellant and his legal advisers or for some other reason unknown to me, it is the fact that the defence largely, if not mainly, was based on preliminary points of technical objection. I call them technical, because their object, either confessedly or manifestly, was to stave off a consideration of the merits of the case. Speaking for myself, I should have thought that a Judge accused—and, as he asserts, falsely accused—of corruption would have welcomed an opportunity of meeting that accusation on its merits in a criminal Court, where the onus of proof was entirely on his accusers. That, however, is not the course which this appellant has elected to adopt. The course which he has adopted is a course perfectly open to him. But I will say candidly for myself that unless forced by law to a different view, I should be slow to allow in such a case as this any technical objection to stand between this Court and the decision of the important question whether this appellant has or has not been proved to be corrupt.

Now there were many points of technical objection raised in the Court of the learned Magistrate. Most of them have been abandoned, and I think wisely abandoned, in this Court. There remain, however, two which, since they were pressed by Mr. Velinkar, must be considered and decided by us.

Both these points arise upon the same set of facts which may be explained as follows:—

The Government by Exhibit 3 on the record sanctioned the prosecution of the appellant under section 161 of the Indian Penal Code or such other section as might be found applicable. By the order, Exhibit 7, Government appointed Mr. H. C. Coyajee and Khan Bahadur S. C. Davar, or either or both of them, to conduct this prosecution. In a schedule affixed to that order are set out the charges upon which the trial

was to proceed, and the first of those charges as appearing in the schedule referred to the appellant's receipt of two distinct bribes, viz., the horse with which we are occupied in the present appeal, and two *hundis* for Rs. 55 and Rs. 50 with which this appeal is not concerned. At the trial the learned Magistrate, wisely as I think, decided that these two charges should be tried separately, and the case which he first took up was that in which the present appeal was lodged. The trial in this present case began on the 5th July and the evidence of Narayandas Kanhayalal began on the 6th July. Prior to that date Narayandas Kanhayalal equally with the present appellant had been an accused in respect of these offences of bribery. But, on the 6th July, Narayandas was a witness and was not an accused in respect of the offence of bribery in regard to this horse. He still, however, remained an accused person to the bribery connected with the two *hundis*, and in that case he was not discharged from the position of an accused until the 17th July. I agree with Mr. Velinkar's contention that when Narayandas Kanhayalal began his evidence as a witness on the 6th July, there had been given to him by the responsible authorities an impression or understanding that unless he told in this present case that which the Crown believed to be the truth, he was liable to be prosecuted on the charge connected with the *hundis*. In this state of the facts Mr. Velinkar urges that there has been by the Magistrate a violation of section 342, clause 4, of the Criminal Procedure Code, inasmuch as, according to the argument, Narayandas Kanhayalal still occupied the position of an accused, so that no oath could be legally administered to him. That argument is admittedly based on the contention that Mr. Davar, who by the orders of Government was conducting the case for the prosecution, had no authority to withdraw from the prosecution as against Narayandas Kanhayalal. The argument is that Mr. Davar's authority was limited to the prosecution of the present appellant, that consequently he had no authority to withdraw the case as against Narayandas Kanhayalal and that, therefore, the Magistrate's order discharging Narayandas Kanhayalal upon Mr. Davar's application was illegal. In my

GOVIND BALVANT LAGHATE V. EMPEROR.

opinion, however, the very basis of this argument fails, because I think that the fair construction to put upon the orders of appointment of Mr. Davar is to regard them as appointing that gentleman under section 495 of the Criminal Procedure Code as a Public Prosecutor for the whole case. If that is so, then Mr. Davar was certainly competent to withdraw as against Narayandas Kanhayalal, and in that event it is admitted that the order of discharge would be good and that Narayandas would in this respect be a competent witness.

I think further that the objection is bad, because Narayandas Kanhayalal cannot be regarded as "the accused" within the meaning of these words as they appear in section 342, clause 4. That section is devoted to laying down the manner in which the Court is to examine an accused person then before it as an accused person, and the words "the accused" in clause 4 must, in my opinion, be read as referring to the accused then under trial and examination by the Court. That admittedly was not the position occupied by Narayandas Kanhayalal on and after the 6th of July. In support of the view which I take as to the scope of section 342, clause 4, I may refer to the decisions of this Court in *Queen-Empress v. Mona Puna* (1), *Empress v. Durant* (2) and *Queen-Empress v. Hussein Haji* (3).

The second of these preliminary objections as to procedure turns upon section 343 of the Criminal Procedure Code. That section provides that except as enacted in certain sections dealing with the tender of pardon to accomplices, "no influence by means of any promise or threat or otherwise shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge." The section does not declare what would be the consequences if an accused person did make a statement under inducement. But I will assume for the purposes of the argument that such a statement would be wholly inadmissible. I am unable, however, to see that Narayandas Kanhayalal is affected by this proposition, because, from what I have said before, it will be clear that,

in my opinion, the inducement offered to Narayandas Kanhayalal was offered to him not as an accused in the *hundi* case, but as a witness in the present case. In that view the objection, invalid as to the admissibility of Narayandas's testimony, would be quite good as an objection only to Narayandas's weight or credit. And I agree that the objection is good so far as it refers to credit. That, I think, is a sufficient technical answer to this technical objection, though I note that in *Queen-Empress v. Hussein Haji* (3) Mr. Justice Candy said that section 343 evidently referred to the same accused person who had been named and described in section 342. For the purposes of the present argument it is not necessary for me to commit myself to a formal agreement with Mr. Justice Candy's opinion, though I must not be taken to suggest any dissent from it. It is enough for our present purposes to observe that section 343 must uncontestedly be limited in some way or other. If A is accused of murder and B happens at the same time to be accused of an unrelated theft, and if some one interested on behalf of A in the murder case makes a promise to B to induce him to give evidence tending to exonerate A, and if all these things are proved at the time that B's evidence is tendered before the Court on the trial of A, then it is my opinion that B would be a competent witness in spite of the inducement, though, of course, the inducement alleged would diminish the credit to be attached to him. This construction seems to me to be favoured by section 118 of the Indian Evidence Act, which provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. This section suggests, what numerous Judges have observed, that in India the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration. The Indian rule is, I think, certainly not less liberal as to the admission of evidence than the rule in England. And in England it appears to me, from

(1) 16 B. 661.

(2) 23 B. 213.

(3) 25 B. 422; 2 Bom. L. R. 1095.

GOVIND BALVANT LAGHATE v. EMPEROR.

such authorities as have been referred to before us, that Narayandas Kanhayalal would be held to be a competent witness. Upon this point reference may be made to *Winsor v. Queen* (4), where the woman Harris was accepted as an admissible witness, though she had been jointly indicted with the prisoner under trial, though she had pleaded not guilty, and though that plea of hers was at the time undisposed of. To this effect also the law in England is stated in Roscoe's Criminal Evidence, 12th Edition, page 113. On these grounds I am of opinion that there is nothing in section 343 of the Criminal Procedure Code which rendered Narayandas Kanhayalal incompetent or inadmissible as a witness.

I may mention, though not as a necessary part of the argument, that Narayandas's evidence in this trial lasted from the 6th July to the 2nd August. He was discharged as an accused in the *hundi* case on the 17th July. Under the law which provides that the witness's evidence should be read out to him when it is finished, his testimony as a whole must, I think, be referred to the date on which it was read out to him and accepted by him. That would be the 2nd of August, a date on which he had already been discharged in the *hundi* case. I mention this not as essential to the removal of the appellant's objections, but as a point worth noticing if only on the question of the credit of Narayandas Kanhayalal.

These preliminary points being thus overruled, we come to the question of the value or the worth of Narayandas Kanhayalal's evidence. Upon that point I quite agree with the learned Magistrate that Narayandas is on general principles a bad witness. He was an accomplice in this offence of bribery, and though not, in my opinion, by any means the worst kind of accomplice, still undoubtedly an accomplice. Moreover, I believe that, when he gave his evidence, there was present to his mind an impression that if he deposed to what the Crown believed to be the truth, it would be advantageous to him in regard to his position in the connected *hundi* case. All that may be freely allowed, but in my

(4) (1866) 1 Q. B. 390; 7 B. & S. 490; 35 L. J. M. C. 161; 12 Jur. (N. S.) 561; 14 L. T. 567; 14 W. R. 695; 10 Cox. C. C. 327.

judgment the worth of a witness is to be determined not by general principles in the abstract, but by general principles as applied to the particular facts of each case. Though much argument has been devoted to this topic and Mr. Velinkar endeavoured to disabuse me of the idea which I hold, I must still adhere to my view, in regard to the weight of Narayandas's testimony, that the witness stands in no appreciably worse position than any other accomplice witness giving evidence under a conditional pardon. Now the assessment of the evidence of such witnesses is a familiar task to our Courts, and there is no reason to think that the assessment of Narayandas's evidence presents any insuperable difficulty. In so far as he is an accomplice the law, as laid down in sections 133 and 114, ill. (b), of the Indian Evidence Act, declares that while the Courts should ordinarily make a presumption against the credit of an accomplice, that presumption may be displaced by other circumstances, notably by sufficient corroboration of the accomplice on material points. I certainly have no wish to say anything calculated to induce any lower Court to believe an accomplice lightly. I entirely agree that an accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. All that is true, but it is not, in my opinion, the whole truth. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is also, in my view, important that the requirements of the Legislature in this respect should not be exaggerated by the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are in their very nature difficult of detection. It seems to me that when all legal precautions have been taken and all relevant considerations duly weighed, there remains the plain question whether the Judge or Magistrate does or does not believe the particular accomplice. That, I think, is a question which it is the Judge's or Magistrate's duty to answer. And, if after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, I conceive it to be his duty to say so

GOVIND BALWANT LAGHATE v. EMPEROR.

and to give effect to his mental conviction. This process, in my opinion, is in direct conformity with the definition of the word "proved", as that definition is given in the Indian Evidence Act. It may be, of course, that at the end of all things the Magistrate may still remain doubtful whether he can believe the accomplice or not, and if he does remain doubtful, he must say so. But within my experience that attitude of mere hesitating doubt is not likely to occur usually where, as here, a vigilant and observant Magistrate has had an accomplice witness for many days before him under examination and cross-examination. I, therefore, approve of the manner in which the Magistrate has dealt with this part of the case, and it appears to me that great weight is due by this Court to the Magistrate's appreciation of Narayandas's testimony. For, the Magistrate has believed Narayandas not lightly or hastily but only after mature consideration of all the evidence and after allowing the fullest weight to the weaknesses and infirmities to which the witness's testimony is inevitably subject.

[His Lordship then discussed the evidence and concluded:—]

In my opinion, therefore, the conviction and sentence should be confirmed and the appeal should be dismissed.

Before parting with the case I desire to put on record my sense of the valuable services which the Police Officers concerned in this investigation have rendered to the cause of public justice.

SHAH, J.—At the outset I desire to express my general agreement with the observations made by my learned brother as to the assistance which the Court has received from the full and clear arguments of the Counsel on both sides, as to the patience and care which have been brought to bear by the learned Magistrate upon this trial, and as to the fair and efficient manner in which the investigation has been made in this case by the investigating Police Officer.

The appellant, Govind Balwant Laghate, was the first class Subordinate Judge at Nasik in September 1913, and it was on the 25th September that his transfer from that

District to the District of Nagar was gazetted. Before that time two cross-suits had been filed in the Court of the first class Subordinate Judge at Ahmednagar in which one Mirabai was concerned. That Mirabai is the adoptive sister of one Narayandas Kanhayalal. She is a widow and her case was managed by her brother. This Narayandas lives at Chandwad and is trading at Chandwad, Lasalgaon and Bombay in the name of Kanhayalal Benkatlal. The prosecution case is that he, being desirous of interesting and influencing the accused Laghate in favour of his sister with reference to her claim, went to the accused and saw him on the 4th of October. He repeated his visit to him on the 8th of October, and on that day it is said that he made a payment of Rs. 24 to the accused and an arrangement was entered into between them whereby he undertook to supply a new horse to him and to take his old horse from him. This is the first stage in the prosecution story. It is said that during the following Christmas holidays the accused, who was then working as a first class Subordinate Judge at Nagar, went with Narayandas Kanhayalal from Ahmednagar to Bombay, that the expenses of the trip were defrayed by Narayandas and that when he was in Bombay, two *hundis* were given by Narayandas to him by way of further bribe; this is the second stage in the prosecution story. The third stage in the story is that during the Shimga holidays, in March 1914, the accused and Narayandas again went to Bombay when the accused made a demand of an annual payment of Rs. 300 for the benefit of his private temple of Ram at Poona.

During this time the suit of Mirabai was slowly progressing; but it was ultimately compromised on the 29th of June. It is not suggested in this case that any favour in fact was shown to Mirabai in the course of the suit, and I do not, therefore, consider it necessary to state in detail the progress of the suit during this period.

In November 1914, in consequence of certain information received, the Criminal Investigation Department was asked to make investigation with reference to the

GOVIND BALVANT LAGHATE v. EMPEROR.

allegations which were then made, and as a result, the Inspector, Mr. Girdharsing, lodged a complaint on the 19th February 1915 after the necessary sanction of the Local Government was obtained. On this complaint, an order was made under section 202 of the Criminal Procedure Code authorizing the same officer, the complainant, to make further investigation. Then, on the 17th of May 1915, a further sanction was granted by the Local Government with reference to several charges of bribery against the present accused, and the charge with which we are concerned in this case is the very first charge mentioned in the schedule attached to that order. Then, on the 17th of June, there was a complaint made against the accused Laghate and two others, Narayandas and Jagannath, by the same officer with reference to the horse and *hundis* said to have been given as bribes to Laghate, with the result that both the complaints were sent for trial to the Additional District Magistrate, who ultimately tried the present case.

On the 5th of July, which was the day fixed for the trial of all the three accused on the charges mentioned in the complaint of 17th June, on the application of the prosecuting Pleader, Mr. Davar, the learned Magistrate decided to separate the trials with reference to the two heads of the charge against the accused. The result was that the case relating to the *hundis* was separated and kept aside, and the trial of the case relating to the giving of the horse as a bribe was proceeded with. After the trials were thus separated, an application was made on behalf of the prosecution in this case to withdraw from the prosecution of the accused Narayandas; and with the consent of the Court to the withdrawal, an order of discharge was made by the learned Magistrate as provided in section 494 of the Criminal Procedure Code. Narayandas was examined as a witness in the case. His examination commenced on the 6th of July and his examination, before the charge was framed, was finished on the 15th of July and his further cross-examination was proceeded with, after the charge was framed, on the 30th of July and 2nd of August.

I have so far stated the prosecution

case briefly, and the facts connected with the investigation which ultimately led to the present proceedings. On a consideration of the evidence of the case, including the evidence of Narayandas, the learned Magistrate has come to the conclusion that the charge is clearly proved against the appellant and has accordingly convicted and sentenced him. It is against this order of conviction and sentence that the present appeal is preferred, which was originally filed in the Sessions Court of Ahmednagar and subsequently transferred to this Court.

It is urged by Mr. Velinkar for the appellant that the order of discharge made under section 494 is not valid, because Mr. Davar had no authority to withdraw from the prosecution of Narayandas, and that as there was no valid discharge Narayandas was, at the time when he was examined as a witness, an accused person in the case within the meaning of section 342, Criminal Procedure Code, and therefore, not a competent witness.

The second argument urged by Mr. Velinkar is that when Narayandas was examined as a witness, he was an accused person in the *hundi* case which was then pending, and as he was at the time of giving evidence under the inducement of a prospect held out to him that the Crown would withdraw from the prosecution in the *hundi* case if he gave his evidence in this case properly, the provisions of section 342 of the Code have been contravened; and it was suggested that the evidence taken contrary to the provisions of the section would not be admissible.

As regards the first contention it really depends upon the construction to be placed upon the order of the Government which was made on the 17th of May 1915. No doubt in that order it is stated that Mr. Coyaji and Khan Bahadur Davar shall conduct the prosecution of the accused, and at that date the only accused was Laghate. The complaint against the other accused was made subsequently. But it seems to me on a fair construction of this order that the appointment of these gentlemen is not with reference to a particular accused, but with reference to a particular case,

GOVIND BALVANT LAGHATE v. EMPEROR.

That is the kind of appointment, for which provision is made in section 492 as well as section 495 of the Criminal Procedure Code; and if the appointment was for the case, it seems to me that if any other accused person came to be implicated subsequently, both of them would be competent to conduct the trial as against all the accused. It is clear that Mr. Davar, who withdrew from the prosecution of Narayandas, was really an officer specially appointed by the Local Government to conduct the trial in the lower Court within the meaning of section 495. It follows that under the second clause of that section he would have power to withdraw from the prosecution as provided by section 494. It seems to me, therefore, that the only objection urged against the validity of the discharge fails.

An objection was taken on behalf of the defence in the lower Court at the time this order of discharge was made that as the object of the prosecution was to secure the evidence of Narayandas as a witness, it would not be right for the Court to give its consent to the withdrawal and to make the necessary order of discharge. But having regard to the decision in *Queen-Empress v. Hussein Haji* (3) it is clear that it is legally open to the Crown to withdraw from the prosecution of any particular accused, even if it be for the purpose of securing him as a witness in the case. Of course it is for the Court, whose consent is necessary under section 494, Criminal Procedure Code, to exercise its discretion according to the circumstances of each case, and it is open to that Court to give or withhold its consent. It follows that the order of discharge being valid, Narayandas ceased to be an accused person in the present case; and the only provision, which could prevent Narayandas from being examined as a witness contained in sub-section 4 of section 342, would have no application to him at the time when he was tendered as a witness. 'The accused' mentioned in that sub-section is the accused then under trial and examination and no other. This view has been taken in the case of *Empress v. Durant* (2) and it also derives support from *Queen-Empress v. Mona Puna* (1), in which it has been held

that by the word 'accused' in section 342 is meant a person over whom the Magistrate or other Court is exercising jurisdiction. This contention must, therefore, be disallowed.

The second contention which has reference to section 343 of the Criminal Procedure Code, is based upon the allegation that when Narayandas commenced to give his evidence, he was under the influence of an inducement that he would be able to secure immunity from prosecution in the *hundi* case, only if he gave his evidence in the present case in a manner which the prosecution would believe to be true. It was urged with reference to this contention by Mr. Coyaji that really there was nothing to show that while giving evidence he was under the influence of any such inducement. But it seems to me that the evidence of the investigating officer and the letter which the District Magistrate wrote to Mr. Davar on the 5th of July 1915 and the statement of Narayandas taken together show that the witness Narayandas was an accused person in the *hundi* case and that while that case was kept pending against him, an order of discharge in the present case was obtained, and it is quite a fair inference to draw that he was then under the belief that he would obtain his immunity from prosecution in the *hundi* case only if he gave his evidence in a truthful manner or under the circumstances, in other words, if he satisfied the prosecution.

Under these circumstances it seems to me that the contention of Mr. Velinkar that Narayandas, when examined from the 6th to the 15th of July, was under this inducement to earn his immunity in the other case which was pending against him, is made out; and it is obvious under the circumstances that it would really mean that Narayandas would have strong reasons to think that his immunity would largely depend upon his implicating the present accused, whom the prosecution believed to be implicated in this affair.

The question then arises, whether this kind of influence is within the prohibition in section 343 with reference to the person in the position of Narayandas. It is urged by Mr. Coyaji that section 343 has no application

GOVIND BALVANT LAGHATE V. EMPEROR.

as, in the *first* place, it really refers to, and provides against, the influence being used by a Court and not by anybody, and, *secondly*, that the expression 'an accused person' in the section really refers to 'the accused' referred to in section 342, that is, to the accused then under trial and examination and to no other person. I do not desire in this case to express any definite opinion on the scope and meaning of section 343, as it is not necessary to do so. But it does seem to me that there is a difficulty in accepting the limited construction suggested by Mr. Coyaji. There are no words in the section to show that the prohibition contemplated by the section refers to the Court and not to any other person, and that an accused person, within the meaning of the section, is the accused under examination and trial. There is some force in the argument on the other side that Narayandas was undoubtedly ■■ accused person in the *hundi* case, and that the fact that he was to be examined as a witness in the horse case would make no difference in his position ■■ an accused in the *hundi* case. It is also urged by Mr. Velinkar that in this Chapter, which relates to general provisions ■■ to inquiries and trials, there are several sections dealing with different and independent matters and that there is no necessary connection between sections 342 and 343. It is not necessary, however, for the purposes of this case to express any definite opinion on the applicability of section 343 to the circumstances under which Narayandas came to be examined in this case. I feel quite clear that, even assuming that section 343 would apply to such inducement as must be deemed to have been held out to Narayandas in this case, the admissibility of the evidence of Narayandas as a witness in this case is not in any way affected. He remains ■ competent witness in this case, because he ceased to be an accused person in consequence of his discharge under section 494, Criminal Procedure Code, and the only provision which would render him incompetent as ■ witness, *viz.*, sub-section 4 of section 342, would have no application.

Whether the provisions of section 343 have been contravened or not, it is clear that the circumstances under which Narayandas was examined as a witness must

materially affect the weight to be attached to his evidence. It is not the evidence of an ordinary accomplice; but it is the evidence of ■■ accomplice who, while giving evidence, is under the inducement of securing his own liberty in the connected case. It is not unfair to say that he is ■ witness whom even the prosecution were not prepared to trust to tell the truth without keeping the *hundi* case pending against him.

I desire to deal here with two arguments urged by Mr. Coyaji with reference to the weight to be attached to the evidence of Narayandas. It was urged by him that he would not be in any worse position than ■ pardoned approver. I am not able to agree with this contention. The difference between the two positions to my mind is that in the one case the pardon is given openly to the knowledge of the parties and subject to the statutory conditions and limitations. In the other case the fact of the inducement is known only to the party to whom the inducement is given and to the party who gives the inducement and not to all the parties, not even to the Court, before the evidence relating to the inducement is adduced in the course of trial. Besides, the approver's liberty is subject to the control of the Court, whereas the liberty of the witness in the position of Narayandas, in the first instance, is in the hands of the party who is supposed to have held out the inducement.

The second argument is that though up to the 17th of July there may have been this inducement, still after the 17th of July when the order of discharge was made in the *hundi* case, there could be no such inducement operating on his mind. This argument is plausible but not sound; because it seems to me that the whole story was really given out at ■ time when the inducement would be operating on his mind and the fact that the document ceased to exist subsequently would not materially affect the position. After his examination was finished on the 15th July, it was hardly open to him to go back upon his story in his further cross-examination on the 30th July and 2nd August ■ suggested by Mr. Coyaji.

[His Lordship then discussed the evidence and concluded:—]

NABIN CHANDRA AICH v. NOAKHALI MUNICIPALITY.

These are really the material points in the story of the prosecution, and it seems to me that even without the evidence of Narayandas the ■■■ for the prosecution, ■■ far as the giving of the horse as an illegal gratification is concerned, is clearly proved; and I have no hesitation in saying that this conclusion is consistent with, and derives further support from, the evidence of Narayandas. It follows that the charge is established and that the conviction of the accused under section 161, Indian Penal Code, is proper.

As regards the sentence, having regard to all the circumstances, I do not think it is excessive.

I, therefore, agree that the conviction and sentence must be confirmed and the appeal dismissed.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 65 OF 1916.

May 10, 1916.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Sheepshanks.

NABIN CHANDRA AICH—

APPLICANT

versus

NOAKHALI MUNICIPALITY—

OPPONENT.

Bengal Municipal Act (III B. C. of 1884), ss. 175, 176, 178, 179, non-compliance with provisions of—Conviction under s. 218, legality of.

The conviction of, and sentence passed upon, an accused under section 218 of the Bengal Municipal Act cannot be sustained, where the essential preliminary steps in compliance with the provisions of all the sections 175, 176, 178 and 179 of the Act had not been observed before an application was made to the Magistrate under section 202 of the Act for his criminal prosecution. [p. 986, col. 1.]

Criminal reference by the Sessions Judge, dated the 26th April 1916, against ■ conviction and sentence by the Sub-Divisional Officer, Noakhali, dated the 15th February 1916.

ORDER.—This is a reference under section 438, Criminal Procedure Code, by the Sessions Judge of Noakhali recommending that the conviction of the accused and the sentence passed on him under section 218 of the Bengal Municipal Act by the Sub-Divisional Magistrate of Noakhali may be set aside.

The accused put up ■ fence and is alleged to have thereby encroached on ■ public drain, which lies towards the east of ■ public road within the Noakhali Municipality. On the 20th December 1915, the Municipality served ■ notice on him under section 202 requiring him to remove within eight days the fence, which was described as an obstruction. The accused preferred ■ objection on the 23rd December, stating that the fence put up by him was not an obstruction as the eastern part of the drain appertained to the land of an adjoining school. On that very day the Chairman passed an order in the following terms: "I have seen the place. Nabin Chandra Aich (the accused) has encroached on the Municipal drain. Move District Magistrate requesting criminal prosecution against him." The petitioner was then placed on his trial and was fined Rs. 10 under section 218 of the Bengal Municipal Act by the Sub-Divisional Magistrate, to whom the case was made over by the District Magistrate. The legality of this conviction is in question before us.

Part V of the Bengal Municipal Act includes sections 173—219. Section 175 prescribes the procedure to be followed in all cases where the owner or occupier of any land is required to execute any work or to do anything within a specified time. The first step is the service of the notice on the owner or occupier, who is required to execute such work or to do such thing in the manner provided in sections 356 and 357. The second paragraph of section 175 sets out the substance of the contents of the notice. Section 176 allows the person on whom the notice has been served to prefer ■ written objection to the Commissioners within a prescribed time. The second paragraph of section 176 and the first paragraph of section 177 specify the Municipal authority by whom the objection is to be heard and disposed of. Section 178 then lays down that after the objection has been heard, an order shall be recorded, withdrawing, modifying or making absolute

LAKHIMI RAM GAGOI v. EMPEROR.

the requisition against which the objection is preferred. If the requisition is not withdrawn on the objection, the order must specify the time within which the requisition shall be carried out, which shall not be less than the shortest time which might have been mentioned in the original requisition. Section 179 next provides that such order shall be explained orally to the objector, should he be present at the office of the Commissioners, or if such order cannot be so explained, notice of the order shall be served on him in the manner laid down in section 356. Then follows the very important provision in section 179 that such explanation of or service of the notice of the order shall be deemed a requisition duly made under the Act to execute the work or to do the thing required. It is consequently plain that there are two distinct stages in the preliminary procedure; there is, *first*, the initial notice under section 175 followed by the objection, if any, on the part of the person notified and there is, *next*, the explanation or notification of the order absolute, if any, made after his objection had been heard. This procedure is, by virtue of section 175, applicable in its entirety to a case under section 202. In the case before us, as is clear from the facts already recited, there was compliance with the provisions of sections 175 and 176 but not with those of sections 178 and 179. Consequently there was a failure to observe the essential preliminary steps before an application could be made to the Magistrate under section 202. The proceeding before the Magistrate was thus without jurisdiction and the conviction and sentence cannot be sustained.

We accordingly accept the recommendation of the Sessions Judge, set aside the conviction and sentence on the petitioner and direct that the fine, if paid, be refunded.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL.

May 2, 1916.

Present:—Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Sheepshanks.

LAKHIMI RAM GAGOI—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Appeal—Assistant Sessions Judge, judgment of—Sentence under each of two sections, Penal Code, ■ years, sentences to run concurrently—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 408.

Where an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years under each of two sections of the Penal Code, the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court.

Criminal appeal against the order and sentence of the Assistant Sessions Judge, Assam Valley Districts, dated the 17th March 1916.

ORDER.—In the case mentioned, *Somiruddin Sonar v. Emperor*, the accused had been convicted of an offence under one section only of the Indian Penal Code and sentenced to imprisonment for a term of two years; it was ruled by Sharfuddin and Chapman, JJ., that as the trial had been held by an Assistant Sessions Judge, the appeal lay, under section 408 of the Criminal Procedure Code, to the Court of Session and not to the High Court. In the case before us, the accused has been convicted and sentenced under two sections of the Indian Penal Code; the sentences, however, are directed to run concurrently. The appeal, we think, lies to the Court of Session; this view is in accord with that adopted by Chandavarkar and Heaton, JJ., in *Tulsidas Lakshman v. Emperor* (1), namely, that where an Assistant Sessions Judge passes sentences upon an accused, each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court. A similar opinion had been expressed by Clark, C. J., and Maude, J., in *Sher Muhammad v. Emperor* (2).

(1) 3 Ind. Cas. 171; 11 Bom. L. R. 544; 10 Cr. L. J. 250.

(2) 25 P. R. 1901; 3 Punjab Cr. R. 2506.

KAIMI v. EMPEROR.

Let the petition of appeal be returned for presentation to the proper Court.

Appeal petition returned.

PUNJAB CHIEF COURT.

APPEAL FROM ORDER NO. 1192 OF 1915.

January 22, 1916.

Present:—Mr. Justice Chevis and
Mr. Justice Scott-Smith.

KAIMI AND OTHERS—CONVICTS—APPELLANTS
versus

EMPEROR—RESPONDENT.

Practice—Sessions case—Duty of prosecution to produce all eye-witnesses before Committing Magistrate—Presumption—Death sentence on more than one accused for murder of one man, legality of.

All persons said to have witnessed a murder should be produced before the Committing Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness who, he may have reason to believe, will give false evidence. [p. 988, col. 1.]

Ram Ranjan Roy v. Emperor, 27 Ind. Cas. 554; 19 C. W. N. 28; 42 C. 422; 16 Cr. L. J. 170, followed.

Where an eye-witness is not produced before the Committing Magistrate, the natural presumption is that he would not support the case for the prosecution. [p. 989, col. 1.]

From the legal point of view, more than one person may be sentenced to death for the murder of one man where the death sentence is fully merited in the case of each, though in such cases the Crown may exercise its prerogative of mercy. [p. 989, col. 2.]

Appeal from the order of the Sessions Judge, Lyallpur, dated the 25th November 1915.

Messrs. *Kirkpatrick and Meakins*, for the Appellants.

Mr. *Dalip Singh* for the Additional Government Advocate and Mr. *Ganpat Rai*, for the Complainant-Respondent.

JUDGMENT.

CHEVIS, J.—The five appellants, Kaimi, Daimi, Ali, Muhammada and Mughla, have been convicted of the murder of Shaman on the night of 14th-15th August, and sentenced to death. The case is before us on appeal, and also under section 374, Criminal Procedure Code, for orders as to confirmation of the death sentence.

Of the appellants the first three are brothers, and the other two are cousins of the first three.

It is amply proved, and admitted by the defence, that some months before the murder

deceased had abducted and afterwards married *Musammot Khatun*, an unmarried daughter of Kaimi appellant, and that, in consequence of the enmity which resulted, thirteen men on each side were bound down to keep the peace. All of the present appellants were included in the men so bound down.

The evidence for the prosecution is that on the night of the murder (14th-15th August) Shaman was sleeping in his *dera*, and Ahmad Din *chaukidar*, Sikandar, Muridi and Dulla (or Daula) were also there. About one watch before sunrise the five appellants entered, Ali being armed with a *kahi*, Daimi with a hatchet, and the rest with *dangs*. Muhammada and Mughla held down Dulla, Kaimi stood near to and threatened Ahmad Din, while Ali and Daimi struck deceased with their weapons, inflicting fatal blows. The five then ran off, Ali and his two brothers in one direction, Muhammada and Mughla in another. The alarm was then given, and Muhammad Bakhsh, brother of deceased, and Varyama *lambardar* and others arrived and report was sent off to the *thana*. The appellants were searched for, but not found at their houses. Report reached the *thana* (about 16 miles away) at 10 A.M. on 15th August. The Police reached the village that evening, and the usual investigation commenced. None of the appellants were then present. The following day (16th August) Kaimi and Mughla put in an appearance, Daimi was found at his *dhon* (cattle-shed) and arrested after an attempt to run away, Muhammada also was arrested that day, but Ali was arrested some days later.

No blood-stained garments or weapons are forthcoming. A *kahi* was found in Kaimi's *charri* field, but it is not proved to be connected with the murder. As to tracks none were found at the spot, but some distance away certain tracks were identified by the tracker as those of Kaimi and Daimi. These tracks were in a public place, so this evidence is of no importance.

The principal witnesses in the case are Ahmad Din, Dulla and Sikandar. The fourth person said to have witnessed the

KAIMI V. EMPEROR.

murder, Muridi, was not produced as a witness either in the Sessions Court or before the Committing Magistrate. The only reason given for his non-production is that found in the evidence of Muhammad Bakhsh, deceased's brother, viz., that Muridi is under the influence of certain persons who are related to or friends of the appellants. Counsel for appellants comments severely on the non-production of this witness, and quotes *Ram Ranjan Roy v. Emperor* (1). We certainly think that all persons said to have witnessed the murder should have been produced before the Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness whom, he may have reason to believe, will give false evidence. After this lapse of time we think it would be useless to have Muridi called and examined, and we proceed to dispose of the appeal on the record as it stands. We think, however, that the natural presumption is that Muridi, if he were called, would not support the case for the prosecution.

As to Sikandar, Dulla and Ahmad Din, we consider no sufficient reason for doubting the substantial truth of their statements has been made out, though we certainly have considerable doubt as to that part of their story which states that Sikandar and Muridi pursued Ali and his brothers. If there was any pursuit at all it was probably a mere pretence, started after the culprits had got well away. Sikandar is certainly one of deceased's party, as he too was bound down to keep the peace. Ahmad Din is *chaukidar* of the village. He it was who reported to the Police that both parties should be bound down to keep the peace. Dulla was on *thikri paira* duty that night, he certainly is not shown to be a partisan.

Great stress is laid on the medical evidence, which states that semi-digested food was found in deceased's stomach. Muhammad Bakhsh, deceased's brother, says deceased had eaten his evening meal at the usual time. Putting this at about 9 P. M., and allowing 4 hours for digestion (though this is only a rough guess, as many things may retard digestion), it would appear ■ if the murder must have been committed at about mid-

(1) 27 Ind. Cas 554; 19 C. W. N. 28; 42 C. 422; 16 Cr. L. J. 170.

night. Yet according to the prosecution witnesses it occurred in the latter part of the night, one watch before dawn, say about 3 A. M. The argument is that the murder must have occurred at about mid night, and that if it was not discovered till about 3 A. M., nobody could have seen the assailants. But it seems to us much more likely that the witnesses have put down the murder as occurring later in the night in order to make out that report was sent off promptly to the *thana*. Further, witnesses who have no watches are frequently very vague in fixing the hour of night when a certain event occurred. In the day they have the sun to guide them. At night after they have once been to sleep and have then woke up, it is difficult for them to fix the hour. We take it as pretty certain that report was *not* sent off to the *thana* for some time after the murder occurred. The *lambardars* would arrive, all the village would assemble and talk over matters, tracks would be looked for, witnesses would be telling their tales, probably some one would go to ■ if the persons accused were at their homes and so on. Time would slip by faster than people suspected, and when day dawned the time of the murder would probably be put down later than the real time. Dulla, who was on watch duty that night, should, however, know roughly what time of night it was when the culprits came, unless he too had been to sleep. So on the whole the chances seem to be that the hour has been intentionally advanced ■ bit, in order to make it appear that report was sent off without delay. We see, however, no sufficient reason to suppose that this means that the whole case is concocted. That Dulla and the other two eye-witnesses were sleeping in deceased's *dera* that night we do not doubt, and we do not think it at all likely that they could have slept peacefully while a man was being murdered close by. The noise of the blows must, we think, have aroused them.

The appellants were all well known to the witnesses, and we see no reason to suppose they could not have been identified even at night. Dulla's face bore the marks of nail scratches, which fits in with his story of having been held down.

The medical evidence is also relied on by Counsel for the defence as showing that ■

JHAMMAN v. EMPEROR.

hatchet could have been used. The wounds were none of them more than $5\frac{1}{2}$ inches in length, and the Civil Surgeon says they could not have been caused by a weapon with a blade less than $5\frac{1}{2}$ inches wide. We have considerable doubts as to this, for it seems to us that a wound cutting through the side of the neck or head might measure considerably more than the edge of the weapon which caused it. The matter is, however, of no importance, as we do not agree with the learned Counsel for the defence that hatchets never have blades wider than about 3 inches. Weapons shaped thus  are often to be found, of which the edges are well over 5 inches in width.

The appellants have all denied the murder, but have produced no evidence for the defence. Kaimi says he was sleeping in his house that night, and awoke when cries were raised, and went and saw the dead body, and heard people saying some thieves had killed deceased.

Daimi says he was not in the village, but had gone to the *Hithar*.

Ali says he had left the village 3 months previously. Muhammada too says he was not in the village, but says his younger brother was, and was sent by the Police to fetch him. It may be noted that Muhabbat, brother of Muhammada, was also one of the men bound down in the section 107 case. If one of the two brothers had to be named merely out of enmity, why should deceased's friends have been so silly as to name the brother who was not in the village and to leave out the one who was in the village.

Mughla owns he was in the village, and says he went to the spot, where it was said thieves had committed the murder.

So two of the appellants admit they were in the village at the time of the murder. Then how is it that not one of them was forthcoming when the Police arrived? For the defence it is urged that they may have run away in fear, when they found that their names were taken, but we think it unlikely that all five would have absconded merely through fear. The evidence as to Daimi's attempting to run away at the time of his arrest we regard as quite trustworthy.

As to the appellants' plea that Waryama *lambardar* got up a false case, we note that this witness admits that a few years ago

the uncle of Kaimi, Daimi and Ali gave evidence against him when he was tried for murder, but he also says Shaman gave evidence against him.

Then we are reminded that it is a common custom to implicate many persons possible. But there was a fourth brother of Kaimi, Daimi, and Ali, who was bound down in the section 107 case. Why was he not named? And why was Muhabbat not named?

That no blood stains were found on the clothes or persons of the appellants and no bloody weapons were recovered, is not surprising when it is remembered that none of the appellants were forthcoming for more than 24 hours after the murder.

Having carefully considered all the evidence we consider the guilt of the appellants to be fully proved. We can see no sufficient reason for disbelieving the evidence of the eye-witnesses.

As to the sentence, the murder was a cold-blooded murder, committed at night, and we can find no extenuating circumstances. All who joined in it are equally culpable. It might perhaps have been urged (though it was not urged) in arguments before us that to sentence as many as five men to death for the murder of one man is a heavy sentence, but we can only regard the case from a legal point of view, and we should certainly not think of reducing the sentence if the case of any one of the five alone was before us (say the other four had absconded,) nor can we say as regards any one of the five that the death sentence is not fully merited. The only ground, so far as we can see, on which any one of the appellants could be granted a reduction of sentence is that of mercy, and it is not our business to usurp the prerogative of the Government.

We uphold the conviction and confirm the sentence. The appeal is dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 190 of 1916.
April 14, 1916.

Present:—Justice Sir P. C. Banerji, Kt.
JHAMMAN AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

C. P. Municipalities Act (I of 1900), ss 130, cl.

SIRYAN v. EMPEROR.

(a), (c), 132—*Breach of rules—Conviction—Notice, necessity of.*

In order to render a person liable to punishment for committing breach of any rules made under clause (a) or clause (c) of section 130 of the U. P. Municipalities Act, it is necessary that notice should have been served upon him as provided by the section.

Reference submitted by the Sessions Judge, Budaun, as per his letter No. 88/111, dated the 17th March 1916.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

ORDER.—This case has been referred by the learned Sessions Judge of Budaun, with the recommendation that the conviction of the 23 accused persons in this case under section 132 of the Municipalities Act should be set aside and the fines imposed on them refunded. It appears that the Municipal Board of Ujjhani made a rule under section 130 of the Act prohibiting the exposure for sale or sale of fruits and vegetables outside the limits of the Municipal market, unless the persons so selling or exposing for sale obtained and held a license. The rule was sanctioned by Government and was publicly proclaimed on the spot. The accused persons not having obeyed the rule were prosecuted and convicted and sentenced to different amounts of fine. The learned Sessions Judge is of opinion that they were protected by the proviso to section 130 of the Act, which is to the effect that "no person shall be punishable for breach of any rule made under clause (a) or clause (c) by reason of the continuance of such manufacture, preparation or exposure for sale or sale, upon any premises which are at the time of the making of such rule used for such purpose, until he has received from the Board six months' notice in writing to discontinue such manufacture, preparation or exposure for sale, or such sale in such premises." Section 143 prescribes the mode in which notice is to be served. It is admitted in the present case that notice was not served on each of the twenty-three accused in the manner laid down in section 143. It was not proved that the accused were doing anything beyond continuing the exposure of their goods for sale or the sale of fruits and vegetables at a place called the Ganda Nala. That was the place, according to the Secretary's evidence, where fruits and vegetables were exposed for sale and sold, and the

accused apparently were exposing their goods and selling them at that particular place. This was clearly a case in which the accused continued the act which they were prohibited from doing by the new rule promulgated by the Municipality. In order to render them liable to punishment for committing such breach, it was necessary that notice should have been served on them in the manner provided by law. As this was not done, they were not liable to punishment and are protected by the proviso to section 130. I agree with the view taken by the learned Sessions Judge and accepting his recommendation, I set aside the convictions and sentences and direct that the fines, if paid, be refunded.

Convictions set aside.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 478 of 1915.

September 25, 1915.

Present:—Mr. Justice Shadi Lal.

Musammât SIRYAN—CONVICT—
APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 100, 304 (II), 325—Fatal blow struck on sudden provocation—Right of private defence, when established.

The deceased went to the accused's house armed with a pitchfork and abused her sister. The deceased's son also turned up and struck a blow on the sister's head with a stick. The accused hearing the cries of her sister came out with a pitchfork in her hand and struck the deceased with its handle, who died within a short time:

Held, (1) that though the deceased and his son acted in a high-handed manner, their action could not be regarded as a sufficient justification for causing the death, and the accused could not avail herself of the benefit of section 100, Indian Penal Code; [p. 991, col. 2.]

(2) that inasmuch as the conduct of the deceased and his son provoked the accused, who in a moment of anger and without any premeditation struck the blow, not knowing that it was likely to cause death, she could not be convicted under section 304 (II), Indian Penal Code, but was guilty of an offence under section 325. [p. 991, col. 2.]

Appeal from the order of the Sessions Judge, Hissar, dated the 15th April 1915, convicting the appellant.

Mr. Nanak Chand, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—Musammât Siryan, a Brahmin woman of Mauza Kot Kalan in the

SIRYAN V. EMPEROR.

District of Hissar, has been convicted of having, on the 17th January 1915, caused the death of one Mam Chand, a *Brahmin* of the same village, and has been sentenced under section 304, part II, to five years' rigorous imprisonment. The convict has preferred an appeal to this Court through Counsel, and I have listened to the argument advanced by Mr. Nanak Chand and the learned Government Advocate, examined the evidence on the record, and arrived at the conclusion that the offence of culpable homicide has not been established and that the accused is guilty of causing grievous hurt within the purview of section 325, Indian Penal Code.

The facts of the case are simple and may be stated in a few words. It is common ground between the parties that on the 16th January there was a quarrel between the deceased's wife *Musammât Nand Kour* on one side and the accused and her sister *Musammât Dhanno* on the other, in regard to the right to deposit cowdung cakes on a disputed plot of land in the village *Bataura*, and that *Musammât Nand Kour* was worsted in the struggle. The story for the prosecution is that on the succeeding day the woman refused to go to the *Bataura*, and that her husband, namely *Mam Chand*, thereupon went to the house of *Musammât Dhanno* to remonstrate with her. It is clear that he went armed with a pitchfork and abused *Musammât Dhanno* who returned the abuse. His son *Joti* then turned up and struck a blow with a stick on *Musammât Dhanno's* head. She sat down and began to weep. *Musammât Siryan* heard the cries of her sister, came out with a pitchfork in her hand and aimed a blow with it on *Mam Chand* who warded it off with his own pitchfork; the result being that the prongs of *Musammât Siryan's jeli* were broken. She then struck a blow on *Mam Chand's* head with the handle of the pitchfork and he succumbed to the injury within a short time.

This is briefly the version of the prosecution: and I think that there can be little doubt as to the main facts. The first information report made by *Talu*, who is described by the learned Sessions Judge as "an idiot-looking man", is a confused document. Upon the evidence produced by the prosecution, I entertain no doubt whatever that *Musammât Siryan* inflicted a blow on the

deceased's head in the manner stated above. I cannot accept the contention of the learned Counsel for the appellant that the occurrence took place in the *Bataura*. The evidence of the eye-witnesses and the statement of the accused before the Committing Magistrate prove satisfactorily that the assault was committed in the compound in front of the house of *Musammât Dhanno*.

The important question for consideration in the appeal is whether the convict acted in the exercise of the right of private defence. This point has been ably argued by the learned Counsel for the appellant, but after giving my careful consideration to the evidence and the law bearing upon the subject, I am of opinion that though the deceased and his son acted to some extent in a high-handed manner, their action cannot be regarded a sufficient justification for causing the death. Section 100 of the Indian Penal Code enumerates the cases in which the right of private defence extends to causing death, and I am quite clear that the accused has failed to bring her case within the purview of that section. There is no convincing evidence on the record that the deceased *Mam Chand* attempted to strike the accused, and it is manifest that the hurt caused by *Joti* to *Musammât Dhanno* did not justify the assault upon the deceased.

While holding that the right of private defence has not been established, I am convinced that the conduct of the deceased in coming to *Musammât Dhanno's* house with a pitchfork in his hand and abusing her, and his son's attack upon the latter, provoked the convict who in a moment of anger, and without any premeditation, struck the deceased on the head. The facts of the case do not show that hurt was caused with the knowledge that it was likely to cause death, and the learned Government Advocate frankly admits that the accused's act does not amount to culpable homicide. Upon the evidence there is no reasonable doubt that the appellant caused grievous hurt to the deceased and that she is, therefore, guilty of an offence under section 325, Indian Penal Code. I, therefore, alter the conviction to one under that section and in view of all the circumstances I reduce the punishment to one year's rigorous imprisonment. The

SADHO LAL V. EMPEROR.

appeal is accepted *pro tanto* and the order of the Sessions Judge is modified accordingly.

Appeal partly accepted.

PATNA HIGH COURT.
CRIMINAL REVISION PETITION No. 127
OF 1916.

June 4, 1916.

Present:—Mr. Justice Roe and
 Mr. Justice Jwala Prasad.
SADHO LAL—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 420, 417, 511, 30—Acknowledgment of receipt of insured parcel, whether 'valuable security'—Despatch of registered insured packets with blank sheets to a creditor—Creation of evidence in discharge of debt—Offence—Cheating—Attempt to cheat—Criminal Procedure Code (Act V of 1898), s. 237 (2).

An acknowledgment of receipt of an insured parcel is not a 'valuable security' within the meaning of section 30 of the Indian Penal Code.

The accused, who owed the complainant Rs. 650, filled a registered envelope with blank sheets of paper and posted it to the complainant after insuring it for Rs. 650, in order to create evidence of discharge of the debt. He was convicted for cheating under section 420, Indian Penal Code:

Held, (1) that, as the acknowledgment of receipt of the insured parcel was not a valuable security, the conviction under section 420, Indian Penal Code, was bad in law;

(2) that, as the offence of attempting to cheat was made out, the accused should have been convicted under section 417 and 511, Indian Penal Code.

Mr. E. P. Pugh, Counsel, and Mr. Gour Chandra Paul, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.—In this case the petitioner Sadho Lal has been sentenced to one year's rigorous imprisonment under section 420, Indian Penal Code. The facts found against him are that he owed the complainants Rs. 650 and in order to create evidence that he had paid that Rs. 650 filled a registered envelope with blank sheets of paper and posted it to the complainants after insuring it for Rs. 650. It is contended on behalf of the petitioner, *firstly*, that the offence of cheating has not been committed and, *secondly*, that an acknowledgment of receipt of an insured parcel is not a

valuable security and, *thirdly*, that the judgment of the District Court is not in accordance with law in that no attempt has been made to discuss the defence evidence. In the latter ground there is no substance. We have been carefully through the defence evidence and note that it is entirely at variance with the explanation given by the petitioner to the inspecting officers of the Postal Department when making enquiries into this matter. The learned Magistrate had pointed this out and the learned Judge was fully justified in his acceptance of this part of the lower Court's judgment without comment. We are in agreement with the learned Counsel for the petitioner that the facts found do not amount to a complete offence of cheating. They do amount to an attempt to cheat. We also agree that an acknowledgment of receipt of an insured parcel is not a valuable security. It is merely evidence that a parcel of some sort was delivered to the complainants and cannot operate as a discharge of any liability and is not, therefore, a valuable security. The petitioner should, therefore, have been charged with an attempt to commit an offence under section 417. Under section 237 (2) of the Criminal Procedure Code of 1898 it is set forth clearly that when an accused is charged with an offence he may be convicted of having attempted to commit that offence, although the attempt is not separately charged. There is nothing in this case which calls for our interference save that the maximum punishment under section 417 read with section 511 would be six months' rigorous imprisonment, whereas the petitioner has been sentenced to one year's rigorous imprisonment. The sentence must, therefore, be reduced to one of six months' rigorous imprisonment. The petitioner must surrender to his bail and serve out the remainder of this sentence.

Conviction altered; Sentence reduced.

J. N. Das
 Advocate High Court
 Jammu & Kashmir
 Srinagar.

JAGAT RAM v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1888
OF 1915.

January 12, 1916.

Present:—Mr. Justice Shadi Lal.

JAGAT RAM AND OTHERS—CONVICTS—
PETITIONERS
versus

EMPEROR—RESPONDENT.

Police Act (V of 1861), s. 34, cl. (6)—“Riotous,”
meaning of—Quarrelling in a public street—Conviction
—Revision—Criminal Procedure Code (Act V of 1898),
s. 537.

The word “riotous” in section 34, clause (6), of the Police Act is sufficiently wide to cover the case of a person who creates a row in a thoroughfare.

Where, therefore, the accused had a quarrel in the bazar and was convicted of an offence under section 34 (6) of the Police Act:

Held, that there was not such an error of law as would justify interference in revision.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Gurdaspur, dated the 7th August 1915, affirming that of the Magistrate, 1st Class, Gurdaspur at Dalhousie, dated the 26th July 1915, convicting the petitioners.

Bakhshi Tek Chand, for the Petitioners.

JUDGMENT.—The Magistrate has, after considering the evidence produced by the prosecution, come to the conclusion that the three convicts had a quarrel in the bazar at Dalhousie, and he has convicted them under section 34, clause 6, of the Police Act (V of 1861). The finding of fact cannot be impeached on revision, and the only question is, whether there is any error of law, which would justify interference by this Court. Now, the aforesaid provision of law makes it penal for a man to be “riotous” in a public street and it is, in my opinion, sufficiently wide to cover the case of a person who creates a row in a thoroughfare. The word “riotous” means tumultuous, and it can hardly be said that a man creating a disturbance in a street open to the public is not tumultuous.

The requirements of law have been complied with, and the application for revision is dismissed.

Petition dismissed.

RAM SINGH v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 810 OF 1915.
December 21, 1915.

Present:—Mr Justice Leslie Jones.

RAM SINGH—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 27—Information given by two persons leading to discovery—Only that given first admissible—Necessity of proving specifically the information given by each—Approver's story—Corroboration.

Where two persons are alleged to have given certain information to the Police which led to the arrest of another accused, it is only the information given first which can be admitted under section 27 of the Evidence Act. It is also necessary that the information given by each should be precisely and separately stated. [p. 998, cols. 1 & 2.]

Queen-Empress v. Babu Lal, 6 A. 509; *Alah Bakhsh v. Emperor*, 52 P. L. R. 1902, followed.

The statement of an approver, veracious though it may appear to be and though the truth of a large part of it be established beyond all doubt, nevertheless requires corroboration. [p. 996, col. 1.]

Appeal from the order of the Magistrate, 1st Class, exercising enhanced powers under section 20 of the Criminal Procedure Code, Gurdaspur, dated the 9th July 1915, convicting the appellant.

Mr. Sewa Ram Singh for the Additional Government Advocate, for the Respondent.

JUDGMENT.—This judgment refers to appeals by nine persons, who have been convicted of either committing or abetting a dacoity which took place in the village of Tolah in the Gurdaspur district on the night of the 29th January 1915.

The case for the prosecution may be re-stated as follows. In Tolah there is a family of rich mahajans of whom Ba'u Shah is the senior member. Not long ago the family in question partitioned its joint property. Half of the property fell to the share of Bhandu alias Nand Lal, sole representative of one branch, and the other three shares fell to Balu Shah and his nephew Khushia, to Kaka and to Buta who are the first cousins of Balu Shah. Owing, however, to his position in the family Balu Shah took or was allowed to take (the partition being a private one managed by Balu Shah) an area twenty ghumaons of land over and above his share. Bhandu, who is a young man, apparently thought that Balu Shah ought not to have been allowed

RAM SINGH V. EMPEROR.

this concession and friction soon arose between him and Balu Shah. Kaka and Buta, though their shares were separated at the partition, shortly rejoined Bhandra with whom they are now living again as members of a joint family. Bhandra's anger against Balu Shah took the form of constant insolence and he also worried him with petty litigation, going as far as to attach the mare which Balu Shah used to ride.

Balu Shah became so incensed with the conduct of his young relative who was supported by Kaka and Buta that he determined to make them pay very dearly for what they were doing. He proceeded to consult a man named Ali Bakhsh who is a resident of the neighbouring village of Dosri. He knew Ali Bakhsh well because they had been connected in a transaction, legitimate or otherwise, according to which Ali Bakhsh had made himself responsible for the debt due to Balu Shah's family by one Budha, Ali Bakhsh taking a mortgage from Budha which Balu Shah would have been unable, owing to the provisions of the Land Alienation Act, to obtain for himself. The suggestion made by Balu Shah was that Ali Bakhsh should assist him to get Bhandra, etc., robbed of their valuables. To this end Ali Bakhsh invited the co-operation of a man named Mula Singh, a well-known thief, from a village about twenty miles distant in the district of Sialkot. Mula Singh having been thus invited brought with him to Dosri four other men of his acquaintance, named Sharma, Lal Din, Ram Singh and Jaimal, with the object of perpetrating a robbery that night. But Balu Shah and his son Mukanda whose co-operation was necessary were late in making their appearance. When they eventually arrived Mula Singh was taken by Mukanda to the *haveli* which is still occupied by Balu Shah and all his relatives above mentioned. He was shown from an inner *deorhi* the part of the *haveli* where Bhandra, etc., dwelt and kept their valuables. But on inquiry as to the number of the inmates he decided that the party which he had brought with him was too small to effect their object in safety. Accordingly he determined to postpone the

robbery and went back to Dosri where he informed Ali Bakhsh and his brother Mehr Din that he would return with more men in ten or twelve days. He and his party then went off.

On the 29th January he returned; this time with nine other men three of whom, namely, Lal Din, Ram Singh and Sharma were members of the original party. For Jaimal Singh, the fifth member of that party, Jaimal Singh's son Sohan Singh had been substituted. The other five, Ujagar Singh, Bur Singh, Buta Singh, Partab Singh and Alf, were men from the Amritsar district with whom Mula Singh was not previously acquainted, but they had been recruited for him for the purpose of assisting in the dacoity which he had planned.

Having arrived at Dosri, Ali Bakhsh was sent on to Tolah to let Balu Shah and Mukanda know that the dacoits were ready for their work. This done Mula Singh and his nine men proceeded to the *haveli* in Tolah. They found the outer door open as also that of the inner *deorhi* in which admittedly Balu Shah and Mukanda habitually sleep. In that *deorhi* they found two men, Balu Shah and Mukanda, who took their arrival without any exhibition of alarm. One of them was smoking and continued to do so. With these two men Mula Singh held no immediate conversation, but nevertheless he left two of his party at the *deorhi* either to insure that there would be no betrayal or in any case to keep the men in question quiet, whoever they might prove to be.

The *deorhi* in question opens into an inner courtyard. At the far end of the courtyard there is a line of five rooms faced by a verandah. This verandah is roofed and walled in front, entrance to it being obtained by doors. On the right hand side beyond the verandah are three rooms belonging to Bhandra, Buta and Kaka. To the left are two rooms belonging to Balu Shah and Mukanda. The door in front of the rooms of Bhandra, etc., was locked but that in front of Balu Shah's rooms had been left open. The remaining dacoits entered the verandah by Balu Shah's door. They did nothing to rooms immediately

RAM SINGH v. EMPEROR.

in front of them and did not disturb the wives of Balu Shah or Mukanda, but proceeded at once to the rooms of Bhandu and his party whom they found sleeping in the verandah with their female relatives. They then proceeded to demand the keys of the rooms and compelled their delivery after inflicting some minor injuries on Buta, Kaka, Musammât Dhani and Musammât Rakhi. *Chavis* were used but no great damage was done, the object being to intimidate rather than to cause injuries.

The room to the extreme right has no separate door into the verandah, being reached from the second room. The key of this having been obtained both rooms were thoroughly ransacked. Later the key of the third room was also procured and that room was treated in like manner. Altogether the dacoits spent about three hours in ransacking these rooms, from which they obtained a large amount of cash and a quantity of ornaments. While ransacking was going on one of the dacoits, pointing to a man who was lying on a bed in the extreme right hand corner of the verandah, asked if he was Bhandu. That man was in fact Bhandu, but Buta fearing for his relative replied that the man in question was a guest and that Bhandu had gone on a visit to Shakargarh. In this reply the dacoit apparently placed little reliance, for he went off to the *deorhi* to make enquiries from Balu Shah and Mukanda and came back satisfied that he was right in his suspicion. Buta was abused for having lied and Bhandu was made to get up in order to show where his property was. In point of fact, however, the dacoits had already secured his property when they ransacked the two rooms on the right.

Still no attempt was made either to touch the rooms of Balu Shah or of Mukanda and eventually Buta, who managed to slip away from the verandah unobserved, ran up the staircase by the *deorhi* which leads to the roof and there raised the alarm. The dacoits immediately decamped by the way they had come, taking their booty with them. A number of villagers quickly collected in the yard but Balu Shah and Mukanda remained unconcerned, not even approaching their own rooms immediately.

The next day Kaka and Bhandu set off to the *thana*, which is nine miles distant, to

make a report. They were followed by Balu Shah, who caught them up and was present when the report was made. In that report they described the main facts concerning the dacoity as they knew them and added that it had been effected with the connivance of Balu Shah. Balu Shah denied this and stated that he had lost property himself.

For considerable part of the story as above told there is only the evidence of Mula Singh, the leader of the dacoits who on the offer of a pardon turned approver. The complainants themselves had no notion who Mula Singh was or where he had come from. They were equally ignorant as to the rest of the dacoits. It appears, however, and of this there is no doubt whatever, that the original information which resulted in the arrest of Mula Singh came from Balu Shah himself. Very shortly after the commencement of the investigation Balu Shah gave information which took the Police to Ali Bakhsh and Mehr Din. The Police then proceeded to Dosri where, as I have said, Ali Bakhsh and Mehr Din reside and there they learnt that Mula Singh was one of the dacoits. Mula Singh was consequently arrested and some of the proceeds of the dacoity were found in his possession. Again, owing to a statement made by Mula Singh, Ram Singh and Lal Din were caught and to them also more property was traced. Ultimately Sohan Singh, Ujagar Singh and Bur Singh were also arrested. The other three have not yet been caught.

That is the gist of the whole case. Balu Shah, Mukanda, Ali Bakhsh and Mehr Din have been convicted of abetment and the other five as principals in the dacoity. All of them have appealed.

I have been addressed at great length by Mr. Beechey on behalf of Balu Shah and his son Mukanda, but he has had very little to say concerning Mula Singh's statement. He has remarked indeed that the story of the first visit to Tolah is a pure fabrication on the part of Mula Singh, introduced solely with the object of providing evidence against Balu Shah and Mukanda whom otherwise it was difficult to bring in. In point of fact, however, Mula Singh's statement is extraordinarily coherent and agrees in a most remarkable way with that of the other witnesses. Such agreement would, I think,

RAM SINGH v. EMPEROR.

have been impossible, if the part which he assigns to Balu Shah and Mukanda had been a pure invention. If, too, he had been deliberately trying to make out a case against them, his description of what happened in the *deorhi* when the dacoits first entered would not have left so much as it now does to the imagination. Mr. Beechey says that the story of the first expedition is a mere repetition of that of the second and that the two incidents have been evolved out of one for the special purpose to which I have already referred. It is not, however, a mere repetition and Mr. Beechey is entirely unable to explain why, if Mula Singh is doing what he supposes him to be doing, he should have told a that Jaimal Singh attended the first expedition but gave way to his son Sohan Singh on the second. If Jaimal Singh had not attended the first expedition there is no earthly reason for his introduction. The statement of Mula Singh, however veracious though it appears to be and though the truth of a large part of it is established beyond all doubt, nevertheless requires corroboration as against each of the various appellants. In the case of Mukanda that corroboration consists of conduct, and in that of Balu Shah of conduct and knowledge combined.

[After discussing the evidence in detail, the learned Judge held Balu Shah and Mukanda guilty of abetting the dacoity and dismissed their appeals as also those of Ram Singh, Lal Din and Sohan Singh. The judgment then proceeds as follows:—]

The cases of Ujagar Singh and Bur Singh stand on a different footing. There is evidence that when both these men were arrested they gave information which led to the discovery of melted metal in the hands of *sonars*, but this metal was incapable of identification and there is no evidence as to the dates on which the *sonars* obtained it. *Ex hypothesi* both the appellants in question are old hands who are ready to travel a considerable distance to join a dacoity under the leadership of a man with whom they have no acquaintance and although it is doubtless a suspicious circumstance that they should have got ornaments melted by *sonars*, it does not in the least follow that they obtained those ornaments as the proceeds of this particular

dacoity, and on this evidence the Public Prosecutor does not rely.

Against Ujagar Singh there is the further evidence that one *chhan kangar* (a small tinkling bracelet) was found in his possession in a basket of other jewellery which was not identified. Ujagar Singh claimed this ornament as his own, but the Magistrate believed the evidence for the prosecution to the effect that it was the property of Musammatt Rakhi, a sister of Bhandra. He states that Musammatt Rakhi gave him good reasons for supposing that she was able to identify that the bracelet was her own, but as a matter of fact his statement is inaccurate, for the part of Musammatt Rakhi's evidence which applied to this bracelet related not to it but to other property which was found in the possession of other appellants. More than that, however, the Magistrate has not noticed the peculiarly conflicting evidence as to the history of this ornament. Musammatt Rakhi herself states that she has had it since the time of her marriage about fourteen years ago, when it was presented to her by the family of her father-in-law and that she has worn it for about twelve years. On the other hand Bhandra and a *sonar* from Shakargarh were produced to swear that it was made for Bhandra's wife only two years back and that it was afterwards made over to Musammatt Rakhi. The Magistrate has not noticed this strange discrepancy, but in view of it I do not think that it will be safe to hold affirmatively that it is proved that the ornament in question is a part of the stolen property.

The only other evidence on which the Public Prosecutor now relies as against either Ujagar Singh or Bur Singh is that of identification after their arrest.

It appears from the evidence that on the 20th February 1915 Mula Singh and Lal Din, who had by that time been arrested: were made to sit with thirteen other men and were identified both by Kaka and by Buta a having been among the number of dacoits. On the 1st March 1915 Ram Singh, Ujagar Singh and Bur Singh, who had by that time been arrested, were made to sit with fifteen other persons

■■■ SINGH v. EMPEROR.

and were then similarly picked up by Buta and Kaka. Lastly on the 10th March 1915 Sohan Singh was placed with fourteen other persons and was then successfully identified by Bhandu ■ well ■ by Buta and Kaka.

The Magistrate is of opinion that all these investigations were extremely well done, and as one of his reason he gives the fact that at the time lists were prepared of the men with whom the accused persons were made to sit and that though the names in the lists were communicated to the defence, none of those persons were called by the defence as witnesses.

It seems to me, however, very doubtful whether the second identification, and that is the one in which both Bur Singh and Ujagar Singh were concerned, was entirely straightforward. It so happens that Ujagar Singh was already ■ convict in another case and it is admitted that at the time when this identification took place, he was wearing his fetters if not his handcuffs. Attempt has been made to show that the fetters were concealed from the view of the complainants, but it would have been so easy to have removed the fetters from the prisoners before the identification that I regard this circumstance as greatly detracting from its value. More than that, however it seems to me to be at least doubtful whether the complainants would have been able to pick out the accused persons at all unless, as I am afraid sometimes happens, they had been pointed out to them before the formal identification took place.

It is stated in the first report that the dacoits were wearing *mandas* at the time of the dacoity, i.e., they had at least covered the lower parts of their faces with clothes tied under their chins and over their heads. The only possible reason for their doing this was to prevent future recognition and the probability is that they did it effectually. It is true that in the first report the complainants were able to give certain information regarding the stature and complexion of some of the dacoits and it is also true that they were able to watch them for a long time by candle light. Nevertheless they did

not give any information as regards features and they have not given any reasons in Court for their ability to recognise the men whom they identified. The matter would, of course, have been very different if the complainants had been previously acquainted with any of the dacoits, but they were not, and in the circumstances I do not feel prepared to regard this evidence as reliable. In the case of Bur Singh particularly I think that it is in all probability quite unreliable, for this reason that Bur Singh was one of the two men who remained in the *deorhi* and was not brought into contact with any of the complainants. This being so, although there is doubtless great suspicion against both Bur Singh and Ujagar Singh, it cannot be said that there is any real corroboration of the statement of the approver and I must accordingly accept their appeals and direct that they be set at liberty.

I have purposely left the appeal of Ali Bakhsh and Mehr Din to the last. The Magistrate has relied on certain evidence that they had knowledge regarding the movements of the dacoits on the night of the dacoity. This evidence, however, is not of a kind to bear examination and as regards one part of it at least the Magistrate is plainly inaccurate. He says that before the Police got any communication with Mula Singh, Ali Bakhsh and Mehr Din were able to point out a *phulai* tree from which sticks had been cut for the use of three other dacoits, but the Police diaries make it clear that no such information was obtained until after Mula Singh's arrest. The Public Prosecutor has in fact discarded all the evidence against Ali Bakhsh and Mehr Din with the exception of the statement of the approver, and ■ further statement by a Sub-Inspector that they gave information which led immediately to the arrest of Mula Singh.

This is a case which was conducted in the first Court by a Public Prosecutor, yet not only the Police Officer and the Magistrate but also the Public Prosecutor have fallen into a very common mistake which often proves fatal to the cause of the prosecution. I can hardly believe that the Police Officer, the Magistrate and the Public Prosecutor all supposed that Ali

SHER SINGH v. EMPEROR.

Bakhsh and Mehr Din have but one brain and one tongue between them, and if they have not, it is not possible that both should have simultaneously given information which led to Mula Singh's arrest.

There is a passage in *Queen-Empress v. Babu Lal* (1) which is reproduced at page 170 of the Commentary of Ameer Ali and Woodroffe on the Law of Evidence (Fourth Edition). It doubtless re-appears in later editions. In that judgment Straight, J., observed as follows:—

"I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state 'they said this' or 'they said that,' or the 'prisoners then said.' It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. In detailing statements of this kind, which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it."

Similar observations were made by Reid, J., in *Alah Bakhsh v. Emperor* (2) and it is, I think, a pity that his remarks have not found their way into the Punjab Record, because a mistake of the kind with which I am now dealing is one which constantly recurs.

Two men cannot make a statement leading to a discovery. Both, no doubt, may give information to the Police, but it is only the information first given which can be admitted under section 27 of the Evidence Act. It is plain in this case that the admission or statement was made either by Ali

Bakhsh or by Mehr Din, but on the record it is impossible to say which. It was, of course, extremely necessary that the Police Officer, Sub-Inspector Gurbakhsh Rai (P. W. No. 28), should be particularly examined on this point and should have been asked to state, if possible, from which of these two appellants the first information came, and as this was not done Sub-Inspector Gurbakhsh Rai will now be called under section 428, Criminal Procedure Code, for further examination in this Court.

Order accordingly.

PUNJAB CHIEF COURT.

CRIMINAL APPLICATION NO. 20 OF 1914.

April 17, 1914.

Present:—Mr. Justice Rattigan.

SHER SINGH AND OTHERS — ACCUSED —
PETITIONERS
versus

EMPEROR — PROSECUTOR — RESPONDENT.

*Criminal Procedure Code (Act V of 1893), s. 252—
Right of accused to cross-examine prosecution witnesses
—Adjournment for securing services of Counsel.*

A Magistrate should grant an accused an adjournment of the case in order to enable him to secure the services of Counsel for the purpose of cross-examining the prosecution witnesses. [p. 999, col. 1.]

Application under section 526, Criminal Procedure Code, for transfer of the case, from the Court of the Magistrate, First Class, Chakwal, to some other competent Court.

Mr. Oertel, Lala Hukam Chand and Bakhshi Tek Chand, for the Petitioners.

The Government Advocate, for the Respondent.

JUDGMENT.—I see no ground for transferring the case, nor is it necessary for me at this stage to discuss the matters set forth in the petitioners' application. I am satisfied with the Magistrate's explanation and that the petitioner will have a fair trial.

As, however, the first hearing took place on the 13th February, I am inclined to think that the Magistrate should have granted

(1) 6 A. 509 at p. 533.

(2) 92 P. L. R. 1902.

TAJOO v. EMPEROR.

petitioner the adjournment for which he prayed on the 14th February, so as to enable him to secure the services of Counsel for the purpose of cross-examining the prosecution witnesses. The next hearing is, I find, fixed for the 29th instant, and I direct that the prosecution witnesses be ordered to be present on that date and that Sher Singh be permitted to cross-examine them by himself or by Pleader. After these witnesses have been cross-examined and re-examined, the Magistrate will proceed with the trial from the stage at which it stood at the close of the hearing on the 18th February.

Petition partly accepted.

PUNJAB CHIEF COURT.

CRIMINAL APPLICATION No. 248 of 1916.

May 10, 1916.

Present:—Mr. Justice Rattigan and
Mr. Justice Scott-Smith.

TAJOO—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—First report not mentioning accused—Eye-witness failing to identify accused at investigation—Circumstantial evidence, value of.

Where in a trial for murder it appeared that the first report did not name the murderer, that the only eye-witness who professed to have seen the murder could not identify the murderer before the Police and that the only evidence against the accused consisted in the production of a blood-stained *kutta* from the house where he and his brothers resided and his pointing out a blood-stained knife which was concealed in a bush on the way from the deceased's house to his own:

Held, (1) that in the absence of any direct evidence connecting the accused with the murder the circumstantial evidence that had been produced was altogether insufficient for conviction; [p. 1000, col. 2.]

(2) that the mere fact that it had not been shown who else could have committed the murder was no ground for holding that the accused must have committed it and he was, therefore, entitled to an acquittal. [p. 1000, col. 2.]

Appeal from the order of the Sessions Judge, Shahpur at Sargodah, dated the 10th March 1916, convicting the appellant.

Mr. Mukand Lal Puri, for the Appellant.

Rai Sahib Lala Mul Chand for the Government Advocate, for the Respondent.

JUDGMENT.—Tajoo Lohar, of Chak No. 60, Southern Branch, Jhelum Canal Colony, has been convicted of the murder of Sultan

Lohar, of Chak No. 48, by giving him numerous wounds with a knife on the night between the 30th and 31st of October 1915, and has been sentenced to death by the Sessions Judge of Shahpur. He has appealed to this Court through Mr. Mukand Lal Puri, Advocate, and the case is also before us for confirmation of the sentence under section 374, Criminal Procedure Code.

The motive for the murder is said to be that Sultan had established his nephew Ahmad as blacksmith in Tajoo's *chak*, thus taking away customers from Tajoo and his brothers. Sunder Singh and Wali Dad (P. Ws. Nos. 4 and 5) deposed that Tajoo spoke to them about this. Sunder Singh says that Tajoo asked him to remove Ahmad from his *chak* or to get Tajoo a place in Chak No. 48. Wali Dad says that Tajoo came to him only four or five days before the murder and asked for work in Chak N. 61, of which Wali Dad is *lambardar*. The motive alleged is not a very strong one, but if Tajoo could not get a redress for his grievance it is quite possible that he may have brooded over his wrongs and have committed the murder.

Musammam Bibi (P. W. No. 2), widow of the murdered man, professes to have been an eye-witness of the murder and to have recognised Tajoo as the murderer. Ahmad Khan (P. W. 3), the *lambardar* of Chak No. 48, made the first information report at the *thana* and in it did not name the murderer. He stated that on inquiry Sultan declared that a young man wearing white clothes had entered the *ihata* and had attacked him while he was asleep on a *charpoy*, and that thereupon he got up and grappled with his assailant, on which the latter inflicted more injuries on him and then fled away. Ahmad Khan has made the same statement in Court as to what Sultan said about his assailant. With reference to Musammam Bibi he stated that she was in such a state of distress that she could say nothing. The Police diaries shew that Musammam Bibi in the course of the investigation stated that she could not identify the murderer. Under these circumstances it is impossible to believe her now when she says that she identified Tajoo as the man who had murdered her husband.

KARMUN V. EMPEROR.

The circumstantial evidence which is said to connect the appellant with the murder is that

(1) ■ blood-stained *kurta* was found in the house where he and his two brothers resided;

(2) the tracks of the murderer are said to have been followed from the *ihata* of Sultan to the house of Tajoo and to have corresponded with the shoes worn by Tajoo, and

(3) the appellant is said to have pointed out a blood-stained knife which was concealed in a bush on the way from the murdered man's house to that of Tajoo.

We do not attach much importance to the blood stained *kurta*. The part of it which was stained was the lower part at the back. No other part of it was stained. Considering the number of injuries which the murdered man received and the fact that his assailant is said to have grappled with him, we are of opinion that the *kurta* worn by the murderer would have been blood-stained in numerous places specially in front. It is, therefore, most important that the blood-stained *kurta* found in Tajoo's house was not one worn by the murderer.

With reference to the tracks the learned Sessions Judge says, "of course no great reliance can ever be placed on track evidence, but in this case the tracks were preserved at once and followed up to Tajoo's house on the first day of the investigation and I think the evidence of two independent trackers is not entirely without corroborative value." What the learned Sessions Judge has, however, relied on chiefly is the discovery of the knife, which he says is the damning fact against Tajoo. That Tajoo produced this knife which was stained with human blood is a strong point against him. At the same time it is not a conclusive proof that Tajoo committed the murder. It is possible, for instance, that Tajoo saw someone place the knife where it was found or got some information as to where it was. He has not attempted to explain how he was able to produce it.

There is no evidence in this case that *Musammāt Bibi* was ■ woman of bad character. In fact there is clear evidence to the effect that she is a woman of good character. The Sessions Judge says, "one must believe that the murder was commit-

ted by Tajoo or by *Musammāt Bibi's* lover or by some enemy of Sultan. But according to the evidence *Musammāt Bibi's* character is excellent, and Sultan had ■ other enemies." The fact that it has not been shown who else could have committed the murder cannot be used as an argument for holding that Tajoo must have committed it. Tajoo can only be convicted if there is clear evidence showing that he committed the murder. The track evidence and the production of the knife are, no doubt, strong circumstantial evidence against him, but we find it impossible to hold that he is really guilty because it is clear that neither Sultan nor *Musammāt Bibi* identified him at the time of the murder. He is the cousin of *Musammāt Bibi* and was well known both to her and to her husband. The assailant struggled with Sultan and he and his wife had ample opportunity of identifying the murderer had they known him before. The facts that neither of them named him to Ahmad Khan and that *Musammāt Bibi* during the Police investigation said that she did not recognise the murderer are the strongest reason for holding that he was not Tajoo.

The assessors were of opinion that Tajoo was not the murderer and one of the reasons given by them is that if he had been, *Musammāt Bibi* would certainly have named him. We have no hesitation in agreeing with them and we, therefore, accept the appeal and setting aside the conviction and sentence, acquit Tajoo and order that he be released from custody forthwith.

Appeal accepted.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL NO. 529 OF 1915.
December 14, 1915.

Present:—Mr. Justice Shadi Lal.
KARMUN—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.
Penal Code (Act XLV of 1860), s. 399—Preparation

KARMUN v. EMPEROR.

for committing dacoity, what constitutes—Mere assemblage not enough—Overt act towards commission of dacoity necessary—Prosecution, whether bound to point out part taken by each member.

In order to constitute the offence of "preparation for committing dacoity" within the purview of section 399, Indian Penal Code, it is not necessary that the accused should have done an overt act towards the commission of dacoity. The law requires that they should have done some act to get ready for dacoity. [p. 1002, col. 1.]

A mere assemblage to commit dacoity does not amount to preparation; but where it is found that the members of a gang had taken in their possession instruments for house-breaking and arms for the purposes of offence and defence and had actually proceeded to a place near the scene of contemplated dacoity, the Court is justified in holding that there was not a mere assemblage but that the members of the assembly had got ready for the actual commission of a dacoity. [p. 1002, col. 1.]

It is not necessary that the prosecution should point out the exact part taken by each member of the gang ■ regards preparation, provided that it is shown that the accused were members of ■ gang which had made in fact preparation for dacoity. [p. 1002, col. 2.]

Romesh Chandra Banerjee v. Emp ror, 23 Ind. Cas. 935; 41 C. 350 at p. 357; 18 C. W. N. 498; 15 Cr. L. J. 385, referred to.

Appeal from the order of the District Magistrate, Karnal, dated the 28th May 1915, convicting the appellant.

Bakhshi Gokal Chand, for the Appellant.

Mr. Jai Gopal Sethi for the Additional Government Advocate, for the Respondent.

JUDGMENT.—The District Magistrate of the Karnal District, invested with enhanced powers under section 30 of the Criminal Procedure Code, has convicted 28 persons of the offences described in sections 399 and 402, Indian Penal Code, and has sentenced each of them to seven years' transportation under each of the said sections, the sentences to run concurrently. One of the convicts, Munshi by name, has not appealed against his conviction and the remaining 27 have preferred to this Court 26 appeals, Nasib Khan and Kasim Ali one joint appeal No. 616 of 1915, and the remaining 25 persons twenty-five separate appeals. The appellant Chubal died during the pendency of the case in this Court and his appeal must, therefore, abate under section 431, Criminal Procedure Code. All the other appeals will be disposed of by this judgment.

The story for the prosecution as related by the witnesses is to the following effect:—On the 24th of April 1915, at about 8 A. M.,

all the convicts were seen sitting together in a garden called the Jamadarwala Bagh, partly owned by Karmun accused and situate in the jungle adjoining the villages Niwarsi, Bhalri and Ghraola in the Karnal District. One Khubi, who was grazing his cattle in the jungle, saw them and suspecting that they were dacoits he despatched Nathu and Ilahia to the villages Bhalri and Niwarsi respectively to give information to the *lambardars* that the men were in the garden and appeared to be dacoits. In consequence of this information, the *lambardars*, with 100 or 150 men, all armed with sticks, arrived at the spot and were led by various circumstances to believe that the gang consisted of actual or prospective criminals. They induced the members of the gang, partly by false pretences and partly by show of force, to accompany them to Bhalri village where the accused were accommodated in a room in the village *chaupal*. At the same time Bansi *chaukidar* was sent to the *thana* at Ladwa, about two miles off, to give information to the Sub-Inspector and fetch the Police to the village. The Sub-Inspector accompanied by Police Constables and *chaukidars* reached the village at about 1 P. M., arrested all the 28 persons, searched them, and made detailed lists of the property recovered from them. It appears that a loaded pistol, three country guns, ammunition and house-breaking instruments were found in bundles of bedding belonging to seven accused, and that on the persons of ten accused, female ornaments and clothes were discovered and some of these latter articles have been duly identified as proceeds of three dacoities committed in the Saharanpur District; two quilts stolen in the dacoity of May 1914 and the remaining clothes and jewellery being the proceeds of the dacoities of the 8th and 22nd of April 1915.

These are briefly the facts of the case, and there can be no manner of doubt that all the convicts were found together in the garden on the day in question. Only three of them, namely, Nasib Khan, Kasim Ali and Karmun belong to the Karnal District and their cases will be considered hereafter. As against the remaining 25 men, the evidence of a large number of witnesses, who appear to be disinterested, fully establishes the facts alleged by the prosecution.

LEHNA SINGH v. EMPEROR.

[After dealing with the evidence, the judgment proceeds:—]

The result is that the assemblage of twenty-eight convicts has been fully established and the question arises, whether they met together for the purpose of committing dacoity. In connection with this matter we have the following facts: Seven convicts had fire arms, ammunition and house-breaking implements concealed in their beddings; three are previous convicts and a few more have, during the pendency of the appeals, been convicted of the dacoity at Ranjit Singh's house. Ten of them had, in their possession, clothes and jewellery; and no fewer than twenty-five are residents of different villages in three districts beyond the Jumna. There is no apparent reason why all these persons should have met together in the garden in question, and if the purpose had been an innocent one they would have easily disclosed it. Having regard to all these circumstances, I entertain no doubt whatsoever that the object of this assembly was to commit dacoity and each and all of them are, therefore, guilty under section 402, Indian Penal Code.

The next point for consideration is whether the members of the assembly had made "preparation" within the purview of section 399, Indian Penal Code. Now in order to commit the offence of preparation, it is not necessary that the prisoners should have done an overt act towards the commission of dacoity. What the law contemplates is that they should have done some act to get ready for a dacoity and the collection of men from different villages, coupled with the collection of arms, sufficiently proves the required preparation. The mere assemblage to commit dacoity does not amount to preparation but when we find, as in this case, that the members of the gang had taken into their possession instruments for house-breaking and arms for the purposes of offence and defence, and they had actually proceeded to a place near the scene of contemplated dacoity, we are justified in holding that there was not only a mere assemblage, but that the members of the assembly had got ready for the actual commission of dacoity. It is not necessary that the prosecution

should point out the exact part taken by each member of the gang ■ regards preparation, provided that it is shown that the accused were members of a gang which had made in fact preparation for dacoity [*vide Romesh Chandra Banerjee v. Emperor* (1)].

Upon the evidence and the law set forth above, I hold that all the accused are guilty under sections 399 and 402, Indian Penal Code, and that convictions and sentences are justified. I accordingly uphold the order of the District Magistrate and dismiss the appeal.

Appeal dismissed.

(1) 23 Ind. Cas. 985; 41 C. 350 at p. 357; 18 C. W. N. 498; 15 Cr. L. J. 385.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1420 of 1915.

January 21, 1916.

Present:—Mr. Justice LeRoussignol.

LEHNA SINGH—CONVICT—PETITIONER
versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), s. 61 (1) (c)—Conviction, first—Sentence—Imprisonment, propriety of awarding.

In awarding sentences in excise cases the consideration that illicit distillation results in not only a loss of excise revenue but also in drunkenness and crime, is of very great importance, but in view of the demoralising influence of a sojourn in jail on the character of a person who is otherwise law-abiding, a heavy sentence of fine is preferable to a sentence of imprisonment in most cases of a first conviction for infraction of an excise law. [p. 1008, col. 1.]

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Gurdaspur, dated the 26th August 1915, modifying that of the Magistrate, 1st Class, Gurdaspur, dated 28th July 1915, convicting the petitioner.

Mr. Broadway, Additional Government Advocate, for the Respondent.

JUDGMENT.—The Crown is represented in this case in order to question the general principle that in excise cases the offender's pocket rather than his body should be mortified.

MEHRAN v. EMPEROR.

It is argued that illicit distillation results in not only a loss of excise revenue, but also in drunkenness and crime.

This latter consideration, no doubt, is of very great importance and in many cases severe sentences of imprisonment are called for, more particularly where there would be no prospect of recovering a really serious fine, such as Rs. 500 to 1,000.

In view, however, of the demoralising influence of a sojourn in jail, on the character of a person who in other respects is law-abiding, I still think that a really heavy sentence of fine will be preferable to a sentence of imprisonment in most cases of a first conviction for infraction of an excise law. The imposition of petty fines will serve no good purpose, but will rather arouse the gambling instinct.

In this case, moreover, the circumstances are peculiar. The petitioner is an old man of 65 or 70 and even the Magistrate found that he was keeping the *mat* of *lahan* not for his own use, but on behalf of another.

He has been 5 weeks in jail and has paid a fine of Rs. 150.

I reduce the sentence to the imprisonment already undergone and a fine of Rs. 150.

Sentence reduced.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 798 OF 1915.
January 29, 1916.

Present:—Mr. Justice Scott-Smith.
Musammât MEHRAN AND ANOTHER—
CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Abduction—Special intent or knowledge necessary—Whether it can be presumed in a girl of 13.

In order to establish an offence under section 366, Indian Penal Code, a special intent or knowledge is necessary and such an intent or knowledge cannot be presumed in a child of immature age. [p. 1003, col. 2.]

Where, therefore, the accused, brother and sister, were convicted of abducting a certain girl and it appeared that the sister was only 13 years of age:

Held that she could not be said to have the special intent or knowledge referred to in section 366 and was not, therefore, liable to conviction. [p. 1003, col. 2.]

Appeal from the order of the Magistrate, 1st Class, with section 30 powers, Gurdaspur, dated the 16th July 1915, convicting the appellants.

Malik Mohammad Hussain, for the Appellants.

Mr. B. R. Puri for the Additional Government Advocate, for the Respondent.

JUDGMENT.—The appellants Badru and *Musammât* Mehran, brother and sister, have been convicted of abducting *Musammât* Mehran, daughter of Bakha, under section 366, Indian Penal Code. Badru has also been convicted of raying the abducted girl, under section 376, Indian Penal Code. He has been sentenced to seven years' rigorous imprisonment for each offence, the sentences to run concurrently. *Musammât* Mehran has been sentenced to one and a half years' rigorous imprisonment.

Malik Mohammad Hussain, in arguing the appeal, has confined himself to urging

1. That *Musammât* Mehran, owing to her youth, is not guilty of any offence;

2. That the offence of rape is not proved;

3. That the sentence, under section 366, is too heavy.

As to (1) the appellant *Musammât* Mehran is only 13 or 14 years of age. For the offence under section 366A, special intent or knowledge is necessary, and I do not see how it can be said that a child of *Musammât* Mehran's age had the specific intent or knowledge referred to in the section. If she did help to deceive the abducted girl, she must have done so at the instance of her brother, and without any knowledge of the probable consequences. Badru may not have told her at all that he was going to take the child away, the intent or knowledge which one would presume in a person of mature understanding cannot be presumed in a child of *Musammât* Mehran appellant's age. I cannot understand how a Magistrate of experience could bring himself to convict under those circumstances, and still less can I understand why he sentenced such a young child to 1½ years' rigorous imprisonment. It is to be regretted that no application for bail was presented on her behalf. I accept the appeal of *Musammât* Mehran and acquit her and order her release forthwith.

BELA SINGH v. EMPEROR.

As to Badru, it is not now contended that he did not abduct *Musammāt Mehran*, daughter of Bakha. The evidence on the point is overwhelming.

The evidence of rape consists only of the statement of *Musammāt Mehran*, daughter of Bakha. It is not at all likely that Badru had the girl in his possession for several days and nights without having intercourse with her. It is further unlikely that a young *Awan* girl would make a false charge of this nature.

Under the circumstances, I consider that conviction under section 376 is justified and I dismiss Badru's appeal.

*Appeal of one convict accepted and
of the other dismissed.*

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 773 OF 1915.

December 6, 1915.

Present:—Mr. Justice Leslie Jones.

BELA SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 366—Abduction—
Abducted woman passed from man to man—Liability of
all concerned—Charge of rape not made during Police
investigation, truth of.*

A woman, in order to avoid living with her deceased husband's brother *F*, whom she had been forced to marry, asked another brother of his *D* to take her to her own brother. *D* took her away. Outside the village they were joined by *M* and proceeded to a *takiya*, when *D* left her with *M* for the night and returned home. The following day *D* rejoined them and they all proceeded to a village *Tibri* where the woman was entrusted to one *B*, who took her to another village and placed her in the charge of one *N*. Ultimately she escaped and being pursued she put herself under the protection of a Policeman. *D*, *M* and *B* were convicted under section 366, Indian Penal Code, *M* and *B* having been sentenced to heavier punishment as the woman stated in cross-examination that they had had intercourse with her.

Held, (1) that under the circumstances of the case, the conviction of all three accused under section 366 was quite justified; [p. 1005, col. 2.]

(2) but that inasmuch as the woman did not make any statement about rape during Police investigation, it could not be believed and *M* and *B* were not liable to a heavier punishment than *D*. [p. 1005, col. 1.]

Appeal from the order of the Magistrate, 1st Class, Gurdaspur, exercising enhanced

powers under section 30, Criminal Procedure Code, dated the 9th August 1915, convicting the appellant.

Mr. *Lakshmi Narain*, for the Appellant.

Mr. *Broadway*, for the Respondent.

JUDGMENT.—This judgment deals with Criminal Appeals Nos. 773, 899 and 874 of 1915.

The original story for the prosecution is as follows. *Musammāt Lal Devi* the wife of *Dhirta* of *Naushera* in the *Hoshiarpur* District. *Dhirta* died and not long after his death *Musammāt Lal Devi* was forced to marry his youngest brother *Fakir Chand* by *chadar andazi*. To this marriage *Musammāt Lal Devi* strongly objected and she appealed to another brother of *Dhirta's* named *Daulat* to take her away to her brother who lived at *Dinanagar*, in the *Gurdaspur* District. *Daulat* promised to do what she wanted, and on the 10th of June 1915 took her away from the village, outside of which they were joined by *Mansa Singh*, a discharged Police Constable. They proceeded to a *takiya* which is about two miles distant from *Mauza Naushera*, and is not on the direct road to *Dinanagar*. *Musammāt Lal Devi* asked why she was not being taken straight to her brother, but was told that if they went by the direct route they would be followed and she would be brought back. That night she was left in the *takiya* with *Mansa Singh* and *Daulat* returned to *Naushera*. The following day *Daulat* rejoined *Musammāt Lal Devi* and *Mansa Singh*, and the three of them then crossed the river and went as far as *Tibri* in the *Gurdaspur* District. *Daulat* and *Musammāt Lal Devi* did not enter the village, but *Mansa Singh* went inside and brought out *Bela Singh* to whom *Musammāt Lal Devi* was entrusted. *Mansa Singh* and *Daulat* then returned home, *Musammāt Lal Devi* being taken by *Bela Singh* to a village named *Anjla*, where she was placed in the charge of a man named *Nehal Singh*, with whom *Bela Singh* left her. Ultimately *Musammāt Lal Devi* became anxious when she found that she was not being taken to her brother in *Dinanagar* and asked *Nehal Singh* when she might expect to go on. *Nehal Singh* then told her that she would not be taken to her brother, but would be sold for Rs. 800 or Rs. 1,000.

BELA SINGH v. EMPEROR.

Musammatt Lal Devi then naturally became very frightened and offered a reward to a certain *Musammatt Gero* to assist her in effecting her escape. When she got a suitable opportunity she ran off and though she was pursued, she succeeded in placing herself under the protection of a Policeman in a neighbouring village before she could be recaptured. Daulat, Mansa Singh and Bela Singh have all been tried and convicted on charges under section 366, Indian Penal Code, and have preferred appeals to this Court.

During her cross-examination *Musammatt Lal Devi* stated that Mansa Singh had had intercourse with her during the night she spent at the *takiya*, and Bela Singh had had intercourse with her after Daulat and Mansa Singh left her, and before she was deposited by Bela Singh at *Mauza Tibri*. The learned Magistrate believed these statements and for that reason he awarded 7 years to Mansa Singh and 5 years to Bela Singh, though the sentence given to Daulat was only 3 years. *Musammatt Lal Devi* had, however, made no such statement to the Police during the course of the investigation, and the learned Government Advocate does not think it true. No more do I. For reasons, which it is not necessary to discuss in detail, it is quite inconsistent with the rest of the story. On the other hand I have no doubt that *Musammatt Lal Devi's* original story is perfectly true throughout. It is noticeable that after she left Naushera and before she came into the hands of the Police a report was made at the *thana* by her husband Fakir Chand, who accused Daulat and Mansa Singh of having abducted her. Fakir Chand now tells a preposterous story, in which he tries to make out that this report was made by him at the instance of *Musammatt Lal Devi's* brother. But there is not a word of truth in what he says and it was evidently well known in Naushera, before there was any access to *Musammatt Lal Devi*, that Mansa Singh and Daulat were her abductors. Nor is there any reason for supposing that Bela Singh could have been implicated in this case, unless he played the part assigned to him by *Musammatt Lal Devi*, and the suggestion that he may have innocently conducted *Musammatt Lal Devi* to the house of Nehal Singh at the request of Daulat and Mansa Singh, believing that she was to be taken to her brother, is negatived by the knowledge which Nehal

Singh possessed as to what was to be done with *Musammatt Lal Devi*, because Nehal Singh had had no direct communication either with Daulat or Mansa Singh.

The defence tried to make out that *Musammatt Lal Devi* left her home willingly, and that she was a bad character. There is no doubt that she left her home willingly enough, but it was only with the object of escaping to her brother and for the allegation against her character there is no solid foundation.

If she had been a bad character she would not have been remarried to Fakir Chand, and she would not have been so anxious to escape from Nehal Singh when she learnt what was intended for her. As to the details of that escape there is no possible doubt whatever. In my opinion all three appellants have been rightly convicted under section 366, Indian Penal Code, and I maintain their convictions. So far from saying that Daulat was the least offender, I think he was the worst and that he might very well have received heavier punishment. Fortunately, however, no ultimate harm was done, and I am not prepared to say that the punishment is so inadequate as to make it necessary to call upon him to show cause why it should not be enhanced. For the other appellants the sentences of three years would perhaps have been adequate on the facts, as the plot had its origin with Daulat. The special reason for giving them greater punishment has failed, and in any case their sentences should not exceed that of Daulat. I accept their appeals to this extent that I reduce the sentence each to three years' rigorous imprisonment. The orders as to solitary confinement will hold good. The appeal of Daulat is dismissed.

Sentences of two convicts reduced.

HARDEO SINGH v. RAM CHARITER SINGH.

PATNA HIGH COURT.
CRIMINAL REVISION No. 112 of 1916.
June 20, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.

HARDEO SINGH AND OTHERS—
PETITIONERS

versus

RAM CHARITER SINGH AND OTHERS—
OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—
Revision—High Court, interference by—Exclusion of
some of the properties in dispute from enquiry—Final
order by another Magistrate as to possession of excluded
lands, legality of.*

A High Court will interfere in only very exceptional cases with orders made under section 145 of the Code of Criminal Procedure. [p. 1007, col. 2.]

Where a Magistrate, after a protracted enquiry into a dispute relating to certain lands, excluded some specified plots from the scope of the enquiry and cancelled the proceedings in respect of those plots, and another Magistrate, who succeeded him in office, passed orders declaring one of the parties in the possession of such excluded plots:

Held, that the Magistrate had no legal authority to go into the question of possession in those plots and that his final order with regard to them was passed without jurisdiction. [p. 1007, col. 2; p. 1008, col. 1.]

Messrs. S. Sinha and Nirsu Narayan Sinha, for the Petitioners.

Messrs. Ram Prasad and B. B. Lall, for the Opposite Party.

JUDGMENT.—In this case the petitioner is aggrieved by an order made under section 145, Criminal Procedure Code, on the 20th April 1916, by Babu Matukdhari Singh, Deputy Magistrate at Chapra.

It appears that a report was received from the Police, described in a proceeding dated the 14th December 1915 as the Mofussil Police, and action taken thereon under section 145 sometime in November or December 1915. The proceedings are not before us but the essential facts thereof are clear from a certified copy on the record. The Mofussil Police reported that there was a dispute between Hardeo Singh, first party, and Ram Chariter Singh, second party, likely to cause a breach of the peace. On this Mr. Karam Hussain, Deputy Magistrate, drew up proceedings under section 145. Later a cross-report was received from the Revilganj Police that there was a dispute between Ram Chariter Singh, first party, and Hardeo Singh, second party, in regard to sixty bighas of land which had been measured as plots Nos. 661

and 671—4714 at the Cadastral Survey and recorded in the name of Ram Chariter Singh. On receipt of this report the Deputy Magistrate compared the Mofussil Police Report with the Revilgunj report and both with a judgment of 1905, which is Exhibit G of the record, and wrote as follows on the proceedings already taken on the report of the Mofussil Police:—

"I have seen the judgment of case section 145, Civil Procedure Code. That case refers to Survey Nos. 658, 664, 665, 651, 652, 653, 654 and 660. This is binding on both parties. This case is regarding plots Nos. 664, 665 and 535.

"The second party do not claim plot No. 535, so there is no more dispute regarding the lands for which this proceeding was drawn up. The proceedings are, therefore, dropped. The 2nd party are warned against entering in plots Nos. 664, 665 and 535.

"From the report of Revilgunj Police Sub-Inspector it appears that there is dispute between the parties regarding the Survey plots Nos. 661 and 661—4714, and there is likelihood of a breach of the peace over these lands. A separate proceeding under section 145, Civil Procedure Code, will be drawn up regarding these lands. The case is fixed for 8th January 1915."

Thereupon the proceedings on the Mofussil Report were filed and a fresh order sheet opened upon the Revilgunj report with the order:—

"Dated 14th December 1915.

"From the report of the Revilgunj Police Sub-Inspector it appears that there is dispute between the parties regarding the survey plots Nos. 661 and 661—4714 and there is likelihood of breach of the peace over these lands. A separate proceeding under section 145, Civil Procedure Code, will be drawn up regarding these lands. The case is fixed for 8th January 1915."

On the 18th December 1915 a petition was filed by Hardeo Singh, the second party, to the effect that there was a discrepancy in the Revilgunj report, inasmuch as plots Nos. 661 and 4714 measured only 32 bighas whereas the land said to be in dispute measured 60 bighas. Hardeo Singh also asserted that this 60 bighas was in fact the plots Nos. 664, 665 and 535, which in the proceedings upon the Mofussil Report Ram Chariter had given up. He, there-

HARDEO SINGH v. RAM CHARTER SINGH.

fore, asked that an *amin* be deputed to locate plots Nos. 664, 665 and 535, and that an order be issued on Ram Chariter to refrain from entering upon plots Nos. 664 and 665 as ordered in the proceedings on the *Mofussil* Report. On the 22nd December 1915 Mr. Karam Hossain ordered that an *amin* be deputed to demarcate plots Nos. 661, 4714, 664, 665 and 535 and submit a report with his map. On the 31st January 1916 the *amin* submitted a report and a map. His map showed the position of the plots which he had been ordered to demarcate, and his report showed that the plots over which the parties were fighting measured 60 *bighas* as stated by the Revilgunj Police and was shown in the quadrangle L.N.O.J. in his map. He further reported that 10 *bighas* of this quadrangle fell in plots Nos. 661—4714, that the whole of Nos. 664 and 665 was within the quadrangle and that the remainder of the quadrangle fell in plots Nos. 663, 666 and 669 of the survey map. He further stated that the plot L. N. O. J. was *parti* land and that Ram Chariter and others claimed it as settled with them by the Dumraon Raj.

Upon this report Mr. Hossain wrote:—

"31st January 1916.

"The *amin* has prepared a plan which shows the lands disputed by the parties are within the boundary marked L.N.O.J. and plots bearing Nos. 661—4714. It is to be noted that there was a case under section 145, Civil Procedure Code, about Nos. 665 and 664 which is within L.N.O.J., in which it was held that these plots are in possession of Hardeo Singh and others. No evidence is required for these plots. The judgment of the Court is binding on both parties.

"Draw up proceedings regarding the disputed land, calling on both parties to show cause on 14th February 1916 to file their written statements and adduce evidence regarding their claim to actual possession. Matbar Singh is added as 2nd party to the case."

On the 23rd February the case was transferred to the file of Babu Modeswara Singh, Deputy Magistrate. He on the 8th March 1916 wrote:—

"On going through the written statements filed by the parties and the petition filed by the 1st party, I find that the plot of land marked in *amin's* map within L. N. O. J. is only in dispute, so amend proceedings

accordingly as prayed for by the 1st party."

The proceedings were amended and a number of other parties added on information given in the written statements. On the 1st April 1916 the case was transferred to the file of Babu Matukdhari Singh.

After a prolonged hearing Ram Chariter Singh and others were declared to be in possession of the whole quadrangle L.N.O.J. With regard to plots Nos. 664 and 665, the Deputy Magistrate has written:— "From the proceeding, Exhibit F, in the 145 case of 1905 and the proceeding in the present case, I am not in a position to say if the land in dispute in the present case formed part of the subject-matter of the dispute in the preceding case."

"From the judgment, Exhibit G, in the first 145 case it appears that plots Nos. 664 and 665 were held to be in possession of Hardeo Singh and others. But this occurred in 1905 and there may have been some changes."

Clearly this was most unfair to Hardeo Singh and his party. The land had been shown by the *amin* to be *parti*. It had been identified as plots Nos. 664 and 665. Mr. Karam Hossain had on the 14th December 1915 warned Ram Chariter and his party against entering on plots Nos. 664 and 665 and had on the 31st January 1916 promised Hardeo that his possession in these plots should be maintained.

The High Court will interfere in only very exceptional cases with orders made under section 145.

We have set forth the facts at full length in order that it may be clear that they were in this case probably unique.

There had been an express direction made by Mr. Karam Hossain under section 145 (5) that the proceedings with regard to plots Nos. 664 and 665 be cancelled. This direction was again emphasised in a later order. It must be presumed that the orders of Mr. Modeswara Singh were issued in the same spirit as those of Mr. Karam Hossain. The question of possession in plots Nos. 664 and 665 was not before Mr. Matukdhari Singh at all. He had no legal authority to go into the question of possession in these plots. His order declaring Ram Chariter Singh and others to be in possession of plots Nos. 664 and 665, was made without legal authority. We declare it null and void.

SUBRAMANIAN v. EMPEROR.

The order of Mr. Matukdhari Singh in respect of so much of the quadrangle L.N.O.J. as is not covered by plots Nos. 664 and 665 was legally made. His orders in respect of plots Nos. 664 and 665 were illegally made and are hereby declared nullity. The District Magistrate will maintain Ram Chariter Singh and others in possession of so much of the quadrangle L. N. O. J. as is not covered by plots Nos. 664 and 665. He will maintain Hardeo Singh in possession of plots Nos. 664 and 665 until evicted in due course of law.

Orders modified.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 73 OF 1916.

March 10, 1916.

Present:—Mr. Justice Coutts Trotter.

SUBRAMANIAN—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 271—Sessions case—Committal for offences under ss. 457 and 75, Penal Code (Act XLV of 1860)—Charge under s. 75, Penal Code, omission of, by Sessions Court—Conviction under ss. 457 and 511, Penal Code—Previous convictions put to prisoner, and admitted and taken into consideration in passing sentence—Sentence passed, legal, even without proof of previous convictions—Interference in appeal—Practice—Procedure.

In a case in which the prisoner was committed to the Sessions on charges under sections 457 and 75, Indian Penal Code, the Sessions Judge omitted the charge under section 75, Indian Penal Code, and after trying the prisoner on the other charges, convicted him under sections 457, 511, Indian Penal Code. He then put to the prisoner the previous convictions and on his admitting them, took into consideration the existence of such previous convictions and passed a sentence which was legal even without proof of the said previous convictions:

Held, that the sentence was legal, even though the same was influenced by a consideration of the gravity of the offence for which the prisoner had been previously convicted.

The desirability of Magistrates and Judges taking the ordinary precaution of charging prisoners under section 75 also in such cases pointed out.

Ismail Alibhai v. Emperor, 26 Ind. Cas. 995; 16 Bom. L. R. 934; 16 Cr. L. J. 83; 39 B. 326, referred to.

Appeal against the order of the Court of Session of the North Arcot Division, in Case No. 11 of the Calendar for 1916.

The Public Prosecutor, for the Government.

JUDGMENT.—In this case the prisoner was committed to the Court of Session of North Arcot on a charge of house-breaking by night and he was further committed, on a charge framed against him by the Magis-

trate, of previous convictions under section 75 of the Penal Code. When the matter came before the Assistant Sessions Judge, for some reason best known to himself, he chose to omit the charge under section 75 altogether. The prisoner was tried and convicted of an attempted house-breaking. Why he was not convicted on the evidence of house-breaking is not clear to me; but let that pass. After conviction the learned Assistant Sessions Judge proceeded to put to the prisoner in the dock the previous convictions which he might have, but had not, inserted in the charge under section 75, and the prisoner admitted them. Thereupon he passed on him a sentence which was a legal sentence under sections 457 and 511 without proof of the previous convictions, so that in fact it was unnecessary to call in aid section 75 to pass the sentence which the learned Judge has done. At the same time, while that is true, there is no doubt that the Assistant Sessions Judge, as he says, in giving a severe sentence of six years, took into consideration, to my mind rightly, the fact that the man had been twice previously convicted of a serious offence and in one of the previous cases he had received a sentence of five years' rigorous imprisonment. The Assistant Sessions Judge refers to *Ismail Alibhai v. Emperor* (1). I think that the Judge having read *Ismail Alibhai v. Emperor* (1) thought it would be convenient in practice and proceeded to avoid the obvious course of charging the man under section 75 in order, I suppose, to see whether this Court would agree with *Ismail Alibhai v. Emperor* (1). All that I say is I do not wish to have that kind of work thrown upon me and I hope that in future Magistrates and Judges will take the ordinary precaution of charging under section 75. I shall not express any opinion about *Ismail Alibhai v. Emperor* (1) because it is unnecessary for me to do so. But I think in this case as the sentence in itself is legal, I may uphold it, although I am quite conscious that both in the Judge's mind and in my own the gravity of one of the previous crimes undoubtedly carries weight, but that cannot be helped. I dismiss the appeal.

Appeal dismissed.

V. R. P.

(1) 26 Ind. Cas. 995; 39 B. 326; 16 Bom. L. R. 934; 16 Cr. L. J. 83.

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